Case Nos. LEF-0057 and LEF-0073

September 6, 2001

DECISION AND ORDER

DEPARTMENT OF ENERGY

Implementation of Special Refund Procedures

Names of Firms:Intercoastal Oil Corporation

Gulf States Oil & Refining

Dates of Filing: July 20, 1993

July 20, 1993

Case Numbers:LEF-0057

LEF-0073

The Office of General Counsel (OGC) of the Department of Energy (DOE) filed a Petition requesting that the Office of Hearings and Appeals (OHA) formulate and implement Subpart V special refund proceedings. Under the procedural regulations of the DOE, special refund proceedings may be implemented to refund monies to persons injured by violations of the DOE petroleum price regulations, provided DOE is unable to readily identify such persons or to ascertain the amount of any refund. 10 C.F.R. § 205.280. We have considered OGC's request to formulate refund procedures for the disbursement of monies remitted by Intercoastal Oil Corporation (Intercoastal) and Gulf States Oil & Refining (Gulf States) pursuant to Consent Orders (the Consent Orders) the firms have entered into with the DOE and have determined that such procedures are appropriate.

Under the terms of the Consent Orders, a total of $528,941 has been remitted to DOE to remedy pricing violations which occurred during the relevant audit periods.(1) These funds are being held in an escrow account established with the United States Treasury pending a determination of their proper distribution. This Decision sets forth OHA's plan to distribute those funds. The specific application requirements appear in Section III of this Decision.

I. Background

Gulf States, a firm with its home office in Houston, Texas, was a refiner during the period of price controls, August 13, 1973 through January 27, 1981. During this period, Intercoastal, a California corporation, was a reseller of crude oil and refined petroleum products. Economic Regulatory Administration audits of Intercoastal and Gulf States revealed possible violations of the Mandatory Petroleum Price Regulations (MPPR). Subsequently, each firm entered into a Consent Order to settle its disputes with the DOE concerning sales of crude oil and refined petroleum products. Pursuant to these Consent Orders, the firms agreed to pay to the DOE specified amounts in settlement of their potential liability with respect to sales to their customers during the settlement periods. The settlement period referenced in the Intercoastal Consent Order is the period October 25, 1973 through January 17, 1981. (2) For the Gulf States Consent Order the settlement period is August 19, 1973 through January 27, 1981.

II. Jurisdiction and Authority

The general guidelines that govern OHA's ability to formulate and implement a plan to distribute refunds are set forth at 10 C.F.R. Part 205, Subpart V. These procedures apply in situations where the DOE cannot readily identify the persons who were injured as a result of actual or alleged violations of the regulations or ascertain the amount of the refund each person should receive. For a more detailed discussion of Subpart V and the authority of the OHA to fashion procedures to distribute refunds, *see Office of Enforcement*, 9 DOE ¶ 82,508 (1981) and *Office of Enforcement*, 8 DOE ¶ 82,597 (1981).

On July 16, 2001, the OHA issued a Proposed Decision and Order (PD&O) establishing tentative procedures to distribute the Consent Order funds. That PD&O was published in the *Federal Register*, and a 30-day period was provided for the submission of comments regarding our proposed refund plan. *See* 66 Fed. Reg. 38670 (July 25, 2001). More than 30 days have elapsed and OHA has received no comments concerning these proposed refund procedures. Consequently, the procedures will be adopted as proposed.

III. Refund Procedures

A. Allocation of Consent Order Funds

Both firms sold crude oil and refined petroleum products. We have been unable to discover factual information concerning the actual amounts of the alleged pricing violations or the distribution of the violations between either firm's sales of crude oil and refined petroleum products. Under the circumstances, i.e., with no factual basis for a decision as to allocation of the consent order funds between crude oil and refined products, one-half of the Intercoastal and Gulf States consent order funds ($264,471 total plus accrued interest) be allocated for restitution for parties injured by Intercoastal's and Gulf States' alleged violations of the pricing regulations for crude oil. The remaining portion of each of the sums remitted by Intercoastal and Gulf States ($264,470 total plus interest) will be allocated for restitution for those parties injured by the firms' alleged violations of the pricing regulations for refined petroleum products.

B. Refined Petroleum Product Refund Procedures

1. Application Requirements

In cases where the ERA is unable to identify parties injured by the alleged overcharges or the specific amounts to which they may be entitled, we normally implement a two-stage refund procedure. In the first stage, those who bought refined petroleum products from the consenting firms may apply for refunds, which are typically calculated on a pro-rata or volumetric basis. In order to calculate the volumetric refund amount, the OHA divides the amount of money available for direct restitution by the number of gallons sold by the firm during the period covered by the consent order.

In the present case, however, we lack much of the information that we normally use to provide direct restitution to injured customers of the consenting firms. In particular, we have been unable to obtain any information on the volumes of the relevant petroleum products sold by the consenting firms during the settlement period. Nor do we have any information concerning the customers of these firms. Based on the present state of the record in these cases, it would be difficult to implement a volumetric refund process. Nevertheless, we will accept any refund claims submitted by persons who purchased refined petroleum products from Intercoastal or Gulf States during the settlement periods discussed above. We will work with those claimants to develop additional information that would enable us to determine who should receive refunds and in what amounts. (3)

To apply for a refund from the Intercoastal or Gulf States Consent Order funds, a claimant should submit

an Application for Refund containing the following information:

> (1) Identifying information including the claimant's name, current business address, business address during the refund period, taxpayer identification number, a statement indicating whether the claimant is an individual, corporation, partnership, sole proprietorship, or other business entity, the name, title, and telephone number of a person to contact for additional information, and the name and address of the person who should receive any refund check. (4)
>
> (2) A monthly gallonage purchase schedule covering the relevant consent order period. The applicant should specify the source of this gallonage information. In calculating its purchase volumes, an applicant should use actual records from the refund period, if available. If these records are not available, the applicant may submit estimates of its refined petroleum product purchases, but the estimation method must be reasonable and must be explained;
>
> (3) A statement whether the applicant or a related firm has filed, or has authorized any individual to file on its behalf, any other application in that refund proceeding. If so, an explanation of the circumstances of the other filing or authorization must be submitted;
>
> (4) If the applicant is or was in any way affiliated with the consenting firm, it must explain this affiliation, including the time period in which it was affiliated; (5)
>
> (5) The statement listed below signed by the individual applicant or a responsible official of the firm filing the refund application:
>
> > I swear (or affirm) that the information contained in this application and its attachments is true to the best of my knowledge and belief. I understand that anyone who is convicted of providing false information to the federal government may be subject to a fine, a jail sentence, or both, pursuant to 18 U.S.C. § 1001. I understand that the information contained in this application is subject to public disclosure. I have enclosed a duplicate of this entire application which will be placed in the OHA Public Reference Room.

All applications should be either typed or printed and clearly labeled with the name and case number of the relevant firm (Intercoastal Oil Corporation, Case No. LEF-0057 or Gulf States Oil & Refining, Case No. LEF-0073). Each applicant must submit an original and one copy of the application. If the applicant believes that any of the information in its application is confidential and does not wish for that information to be publicly disclosed, it must submit an original application, clearly designated "confidential," containing the confidential information, and two copies of the application with the confidential information deleted. All refund applications must be postmarked by November 30, 2001 and should be sent to the address below:

> Office of Hearings and Appeals
>
> Department of Energy
>
> 1000 Independence Ave., S.W.
>
> Washington, D.C. 20585-0107

We will adopt the standard OHA procedures relating to refund applications filed on behalf of applicants by "representatives," including refund filing services, consulting firms, accountants, and attorneys. *See*, *e.g.*, *Starks Shell Service*, 23 DOE ¶ 85,017 (1993); *Texaco Inc.*, 20 DOE ¶ 85,147 (1990) (*Texaco*); *Shell Oil Co.*, 18 DOE ¶ 85,492 (1989). We will also require strict compliance with the filing requirements as specified in 10 C.F.R. § 205.283, particularly the requirement that applications and the accompanying certification statement be signed by the applicant. The OHA reiterates its policy to scrutinize applications

filed by filing services closely. Applications submitted by a filing service should contain all of the information indicated above.

Finally, the OHA reserves the authority to require additional information from an applicant before granting any refund in these proceedings.

2. Allocation Claims

We may receive claims based upon Intercoastal's or Gulf States's failure to furnish petroleum products that they were obliged to supply under the DOE allocation regulations that became effective in January 1974. *See* 10 C.F.R. Part 211. Any such application will be evaluated with reference to the standards set forth in *Texaco* (and cases cited therein). *See Texaco*, 20 DOE at 88,321.

3. Impact of the Petroleum Overcharge Distribution and Restitution Act of 1986 (PODRA) Amendments on Intercoastal and Gulf States Refined Product Refund Claims

The Interior and Related Agencies Appropriations Act for FY 1999 amended certain provisions of the Petroleum Overcharge and Distribution and Restitution Act of 1986 (PODRA). These amendments extinguished rights that refund applicants had under PODRA to refunds for overcharges on the purchases of refined petroleum products. They also identified and appropriated a substantial portion of the funds being held by the DOE to pay refund claims (including the funds paid by Intercoastal and Gulf States). Congress specified that these funds were to be used to fund other DOE programs. As a result, the petroleum overcharge escrow accounts in the refined product area contain substantially less money than before. In fact they may not contain sufficient funds to pay in full all pending and future refund claims (including those in litigation) if they should all be found to be meritorious. *See* *Enron Corp./Shelia S. Brown*, 27 DOE ¶ 85, 036 at 88,244 (2000) (*Brown*). Congress directed OHA to "assure the amount remaining in escrow to satisfy refined petroleum product claims for direct restitution is allocated equitably among all claimants.*"Omnibus Consolidated and Emergency Supplemental Appropriation Act, 1999*, Pub. L. No. 105-277 § 337, 112 Stat 2681, 2681-295 (1998) (language added to PODRA); *Brown*, 27 DOE at 88,244. In view of this Congressional directive and the limited amount of funds available, it may become necessary to prorate the funds available for the meritorious claimants in the Intercoastal and Gulf States refund proceedings. However, it could be several years before we know the full value of the meritorious claims and the precise total amount available for distribution. It will be some time before we are able to determine the amount that is available for distribution for each claimant.

In light of the above considerations, we will pay successful applicatnts using the following mechanism. All successful small claimants (refunds under $10,000) will be paid in full. To require small claimants to wait several more years for their refunds would constitute an inordinate burden and would be inequitable. *See Brown*, 27 DOE at 88,244. For all others granted refunds, including reseller claimants who have elected to take presumption refunds, we will immediately pay the larger of $10,000 or 50 percent of the refund granted. Once the other pending refund claims have been resolved, the remainder of the Intercoastal and Gulf States claims will be paid to claimants to the extent that it is possible through an equitable distribution of the funds remaining in the petroleum overcharge escrow account.

C. Refund Procedures for Crude Oil Pricing Violations

With regard to the portion of the consent order funds arising from alleged pricing violations of crude oil ($264,471 plus accrued interest), these funds will be distributed in accordance with the DOE's Modified Statement of Restitutionary Policy in Crude Oil Cases, (MSRP), *see* 51 Fed. Reg. 27899 (August 4, 1986).(6) Pursuant to the MSRP, OHA will distribute 40 percent of crude oil overcharge funds will be disbursed to the federal government, another 40 percent to the states, and up to 20 percent may initially be reserved for the payment of claims to injured parties. The MSRP also specified that any funds remaining after all valid claims by injured purchasers are paid will be disbursed to the federal government and the

states in equal amounts.

In April 1987, the OHA issued a Notice analyzing the numerous comments received in response to the August 1986 Order. 52 Fed. Reg. 11,737 (April 10, 1987) (April 10 Notice). This Notice provided guidance to claimants that anticipated filing refund applications for crude oil monies under the Subpart V regulations. In general, we stated that all claimants would be required to (1) document their purchase volumes of petroleum products during the August 19, 1973 through January 27, 1981 crude oil price control period, and (2) prove that they were injured by the alleged crude oil overcharges. Applicants who were end-users or ultimate consumers of petroleum products, whose businesses are unrelated to the petroleum industry, and who were not subject to the DOE price regulations would be presumed to have been injured by any alleged crude oil overcharges. In order to receive a refund, end- users would not need to submit any further evidence of injury beyond the volume of petroleum products purchased during the period of price controls. *See City of Columbus Georgia*, 16 DOE ¶ 85,550 (1987).

1. Individual Refund Claims

The amount of money attributed for restitution of crude oil pricing violations is $264,471 plus accrued interest. In accordance with the MSRP, we shall initially reserve 20 percent of those funds ($52,894 plus accrued interest) for direct refunds to applicants who claim that they were injured by crude oil overcharges. We shall base refunds on a volumetric amount which has been calculated in accordance with the methodology described in the April 10 Notice. That volumetric refund amount is currently $0.0016 per gallon. *See* 57 Fed. Reg. 15562 (March 24, 1995).

The filing deadline for refund applications in the crude oil refund proceeding was June 30, 1994. This was subsequently changed to June 30, 1995. See Filing Deadline Notice, 60 Fed. Reg. 19914 (April 20, 1995); *see also* DMLP PDO, 60 Fed. Reg. 32004, 32007 (June 19, 1995). Because the June 30, 1995, deadline for crude oil refund applications has passed, no new applications for restitution from purchasers of refined petroleum products for the alleged crude oil pricing violations of Intercoastal and Gulf States will be accepted for these funds. Instead, these funds will be added to the general crude oil overcharge pool used for direct restitution.

2. Payments to the States and Federal Government

Under the terms of the MSRP, the remaining 80 percent of the crude oil violation amounts subject to this Decision, or $ 211,577 plus accrued interest, should be disbursed in equal shares to the states and federal government, for indirect restitution. Refunds to the states will be in proportion to the consumption of petroleum products in each state during the period of price controls. The share or ratio of the funds which each state will receive is contained in Exhibit H of the Stripper Well Settlement Agreement. When disbursed, these funds will be subject to the same limitations and reporting requirements as all other crude oil monies received by the states under the Stripper Well Agreement.

Accordingly, we will direct the DOE's Office of the Controller to transfer one-half of that amount, or $105,788 plus interest, into an interest bearing subaccount for the states, and one-half or $105,789 plus interest, into an interest bearing subaccount for the federal government.

It Is Therefore Ordered That:

(1) The payments remitted to the Department of Energy by Intercoastal Oil Corporation and Gulf States Oil & Refining, pursuant to consent orders signed on January 25, 1983 and February 1, 1983 respectively, will be distributed in accordance with the forgoing Decision.

(2) Applications for Refund in the Intercoastal Oil Corporation Refund Proceeding, Case No. LEF- 0057, and the Gulf States Oil and Refining Refund Proceeding, Case No. LEF-0073, must be postmarked no later than November 30, 2001.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 6, 2001

(1)Pursuant to the Consent Orders, Gulf States remitted $500,000 to DOE and Intercoastal has remitted $28,941.

(2)The Intercoastal Consent Order resolves all possible violations of the petroleum price regulations for the period August 19, 1973 through January 27, 1981. However, the consent order goes on to state that Intercoastal was active as a reseller of crude oil and refined petroleum products from October 25, 1973 through January 27, 1981. *See Consent Order with Intercoastal Oil Corporation*, Case No. HRO-0083 (January 25, 1983) at ¶ 301.

(3)Applications for Refund from will be accepted only for refined product pricing violations. With regard to crude oil pricing violations the deadline for filing applications for refund has passed. *See infra*.

(4)Under the Privacy Act of 1974, the submission of a social security number by an individual applicant is voluntary. An applicant that does not submit a social security number must submit an employer identification number if one exists. This information will be used in processing refund applications, and is requested pursuant to our authority under the Petroleum Overcharge Distribution and Restitution Act of 1986 and the regulations codified at 10 C.F.R. Part 205, Subpart V. The information may be shared with other Federal agencies for statistical, auditing or archiving purposes, and with law enforcement agencies when they are investigating a potential violation of civil or criminal law. Unless an applicant claims confidentiality, this information will be available to the public in the Public Reference Room of the Office of Hearings and Appeals.

(5)As in other refund proceedings involving alleged refined product violations, the DOE will presume that affiliates of a consenting firm were not injured by the firm's overcharges. *See, e.g., Marathon Petroleum Co./EMRO Propane Co.*, 15 DOE ¶ 85,288 (1987). This is because the consenting firm presumably would not have sold petroleum products to an affiliate if such a sale would have placed the purchaser at a competitive disadvantage. *See Marathon Petroleum Co./Pilot Oil Corp.*, 16 DOE ¶ 85,611 (1987), *amended claim denied*, 17 DOE ¶ 85,291 (1988), *reconsideration denied*, 20 DOE ¶ 85,236 (1990). Furthermore, if an affiliate of the consenting firm were granted a refund, the consenting firm would be indirectly compensated from a Consent Order fund remitted to settle its own alleged violations.

(6)The MSRP was issued as a result of the Settlement Agreement approved by the court in *The Department of Energy Stripper Well Exemption Litigation*, 653 F. Supp. 108 (D. Kan. 1986). Shortly after the issuance of the MSRP, the OHA issued an Order that announced that this policy would be applied in all Subpart V proceedings involving alleged crude oil violations. *See* Order Implementing the MSRP, 51 Fed. Reg. 29,689 (August 20, 1986) (the August 1986 Order).

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:**Benton County, Washington**

Date of Filing:**November 4, 1993**

Case Number: **LPA-0001**

This decision will consider an appeal that Benton County, Washington filed with the Office of Hearings and Appeals (OHA) on November 4, 1993, under the Notice of Interpretation and Procedures (NOIP) implementing the "payments-equal-to-taxes" (PETT) provisions of the Nuclear Waste Policy Act of 1982, as amended (NWPA), 42 U.S.C. § 10101 *et seq*. Under the NOIP, the Department of Energy (DOE) will grant, to a county in which a candidate site for a high-level nuclear waste repository is located, a payment equal to the amount that county would receive if it were authorized to tax site characterization activities at that site. *See* 56 Fed. Reg. 42314 (August 27, 1991). The payment authorized by the NWPA is known as a "PETT grant." Benton County appeals the amount of the PETT grant awarded to it by DOE's Richland Operations Office (DOE/RL).

On May 28, 1993, Benton County submitted to DOE/RL an estimate of $45.7 million as the PETT grant amount it should receive for site characterization activities at the Basalt Waste Isolation Project (BWIP) on the Hanford Nuclear Reservation. On September 24, 1993, the DOE/RL issued an initial DOE determination which denied Benton County's PETT claim. In its initial appeal letter filed on November 4, 1993, Benton County requested a hearing and stated that "extensive briefing will be required." The County was granted several extensions of time to enable it to obtain outside counsel and permit its attorneys to submit a brief setting forth its position in detail. Benton County's brief, along with extensive exhibits, was filed on May 2, 1994. DOE/RL submitted a reply brief on July 5, 1994. A series of pre-hearing conferences was held by telephone during the next several months, and the parties conducted discovery. OHA issued an interlocutory decision to resolve pre-hearing procedural issues. Richland Operations Office, 24 DOE ¶ 82,504 (1994). An evidentiary hearing was held in Seattle, Washington from January 9 through 12, 1995. Post-hearing briefs were submitted, and a second interlocutory decision was issued to resolve post-hearing procedural issues. Benton County, Washington, 25 DOE ¶ 82,502 (1995). Post-hearing depositions of three witnesses were conducted, and DOE/RL was permitted to file an amended post-hearing brief. An oral argument was held in Washington, D.C. on October 24, 1995.

I. Background

A. The Nuclear Waste Policy Act of 1982, as amended

A principal purpose of the NWPA was to provide for the development of a geologic repository for the permanent storage of high-level radioactive waste and spent nuclear fuel from domestic electric utilities. Section 302 of the NWPA authorized the Secretary of Energy to collect fees from electric utilities that generated nuclear power to establish a "Nuclear Waste Fund" to pay for the repository project. 42 U.S.C. § 10222. As originally enacted, section 112(b) of the NWPA directed the Secretary of Energy to recommend to the President three candidate sites for the repository. Section 112(c) required approval by the President of these sites. Under these provisions, the Secretary recommended sites in Benton County (the BWIP); Nye County, Nevada (Yucca Mountain); and Deaf Smith County, Texas. On May 28, 1986, the President accepted the Secretary's recommendation and approved these sites. Section 116(c)(3) of the NWPA

directed the DOE to make PETT grants to the state and local governments in which potential repository sites were located:

The Secretary shall also grant to each State and unit of general local government in which a site for a repository is approved under section 112(c) an amount each fiscal year equal to the amount such State and unit of general local government, respectively, would receive were they authorized to tax such site characterization activities at such site, and the development and operation of such repository, as such State and unit of general local government tax other real property and industrial activities occurring within such State and unit of general local government. Such grants shall continue until such time as all such activities, development, and operation are terminated at such site.

42 U.S.C. § 10136(c)(3) (emphasis added). PETT grants to eligible jurisdictions were to be paid from the Nuclear Waste Fund. 42 U.S.C. § 10136(c)(5).

According to two witnesses in this case who had worked on the project, the BWIP was "way out in front" of other potential candidate sites, including Yucca Mountain, when the NWPA was enacted in 1982. December 14, 1994 Deposition of Stephen P. Reidel (former BWIP staff geologist) at 39. To prevent the stoppage of work at the BWIP, Rep. Sid Morrison (R. Wash.), whose Fourth Congressional District included Benton County, inserted a special "grandfather clause" into the NWPA. December 14, 1994 Deposition of Raymond E. Isaacson (former BWIP Feasibility Study technical director) at 52. This provision, section 112(f) of the 1982 NWPA, authorized the Secretary of Energy to continue work at the BWIP on its original schedule, notwithstanding the candidate site selection procedure prescribed elsewhere in section 112:

Nothing in this section may be construed as prohibiting the Secretary from continuing ongoing or presently planned site characterization at any site on Department of Energy land for which the location of the principal borehole has been approved by the Secretary by August 1, 1982, except that (1) the environmental assessment described in subsection (b)(1) shall be prepared and made available to the public before proceeding to sink shafts at any such site; and (2) the Secretary shall not continue site characterization at any such site unless such site is among the candidate sites recommended by the Secretary under the first sentence of subsection (b) for site characterization and approved by the President under subsection (c); and (3) the Secretary shall conduct public hearings under 113(b)(2) and comply with the requirements under section 117 of this Act within one year of the date of enactment.

42 U.S.C. § 10132(f) (1982) (emphasis added). Section 112(f) applied solely to the BWIP because it was the only site where the location of the principal borehole had been approved by the specified date. It gave the Secretary the option of continuing work at the BWIP before completing the candidate site selection process spelled out in the 1982 NWPA, but all the rigorous procedural requirements still would have applied. For example, section 113 prescribed the contents of site characterization plans and required DOE to submit them for comment to the state legislature and Governor, and to hold public hearings on those plans, before sinking any shafts at a candidate site. Section 117 required further consultations with state governments and affected Indian tribes. The Secretary's option to expedite site characterization at the BWIP under section 112(f) was never exercised.

The BWIP's status as a candidate site was short lived. Only 19 months after the President approved the BWIP as a candidate site for the repository, the relevant statute was amended. Congress enacted the NWPA Amendments of 1987 in Title V of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203. Congress thereby narrowed the search for a repository site by designating Yucca Mountain under section 112 of the NWPA as the sole candidate for characterization in accordance with section 113, 42 U.S.C. § 10133. Section 112(f) was deleted. DOE was directed to terminate all site characterization activities at the BWIP within 90 days after December 22, 1987, the date on which the NWPA Amendments of 1987 were signed into law. 42 U.S.C. § 10172. The 90 day period ended on March 21, 1988.

B. History of The Basalt Waste Isolation Project

In 1968, DOE's predecessor (then the Atomic Energy Commission, or AEC) began to examine the potential for storing high-level defense wastes from over two decades of producing plutonium for nuclear weapons at Hanford. The waste would be stored in a subterranean tunnel, made out of the basalt underlying the Pasco Basin. Isaacson Deposition at 6. The Pasco Basin is an area in southeastern Washington and adjacent portions of Oregon and Idaho, where lava flows accumulated after erupting from fissures or fractures in the earth's surface from 6 to 16.5 million years ago. Over time, the basalt flows in the Pasco Basin attained a thickness of over 3,048 meters (10,000 feet). These layered basalt flows have been named the Columbia River Basalt Group. Within this group is a formation known as the Cold Creek Syncline. This formation, which underlies the Hanford Reservation, contains several different layers of basalt thick enough to house a repository.

The earliest phase of the AEC's investigation consisted of drilling a number of exploratory boreholes to create a stratigraphic diagram depicting the various layers of the Columbia River Basalt Group. In addition, the researchers examined the hydrology of the deep basalts to ascertain how underground water flowed in the confined aquifers located between the layers of basalt. However, work ceased on the project in 1972, after the AEC announced that the United States was not ready to make a decision on how to dispose of nuclear waste.

In 1975, the Energy Research and Development Administration (ERDA), which had succeeded the AEC, assigned the Office of Waste Isolation (OWI) at the Oak Ridge National Laboratory to explore the potential for storing nuclear wastes from commercial electric generators in underground mine caverns of various rock types. The OWI learned about the work that had been done at Hanford, and created the BWIP as a separate project in 1976. Between 1976 and enactment of the NWPA in 1982, preliminary studies went on to characterize and evaluate the environmental (geologic, hydrologic, and geochemical) suitability of the Hanford site for the development of a repository in the underlying basalt. *See generally* Site Characterization Report for the Basalt Waste Isolation Project, DOE/RL 82-3, vol. 1 (November 1982) ("BWIP Site Characterization Report") at 3, Benton County Hearing Exhibit 2. The BWIP Site Characterization Report, published in November 1982, explained the status of the project in elaborate detail. DOE published a three-volume Environmental Assessment in May 1986, when it recommended the BWIP to the President as a candidate site. Environmental Assessment, Reference Repository Location, Hanford Site, Washington DOE/RW-0070 (May 1986), Exhibit 2 to Brief of Petitioner. Over the life of the project, 33 test boreholes were drilled at various different places on the Hanford Reservation. But the once-planned principal borehole, which would have been the site of horizontal excavations for in situ exploration of the basalt, was never drilled. After the BWIP was canceled by the 1987 amendments to the NWPA, the General Accounting Office (GAO) reviewed DOE's efforts to terminate the project, and issued a report entitled Nuclear Waste: Termination of Activities at Two Sites Proceeding in an Orderly Manner, GAO/RCED-89-66 (February 1989). The GAO report noted that termination plans for the sites were developed to "protect large investments in property, data, and technologies...." *Id.* at 3. After the project was terminated, three activities that had been undertaken during the BWIP were transferred to other projects for continuation with different funding: Eastern Washington seismic monitoring, Hanford seismic monitoring, and the management of 33 boreholes drilled for the BWIP. *Id*. at 4.

There were two major concerns in the post-1982 phase of the BWIP. The first concern was the suitability of the quality assurance procedures that had been followed during the early phases of the BWIP. When the BWIP was approved by the President as a candidate site in May 1986, DOE/RL stopped most of the site characterization activities at the BWIP until quality assurance procedures could be adopted that would meet Nuclear Regulatory Commission (NRC) requirements for licensing a repository. Isaacson Deposition at 45-46; *see generally* 10 C.F.R. Part 60-- Disposal of High-Level Radioactive Wastes in Geologic Repositories; Appendix B to Part 50--Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants. The Yucca Mountain project experienced similar problems with the adequacy of its quality assurance procedures during the same time period. Much of the work analyzing core samples had to be repeated at Yucca Mountain after appropriate quality assurance procedures were implemented.

The second concern was the hydrology of the deep basalts, which was viewed as a critical factor in evaluating the suitability of the Hanford site. This is important because the movement of ground water is one of the principal ways in which radionuclides, meant to remain safely isolated, could escape from a repository and reach the human environment. Unlike the Yucca Mountain site, where it might be possible to build a repository situated in the "unsaturated zone" above the water table, the Reference Repository Location at the BWIP site was located entirely in the "saturated zone" below the water table. Even though the basalts themselves are relatively impermeable, there are interbed zones between the basalt flows that consist of different rock types. Some types of sedimentary rock in the interbed zones contain confined aquifers through which water can move. The "ground water travel time," i.e. the rate at which ground water could move through a potential repository horizon, was an important issue that was under study at the BWIP. Isaacson Deposition at 39-43. Important questions about the hydrology of the basalts underlying the Hanford Reservation were still unanswered when the BWIP was canceled as a result of the 1987 NWPA amendments. It was never determined whether the groundwater travel time at the site could meet NRC licensing requirements for a repository. Isaacson Deposition at 43.

C. DOE's Notice of Interpretation and Procedures

In August 1991, the DOE's Office of Civilian Radioactive Waste Management issued a final Notice of Interpretation and Procedures (NOIP) for administering the relevant PETT provisions of the NWPA, as amended. 56 FR 42314 (August 27, 1991). The final NOIP addressed comments received in response to a Proposed Notice issued on March 7, 1990. Several of the changes adopted in response to those comments are relevant to the present case. First, the interpretation of "site" was expanded to include site characterization activities associated with a candidate site coextensive with the taxing jurisdiction's taxing authority, whether or not those activities are conducted on site. *Id*. at 42316. This means that BWIP-related activities and property that were located in the city of Richland and elsewhere within the County are eligible for inclusion in the Benton County PETT claim, in addition to those physically located at the actual Hanford BWIP site. Second, the NOIP provided for an appeal process through the OHA for those jurisdictions having disputes with DOE regarding PETT, and stated that OHA's decision on an appeal will serve as the final DOE action with respect to PETT. *Id*. at 42317. In addition, the NOIP considered comments about the commencement and termination of PETT eligibility. DOE determined that Benton County's eligibility for PETT would begin on May 28, 1986, the date on which the President approved the BWIP as one of the three candidate sites, and end on December 22, 1987, the date of enactment for the NWPA Amendments of 1987. Finally, the NOIP established administrative procedures for considering PETT claims. *See* 56 FR at 42318-20.

In setting time limits for the County's PETT eligibility, the NOIP considered comments submitted by the State of Washington and the Mid-Columbia Consortium of Governments. These commenters had claimed that DOE's proposed selection of May 28, 1986 as the commencement date for PETT eligibility was unreasonable, since site characterization activities were under way at the BWIP before it was formally recommended for site characterization under the NWPA procedures. In considering these comments, DOE took the position that the preliminary activities undertaken before any site was designated as a "candidate site" under the NWPA did not constitute "site characterization" within the meaning of section 2(21) of the NWPA. That term is defined as:

(A) siting research activities with respect to a test and evaluation facility at a candidate site; and

(B) activities, whether in the laboratory or in the field, undertaken to establish the geologic condition and the ranges of the parameters of a candidate site relevant to the location of a repository, including borings, surface excavations, excavations of exploratory shafts, limited subsurface lateral excavations and borings, and in situ testing needed to evaluate the suitability of a candidate site for the location of a repository, but not including preliminary borings and geophysical testing needed to assess whether site characterization should be undertaken.

42 U.S.C. § 10101(21) (emphasis added). The NOIP explained that although various laboratory and field activities may have been under way at the sites prior to May 28, 1986, "these activities were neither related to a test and evaluation facility nor were they undertaken to establish the geologic condition or ranges of the parameters relevant to the location of a repository." 56 FR at 42317-18. The NOIP goes on to state that "[e]ven if some of the data collected before the May 28, 1986 date were relevant to the overall characterization of the site, that fact alone would not qualify the data collection process as ?site characterization' for purposes of the NWPA." *Id*. at 42318. However, the NOIP did make one concession on the issue of PETT eligibility for activities carried out at the BWIP before May 28, 1986. It stated that some of these activities may be included in the computation of a jurisdiction's PETT grant, but only to the extent that the residual value of those activities after May 28, 1986 is treated as an improvement to real estate used in support of site characterization, for purposes of assessment valuation. *Id*. at 42319.

In addition to setting the time limits that apply to Benton County, the NOIP specified the following general requirements for a jurisdiction to be eligible to receive PETT payments for site characterization activities: (i) the jurisdiction must have the requisite taxing authority, and (ii) the jurisdiction must levy taxes applicable to non-Federal activities that are similar to the site characterization activities conducted by the Federal Government. *Id*. at 42318.

Based on the definition of site characterization in section 2(21) of the NWPA, the NOIP determined that the following types of activities would be eligible for PETT: (i) activities that impact the assessed value of real property; (ii) activities carried out prior to May 28, 1986, but only to the extent that the residual value of these activities after May 28, 1986, are treated as improvements to real property, used in support of site characterization for purposes of assessment valuation; (iii) ownership or possessory use of personal property; (iv) purchase or transfer of personal property acquired in one State for use in an eligible State; (v) use of motor vehicles; (vi) use of special fuels; (vii) payment of salaries to Federal employees; and (viii) activities subject to business or income taxes. The preceding list is not exclusive, and the NOIP recognized that other activities undertaken by DOE to evaluate the geologic suitability of the site that an eligible jurisdiction is authorized to tax may also be considered in the calculation of PETT. *Id*.

The NOIP also contained an "Administrative Procedures" section which stated that the eligible jurisdictions should submit an "estimated PETT analysis" to the DOE. For the period concerned in the present Appeal, only two jurisdictions were eligible to submit estimates for PETT payments: Nye County, Nevada, home of the Yucca Mountain site, and Benton County. According to the NOIP, the estimated PETT analysis should include the following:

1. Basis for eligibility showing how the jurisdiction meets the requirement for eligibility as set forth in this Notice. 2. Citations of relevant tax rules, regulations, rates, and bases for applying the rates. 3. Lists of Federal site characterization activities considered in estimating the PETT. 4. Calculations supporting the estimates in sufficient detail to allow DOE to verify the estimates. 5. Estimate of PETT liability for each tax type to which DOE's site characterization activities are subject and estimates of PETT liability for each tax type in accordance with the appropriate tax laws.

Id. at 42319. The NOIP states that DOE will review these analyses to verify that they are complete and correct regarding DOE's site characterization activities, the assessed value of DOE's property used to support its site characterization activities, DOE's operational activities subject to tax, and the tax laws of the eligible jurisdiction. The Notice provides that "late payments shall include interest, if appropriate, in accordance with applicable requirements of the taxing jurisdiction." *Id*.

Finally, the NOIP emphasizes that the NWPA does not constitute a waiver of the Federal Government's sovereign immunity from taxation by local jurisdictions under the Constitution's Supremacy Clause. Benton County and the State of Washington have no authority to tax DOE's activities at the BWIP site. Instead, the NWPA requires DOE to pay PETT grants to local jurisdictions equal to the amounts they would receive if DOE's activities were not tax-exempt. Under this statutory scheme, DOE is required to document its analysis of the information contained in estimates submitted by eligible jurisdictions, but the

ultimate authority for determining the amount of PETT payments rests with DOE.

The estimated PETT analysis that Benton County was required to submit to the DOE under the NOIP was a starting point for DOE/RL's determination of the amount of its PETT grant and for our analysis on this appeal. Benton County properly reasoned that since the amount of its PETT grant is based on the BWIP site as it existed in the 1980s, the PETT analysis had to be based on a retrospective appraisal and tax assessment for the real estate and personal property used for the site characterization process. The validity of these appraisals for each of the years during the relevant period is one of the central issues in the present appeal.

II. The Positions of the Parties

A. Benton County's Revised May 28, 1993 PETT Estimate

By the time the NOIP was issued, several years had elapsed since the termination of site characterization activities at the BWIP. During this interval, considerable changes had occurred at the BWIP site. After the project was closed down due to the choice of Yucca Mountain as the sole candidate site for characterization, the equipment on the BWIP site at Hanford was removed, and the area was restored to its prior state. In addition, BWIP-related activities in the city of Richland had also ceased, and their personnel and equipment were transferred to other projects. *See* Nuclear Waste: Termination of Activities at Two Sites Proceeding in an Orderly Manner, GAO/RCED-89-66 (February 1989). As a result, Benton County officials had to reconstruct the activities that had taken place during the period of PETT eligibility by obtaining records pertaining to that period from the DOE. In order to comply with the relatively short, 120 day PETT estimate filing deadline specified in the NOIP, Benton County submitted a preliminary PETT assessment to DOE in December 1991. This first submission, which was supported by detailed documentation of the types specified in the NOIP, only sought PETT payments for site characterization activities conducted during the 1986 and 1987 tax years. The preliminary PETT estimate requested a total amount of tax equivalents, plus interest, of $20,563,514. In July 1992, DOE made a preliminary and "partial payment" to Benton County in the amount of $770,709.

After obtaining additional information from DOE about the BWIP, the County submitted an updated and revised version of its PETT estimate on May 28, 1993. The revised PETT estimate increased the amount claimed by including tax equivalents based on activities that began in 1982 and continued through 1988, a period considerably greater than the narrow, 18-month time window established in the NOIP. It sought a total of $45,751,726, including interest, from the DOE.

Benton County's PETT estimate is based on a number of fundamental assumptions, each of which, as explained below, is disputed by DOE/RL. First, the County claims that since the BWIP project began site characterization in 1977, it should be eligible to receive PETT payments beginning with 1983, the first tax year after the effective date of the NWPA of 1982. This is contrary to DOE's position in the NOIP that Benton County's PETT eligibility is limited to the period May 1986 through December 1987. Second, while the County based its overall appraisal of the BWIP on the "cost approach," it appraised the bare land on the BWIP site by the "sales comparison approach," i.e. by determining the "highest and best use" of a given parcel, then finding comparable sales of land in the same market area, and multiplying the acreage in the relevant BWIP parcel by the per acre value of the comparable land. Third, the County counted the value of all DOE funds spent on BWIP, minus the sum of those funds either conferred as "grants" or spent on "capital improvements," as "improvements to real estate." Since the County used the cost approach to the overall BWIP appraisal, the amount that DOE spent on the BWIP, minus the sum of those funds either conferred as "grants" or spent on "capital improvements," was added to the appraised valuation of the bare land to make a grand total value used to determine the appropriate amount of real property taxes. In the application of the cost approach to the valuation of improvements to real property, the County included both direct ("hard") costs and indirect ("soft") costs incurred in connection with the BWIP. Fourth, the County used the depreciated cost of all "personal property" (including most of the funds spent for "capital

improvements") attributed to BWIP, both at Hanford and in Richland, to figure the appropriate amount of personal property tax. The County claims personal property tax liability should begin with the 1986 tax year. Fifth, the County's PETT estimate includes amounts reflecting both interest and "interest penalties" which can be assessed against a delinquent taxpayer under Washington State law. In order to decide the present appeal, we will focus on these five basic areas of dispute between the parties.

B. DOE/RL's Initial DOE determination

On September 24, 1993, DOE/RL issued its initial DOE determination on Benton County's PETT estimate. In effect, this determination disputed every important aspect of Benton County's PETT estimate, but it provided almost no explanation for the result which it reached. Referring to the "direction contained in the [NOIP]," it rejected Benton County's claim that its eligibility for PETT payments should have begun in January 1983, for all site characterization activities conducted on the BWIP after the effective date of the original NWPA. Relying on the NOIP, DOE/RL maintained that BWIP activities before May 28, 1986 did not constitute "site characterization" within the meaning of the NWPA. DOE/RL also implied that Benton County had not computed the appropriate tax amounts for the BWIP "in the same manner as [it] taxes the non-Federal property and industrial activities occurring within its jurisdiction." The determination disputed the County's use of the sales comparison approach to the appraisal and assessment of different parcels of bare land on the BWIP site. In addition, DOE/RL rejected Benton County's inclusion of the amount of DOE funds spent on BWIP (minus grants and capital improvements) as improvements to real estate under the cost approach. DOE/RL also disagreed with the County's inclusion of both hard costs and soft costs incurred in connection with the BWIP as improvements to real property in the application of the cost approach under Washington State law. The determination also rejected Benton County's interpretation of Washington State law regarding the incidence of personal property taxes. Based on its analysis of the County's revised 1993 submission, DOE/RL determined that DOE's PETT liability was only $446,956, and that Benton County owed DOE a refund from the partial payment of $770,709 made by DOE/RL in July 1992. Although there was no specific mention of interest or interest penalties in the initial DOE determination, DOE/RL's rejection of Benton County's underlying PETT estimate implicitly denied the significant portion of the $45 million claim which was based on interest and interest penalties.

C. Benton County's Contentions on Appeal

Benton County alleges DOE/RL's initial DOE determination contained the following fundamental errors:

- DOE/RL erred in failing to calculate the amount of Benton County's PETT grant beginning with the 1983 tax year.
- DOE/RL erred in failing to include statutory interest penalties calculated under Washington State law in the amount of Benton County's PETT grant.
- DOE/RL erred in failing to include personal property taxes for 1986 in the amount of Benton County's PETT grant.
- DOE/RL erred in basing its PETT determination on an appraisal of the BWIP as it existed in 1993, rather than on retrospective appraisals of the BWIP as it existed in each tax year during the period of PETT eligibility.
- DOE/RL erred in determining that the highest and best use of the BWIP was other than "industrial use" for site characterization as a potential high level nuclear waste repository.
- DOE/RL erred in failing to measure the "residual value" of improvements to the BWIP under the "cost approach" to real estate appraisal as of the beginning of the period of PETT eligibility.
- DOE/RL erred in failing to treat the determination of Benton County's PETT grant amount for the BWIP site characterization in the same manner as DOE's Nevada Operations Office (DOE/NV) treated the determination of Nye County's PETT amount for the Yucca Mountain site characterization.

III. Analysis of Legal Issues

A. Standard of Review

Although Benton County may submit an estimated PETT analysis to the DOE, the responsibility for determining the amount of its PETT grant rests solely with DOE. 42 U.S.C. § 10136(c)(3); *see also* NOIP, 56 FR at 42314-20; Comments of Respondent DOE/RL at 2-6. Thus, in order to prevail in the present appeal, Benton County has the burden of coming forward with evidence to establish that DOE/RL's initial DOE determination was erroneous in fact or in law, or that it was arbitrary and capricious. 10 C.F.R. § 1003.36(c).(1)

For the reasons explained below, we find that DOE/RL was correct in rejecting certain portions of Benton County's revised PETT estimate, and that DOE/RL's initial DOE determination should be affirmed in part. However, we also find that Benton County has met its burden of proving that DOE/RL's initial PETT determination was erroneous in several respects. Benton County's appeal should therefore be granted in part.

Before we begin our analysis of the real estate appraisal issues which were the primary focus of the evidentiary hearing in the case, we will address three legal issues related to assessment of *ad valorem* property taxes on the BWIP real estate. These concern the starting date for Benton County's PETT eligibility under the NWPA, the authority of the County under the NWPA to assess interest penalties against the DOE for late payment of the PETT amounts for the tax years involved, and the authority of the County to collect personal property taxes for the 1986 tax year. As discussed in the ensuing sections, we find that DOE/RL was correct in its interpretation of the law on each of these three issues.

B. The Starting Date for Benton County's PETT Eligibility under the NWPA

Benton County claims that under section 116(c)(3) of the 1982 NWPA it should receive PETT payments beginning with 1983, the first tax year after the effective date of the NWPA. A favorable decision on this issue would greatly increase the amount of Benton County's PETT payment, by including taxes for three additional years, plus interest on those amounts. According to the County, site characterization at the BWIP commenced in 1977, and the process continued until it was terminated by the enactment of the 1987 NWPA Amendments effective on March 21, 1988, 90 days after December 20, 1987. As evidence of the fact that "site characterization" was taking place at the BWIP before it was approved by the President under section 112(c) on May 28, 1986, the County points to the language in section 112(f) of the 1982 NWPA, which states in pertinent part that:

Nothing in this section may be construed as prohibiting the Secretary from continuing ongoing or presently planned site characterization at any site on Department of Energy land for which the location of the principal borehole has been approved by the Secretary by August 1, 1982....

42 U.S.C. § 10132(f) (1982). DOE/RL argues that section 112(f) is entirely permissive, and that the Secretary elected not to conduct site characterization under the authority conferred by this provision. Instead, according to DOE/RL, the DOE implemented the process of repository site selection under the NWPA by issuing "General Guidelines for the Recommendation of Sites for the Nuclear Waste Repositories," which were published in the Federal Register on December 6, 1984, 49 FR 47714, along with accompanying regulations, codified at 10 C.F.R. Part 960. The guidelines spelled out a five step process:

1. The Screening Phase
2. The Site-Nomination Phase
3. The Site-Recommendation Phase
4. The Site-Characterization Phase
5. The Site-Selection Phase

According to DOE's guidelines, "Site characterization will occur only at the sites recommended to, and approved by, the President. It will involve studies that are much more detailed than those conducted during the screening phase." 49 FR at 47717. DOE/RL maintains there was no informal site characterization that was carried out after enactment of the NWPA; the guidelines were followed and formal site characterization under the auspices of the NWPA was conducted only after three sites received Presidential approval on May 28, 1986. DOE/RL also points out that the definition of "site characterization" in section 2(21) of the NWPA specifically excludes "preliminary borings and geophysical testing needed to assess whether site characterization should be undertaken," implying that the work done at BWIP before the Presidential approval was "preliminary" in nature. For these reasons, DOE/RL contends that OHA should reject Benton County's argument that section 116(c)(3) allows PETT grants for "site characterization" prior to the Presidential approval on May 28, 1986. *See* DOE/RL Post-Hearing Comments at 46-48.

After considering the arguments of the parties and the legislative and regulatory history of the NWPA and the repository siting program, we have determined that Benton County is not eligible for PETT grants under the NWPA for the period before the BWIP was approved for site characterization by the President on May 28, 1986. "Site characterization" for purposes of triggering eligibility for PETT payments under section 116(c)(3) is a term of art that refers specifically to an activity that can occur only after a potential repository site has been recommended by the Secretary of Energy and approved by the President. Section 2(21) of the NWPA defined the term "site characterization" as activities occurring at or affecting a candidate site. 42 U.S.C. § 10101(21). Under this statutory and regulatory scheme, a potential site could not become a candidate site until it was approved by the President. Thus, "site characterization" activities, as defined by the NWPA, are clearly distinguishable from the type of preliminary testing done at BWIP to determine whether it was suitable for recommendation by the Secretary to the President as a potential candidate for site characterization.

The clear intent of Congress and the DOE was that the specified condition precedent had to be met before "site characterization," that would give rise to PETT eligibility under section 116(c)(3), could occur. While there are anomalies in the way the term "site characterization" appears in the record that would tend to support Benton County's position, we find that each of them can be explained and is thus not determinative here. The only anomaly in the statutory scheme was created by the unfortunate use of the term "site characterization" in section 112(f). As explained in the one brief reference to this provision in the legislative history of the 1982 NWPA, it referred specifically to the BWIP site:

While the purpose of this limited exception is to avoid unnecessary disruption in the existing Federal nuclear waste management program, the Secretary's actions must ultimately comply with the provisions of this Act . . . . The Committee intends that this subsection apply solely to the Hanford Reservation in Washington.

H.R. Rep. No. 785, 97th Cong., 2d Sess., pt 1, at 66 (1982). As noted above, this provision had been inserted into the legislation through the efforts of Rep. Sid Morrison, the Congressman whose District included Benton County. It gave the Secretary an option to continue with the research work that had been going on at the BWIP when the NWPA was enacted, provided that the DOE also comply with the procedures set forth in sections 113 and 117 of the Act. DOE/RL is correct in describing this provision as "entirely permissive," and in fact, the Secretary never exercised the authority granted in section 112(f). Isaacson Deposition at 52.

This reference to section 112(f) in the legislative history cannot be read to mean that activities during the early period qualified for PETT grants under section 116(c)(3) of the NWPA. Instead, it refers to the historical context in which the 1982 NWPA was enacted. As noted above, it is unquestionably true that activities which were then called "site characterization" had been done during the course of work at the BWIP site for several years before the enactment of the NWPA. In its pre-hearing brief, the County mentions a study entitled Site Characterization Report for the Basalt Waste Isolation Project, prepared for DOE by Rockwell International, then the prime contractor at Hanford. *See* Brief of Petitioner at 41, citing

DOE/RL 82, vol. 1, at 3 (November 1982) ("BWIP Site Characterization Report"), Benton County Hearing Exhibit 2. Two witnesses at the hearing (Raymond Isaacson and Stephen Reidel) also testified about the nature of "site characterization" studies at BWIP during the period before the enactment of the NWPA in 1982, and before the site was recommended by the Secretary and approved by the President in May 1986. *See* Transcript of January 9, 1995 Hearing at 116-24 [hereinafter cited as "Jan.[date of hearing] Tr."]; Jan. 11 Tr. at 7-30.

The explanation for these apparently inconsistent uses in the record of the term "site characterization" lies in the fact that the Federal government's program for the development of geologic repositories for nuclear waste had been going on long before the passage of the NWPA of 1982. In the Federal Register notice establishing guidelines for the DOE siting process under the NWPA, the DOE stated that the program had begun three decades earlier, and went on to describe how the 1982 Act "established a process for the siting of repositories by integrating the then-existing DOE siting program into its requirements and procedures." 49 FR at 47715. When viewed in the proper historical context, it becomes clear that the term "site characterization" was used during the early days of the nuclear waste program to refer to activities that would not qualify as such under the specific definition later adopted in section 2(21) of the NWPA. The NWPA is not a seamless document, and it used that term in section 112(f) in a sense that was inconsistent with the special definition in section 2(21) of "site characterization" at a candidate site which would trigger a jurisdiction's eligibility for PETT grants under section 116(c)(3). It is also important to note that NWPA section 112(c) and DOE's guidelines for a five step site selection process in 10 C.F.R. Part 960, which required Presidential approval of a candidate site as a prerequisite for site characterization under the NWPA, were irreversibly followed in lieu of the option created under section 112(f). Even if section 112(f) theoretically could have been used to by-pass the five step site selection process later adopted in the guidelines, that provision proved to be a nullity since the Secretary never exercised the option. As a result, section 112(f) did not make Benton County eligible for PETT grants for any period before the Presidential approval of the BWIP as a candidate site on May 28, 1986. The necessary condition precedent for PETT eligibility under NWPA sections 2(21) and 112(c) and the guidelines implementing the DOE siting process was not met until that date. *See* 49 FR at 47714-17.

Our determination that Benton County's PETT eligibility did not begin until May 28, 1986 is consistent with the interpretation of the NWPA contained in the NOIP. It is also consistent with the manner in which DOE/NV treated Nye County in the process of establishing that County's PETT amount. It is important to note, however, that the NOIP does require DOE/RL to include the pre- May 28, 1986 BWIP activities in the assessment valuation used to compute Benton County's PETT amount, to the extent that the residual value of those activities after May 28, 1986 is treated as an improvement to real estate used in support of site characterization. 56 FR at 42319. The proper valuation of "improvements to real estate" is an important issue that will be addressed later in this decision.

Finally, although this related issue was not directly argued by the parties during the course of the present appeal, we have determined, *sua sponte*, that the termination date of Benton County's PETT eligibility should be March 21, 1988, the effective termination date for BWIP site characterization activities figured according to the NWPA Amendments of 1987. 42 U.S.C. § 10172. In specifying that Benton County's PETT eligibility ended on December 22, 1987, the NOIP erred by failing to consider that the statute directed DOE to terminate all site characterization activities at the BWIP 90 days after December 22, 1987. *Id.* Section 116(c)(3) of the NWPA specifies that PETT grants "shall continue until such time as all [site characterization] activities ... are terminated at such site."

C. The Authority of Benton County under the NWPA to Assess Interest Penalties against DOE for Late PETT Payments

Under Washington State law, all property taxes are due and payable on or before April 30th, and are delinquent after that date. Washington Revised Code (hereinafter cited as "RCW") § 84.56.020 provides for the imposition and collection of both interest and penalties. Delinquent taxes are subject to interest, computed monthly from the date of delinquency until paid. RCW § 84.56.020(2). In addition, a penalty of

three percent is also assessed on the amount of the delinquency on June 1st of the year in which the tax is due and an additional penalty of eight percent is assessed on the total amount of the tax delinquent on December 1st of the year in which the tax is due. RCW § 84.56.020 (2). RCW § 84.56.020 (4) defines the term "interest" to mean both interest and penalties.

The NOIP states that "late payments shall include interest, if appropriate, in accord with applicable requirements of the taxing jurisdiction." 54 FR at 42319. In addition to interest, Benton County applied statutory interest penalties under Washington State law to calculate its estimate of DOE's PETT liability. *See* Letter from Treasurer, Benton County to DOE/RL (May 28, 1993) ("PETT Claim Letter"). Interest and interest penalty costs for the years 1983 through 1989, the entire period for which Benton County claims that it is owed PETT payments, total $21,310,945, on an overdue tax obligation the County calculates as $24 million. *See* PETT Claim Letter at 3.

Benton County advised DOE in writing that no interest would be due if its PETT claim was paid by July 1, 1993. The County also encouraged DOE to make a payment under protest, pursuant to RCW § 84.68.020, to avoid further interest accruals on past due obligations. *See* PETT Claim Letter at 3. If such a payment had been made, interest on tax claims would have ceased to accumulate on the date of payment. *Id*. However, as we have seen from the history of this dispute, the parties were far apart as to the appropriate amount of the tax equivalent due.

For the reasons explained below, we have concluded that DOE/RL was correct in determining that Benton County lacks the authority to assess interest penalties against DOE for late payment of its PETT grant. We therefore reject the County's suggestion that we direct DOE/RL to include interest penalties in the amount of its PETT grant.

To support its position that state law controls DOE's obligation to pay interest penalties, the County relies heavily on Federal Reserve Bank of Richmond v. City of Richmond, 957 F.2d 134 (4th Cir. 1992) (Federal Reserve Bank). That case involved the interpretation of 12 U.S.C. § 531, which exempts Federal Reserve Banks from all state and local taxes except taxes on real estate. The Federal Reserve Bank of Richmond (FRB) failed to pay its real estate tax bill on time, and was assessed a penalty and interest for late payment. The FRB paid the tax bill, refused to pay penalty and interest charges, and then filed suit, arguing that the penalty and interest were barred. *Id.* at 135. The FRB prevailed in the lower court, but on appeal the United States Court of Appeals for the Fourth Circuit held that Virginia law governs whether interest and penalties are part of the tax. *See* Federal Reserve Bank, 957 F.2d at 137. Benton County also relies on Irving Independent School District v. Packard Properties, 970 F.2d 58 (5th Cir. 1992) (Irving). In Irving, another federal entity, the FDIC, was statutorily exempt from liability for penalties on unpaid taxes. When a local jurisdiction imposed penalties on the FDIC, the court looked to Texas state law for its definition of interest and penalty. Because Texas state law considered interest on unpaid taxes a form of penalty, the FDIC was exempt from the penalty payment. Benton County maintains that these cases support the proposition that Washington State law should determine DOE's liability to pay interest penalties in the instant case, and argues that under the provisions of RCW § 84.56.020 which are discussed above, DOE is obliged to pay them.

To justify its rejection of Benton County's claim for interest penalties, DOE/RL invokes the Federal government's sovereign immunity from taxes imposed by state and local governments. DOE/RL points out that Congress did not waive the Federal government's sovereign immunity in the NWPA. As that statute has been interpreted by DOE in the NOIP, the DOE is not a taxpayer, and the PETT grants paid under section 116(c)(3) of the NWPA do not constitute a tax. Instead, the PETT grants represent amounts voluntarily paid by the Federal government to compensate affected jurisdictions for the revenue they would otherwise have received if the industrial activities associated with site characterization were carried out within the jurisdiction by private entities. Because the purpose of the Washington State interest penalty is to punish taxpayers who pay their taxes late, DOE/RL argues that it is exempt from this obligation. Pre-Hearing Brief of Respondent at 46.

According to DOE/RL, it is under no obligation to pay a penalty imposed for the purpose of punishing delinquent taxpayers "merely because its procedures for granting money to Benton County are not consistent with the normal schedule for taxpaying." Comments of Respondent at 47. It should be noted, however, that DOE/RL does not dispute its obligation to pay the basic tax equivalency. Nor does DOE/RL dispute its obligation to pay interest on that amount to compensate for the time value of money which the County lost because of DOE's delay in making the PETT payment. *Id*.

We agree with DOE/RL that the Federal government's sovereign immunity bars imposition of interest penalties. Although the NOIP acknowledges DOE's intention to pay interest on untimely PETT grants, it does not permit the taxing jurisdiction to impose penalties on the agency for late payments. Interest and penalties imposed in connection with late taxes serve different functions; penalties are meant to punish a party for late payment, and to deter others from doing the same, while interest is intended to compensate the party to whom the sum is owed for use of his or her money during the period of nonpayment. Cool Homes, Inc. v. Fairbanks North Star Borough, 860 P.2d 1248 (9th Cir. 1993). *See also* State ex rel. Nevada Tax Commission v. Saveway Super Service Stations, 668 P.2d 291 (9th Cir. 1983). The payment of interest to compensate the County for the time value of money lost as a result of DOE's delay is fair and equitable, and its purpose is consistent with the policy goals underlying the NWPA. By contrast, interest penalties are a punitive measure whose use is unnecessary and would not only result in an unjustified windfall to Benton County, but would also divert the monies in the Nuclear Waste Fund for an unauthorized purpose. There is no indication of legislative intent that penalties should be applied in the PETT context. In addition, the imposition of penalties on DOE would not further an appropriate state purpose since there is no likelihood of DOE seeking to evade the jurisdiction's laws.

Benton County's claim for interest penalties flies in the face of long-held, weighty authority to the contrary. It is well-established that in the absence of specific provision by contract or statute, or express consent by Congress, interest does not run on a claim against the United States. *See* Library of Congress v. Shaw, 487 U.S. 310 (1986). In the NOIP, DOE interpreted the statute to authorize the inclusion of interest with the late payment of a PETT grant under the NWPA. 56 FR 42319. The policy underlying this statement manifests the intention of the Congress to compensate affected jurisdictions for federal activities which, had they been performed by a private entity, could have been subject to taxation by the jurisdiction. Since the NOIP was not published until 1991, three years after Benton County's period of PETT eligibility ended, the DOE has acknowledged its willingness to pay interest on late PETT payments to compensate the County for not having the use of that money during the intervening years. However, nothing in the NOIP can be said to authorize the payment of penalties. The NOIP clearly emphasized that the NWPA does not constitute a waiver of the Federal government's sovereign immunity from taxation by local jurisdictions. 56 FR 42318.

Benton County contends that DOE has consented to be treated like an ordinary taxpayer. This unsupported assertion offers little analytical weight here, and we disagree with the notion that penalties can be properly assessed. A waiver of sovereign immunity would be required for DOE to be treated like an ordinary Washington taxpayer, and none has occurred. Our conclusion is supported by a recent case arising under the NWPA's PETT provisions, in which the Ninth Circuit refused a petition by the state of Nevada to allow Nevada law to control the implementation of the NOIP. *See* Nevada v. DOE, 993 F.2d 1442 (9th Cir. 1993) (Nevada). The court stated that it would find a willingness to be subjected to a state scheme only if explicitly stated, and it found no "express waiver of federal immunity from state taxation." *Id.* at 1444. One cannot equate legislation providing that a jurisdiction will receive a grant "equal to the amount . . ." it would receive from a tax with an express waiver of sovereign immunity. The Supreme Court has held that waivers of sovereign immunity must be strictly construed in favor of the United States. Ardestani v. INS, 502 U.S. 129, 137 (1991). *See also* OPM v. Richmond, 496 U.S. 414, 432 (1990). Based on the doctrine of sovereign immunity, we hold that Washington State law does not govern DOE/RL's liability for interest penalties.

The lack of a waiver of sovereign immunity in the present case also explains why the Federal Reserve Bank case cited by Benton County does not govern the present appeal. The underlying statutes involved

are fundamentally different. The NWPA did not waive DOE's sovereign immunity from state taxation, while 12 U.S.C. § 531 did waive the Federal Reserve Banks' immunity from state and local real estate taxes. The DOE is directed to grant "payments equal to taxes" to affected jurisdictions for site characterization activities. The application of state rules allowing DOE to be penalized for not paying Benton County's PETT grant on time "would run counter to the terms of the statute involved." Federal Reserve Bank, 957 F.2d at 136. The objective of the NWPA is to make an affected jurisdiction whole, not to provide that entity with an economic windfall. *See* Nevada, 993 F.2d at 1444 (the NWPA was not intended to be a vehicle for Nevada to increase its revenue base).

D. The Authority of Benton County to Collect Personal Property Tax for the Year 1986

Benton County included in its PETT claim taxes on personal property associated with the BWIP in the year 1986. (As indicated in our discussion of the NOIP earlier in this Decision, the County may properly include in its PETT claim personal property located anywhere in Benton County, as long as it was used in connection with the BWIP.) In support of this claim, Benton County relied on applicable Washington State statutes and regulations governing the *ad valorem* personal property tax. DOE/RL denied this portion of Benton County's claim on the grounds that the property did not become subject to PETT until May 28, 1986, the date on which the President approved the BWIP for site characterization. According to DOE/RL, no PETT is due to Benton County for personal property taxes attributable to the 1986 tax year because the owner of the property was "tax exempt" on January 1, 1986, the statutory date for determining its taxability *vel non*. For the reasons explained below, we have concluded that DOE/RL was correct in determining that Benton County lacked authority to tax the BWIP personal property until the 1987 tax year.

Benton County bases its argument that its PETT claim should include personal property taxes for 1986 on the following three provisions of Washington law:

All property now existing, or that is hereafter created or brought into this state, shall be subject to assessment and taxation for state, county, and other taxing district purposes, upon equalized valuations thereof, fixed with reference thereto on the first day of January at twelve o'clock meridian each year, excepting such as is exempted from taxation by law.

RCW § 84.36.005. Benton County also cites a similar provision in RCW § 84.40.020: "All personal property in this state subject to taxation shall be listed and assessed every year, with reference to its value and ownership on the first day of January in the year in which it is assessed." The statutory scheme also provides for the taxation of personal property moved into the state or a county after January first of the assessment year as follows:

The owner of personal property removing from one county to another between the first day of January and the first day of July shall be assessed in either in which he is first called upon by the assessor. The owner of personal property moving into this state from another state between the first day of January and the first day of July shall list the property owned by him on the first day of January of such year in the county in which he resides: PROVIDED, That if such person has been assessed and can make it appear to the assessor that he is held for the tax of the current year on the property in another state or county, he shall not again be assessed for such year.

RCW § 84.44.080. Benton County reads all three of these provisions together to mean that personal property that is moved into a Washington county between January 1 and July 1 of a year is generally subject to taxation by that county into which it is moved in that year. Based on this interpretation of the law, Benton County maintains that once the BWIP became eligible for PETT on May 28, 1986, its personal property should be treated like property that was moved in from another county, and made subject to taxation in 1986 under RCW § 84.44.080.

DOE/RL argues that the critical issue is whether the owner of the personal property in question was

exempt from taxation on January 1, 1986. According to DOE/RL, on January 1, 1986, the BWIP property was owned by an exempt entity which became the equivalent of a non-exempt entity later in the year. DOE/RL relies on a decision by the Washington State Supreme Court in the case of Timber Traders v. Johnson, 87 Wash.2d 42, 548 P.2d 1080 (1976). This decision reviewed the language of those statutes, and related exemption provisions, and concluded that the legislature intended for personal property to be taxed with reference to its ownership on the 1st of January. Comments of Respondent DOE/RL at 48, Exhibit 44.

We agree with DOE/RL that the decision of the Washington State Supreme Court in the Timber Traders case is controlling, and Benton County cannot include personal property taxes for the year 1986 in its PETT claim. The issue here is timing. DOE, as the owner of the personal property involved, was exempt from Washington State taxation on the relevant January 1, 1986 date for making that determination. The DOE property did not become subject to Washington State taxation (figuratively speaking) until the BWIP was approved by the President as a candidate site under the NWPA on May 28, 1986. The facts in Timber Traders are closely analogous to the situation of the BWIP during 1986. Timber Traders involved a taxpayer who had purchased timber located in Pierce County from the state (a tax-exempt entity) after January 1st, but before the date the Assessor valued it. The Pierce County Assessor levied a tax on the timber for the year in which it was purchased from the state, and the owner sued. The Circuit Court of Pierce County enjoined the collection of taxes on the timber, the Court of Appeals reversed, and the Washington State Supreme Court, after analyzing all of the relevant statutes, reversed its prior interpretation of the law in Star Iron & Steel Co. v. Pierce County, 81 Wash.2d 680, 504 P.2d 770 (1972), and determined that the legislature intended personal property to be taxed by reference to its ownership on January 1st. The court held that Timber Traders, the new owner who had purchased the property after January 1st, could not be taxed in that year because the prior owner had been tax-exempt on January 1st. In reaching its decision, the court noted the following language in RCW § 84.40.020 that Benton County quoted in its pre-hearing brief: "All personal property in this state subject to taxation shall be listed and assessed every year, with reference to its value and ownership on the first day of January of the year in which it is assessed." 548 P.2d at 1081 (emphasis added). The court further relied on RCW § 84.36.855, which provides that property which changes from exempt to taxable status shall be placed on the assessment roll for taxes due and payable in the following year. 548 P.2d at 1082.

The situation of the Benton County Assessor vis-à-vis the taxability of the BWIP personal property in 1986 is comparable to that of the Pierce County Assessor in the Timber Traders case. The BWIP personal property was owned by a tax-exempt entity on January 1, 1986. The status of the owner changed later in that year when the President approved the BWIP as a candidate site under the NWPA and Benton County became eligible to receive a PETT grant. Under RCW § 84.36.855 as interpreted by the state supreme court in Timber Traders, the BWIP property could not be taxed until the year after the owner's status changed, i.e. 1987. We therefore find that Benton County's interpretation of the law is clearly incorrect. Although Benton County reads particular significance into RCW § 84.44.080, which prescribes how to determine which county within the state may properly tax personal property which is moved during the relevant period, that provision offers no help to us in reaching a conclusion on the issue of taxability *vel non,* which is determined here by the tax-exempt status of the owner on January 1, 1986.

E. Summary of Determinations on Legal Issues

In this section, we have considered and ultimately rejected Benton County's arguments regarding three legal issues. The first issue concerns the starting date for Benton County's PETT eligibility under the NWPA. We find that DOE/RL was correct in determining that the County's PETT eligibility began on May 28, 1986 when the President approved the BWIP as a candidate site under section 116(c)(3) of the NWPA. However, we have also determined, *sua sponte,* that the termination date of Benton County's PETT eligibility should be March 21, 1988, the effective termination date for BWIP site characterization activities figured according to the NWPA Amendments of 1987.

The second issue concerns the authority of the County under the NWPA to assess interest penalties against

the DOE for late payment of the PETT amounts for the tax years involved. We find that Benton County is barred by the doctrine of sovereign immunity from assessing interest penalties against the DOE under provisions of Washington State law that are applicable to ordinary taxpayers.

The third issue concerns the County's authority to collect personal property taxes for the 1986 tax year. We find that personal property attributable to BWIP site characterization activities would not have been figuratively subject to taxation in the 1986 tax year because that property was tax-exempt on January 1, 1986, the date on which its taxability *vel non* is determined under Washington State law.

IV. Appraisal of the BWIP Site

A. Introduction

The appraisal of real estate is "a process of estimating value." *See generally* The Appraisal of Real Estate (10th ed. 1992). It is not an exact science, and as a practical matter, appraisals are often used as the basis for negotiation between parties who have competing interests in the value of a property, such as a buyer and a seller, or a local taxing authority and an owner. In the present case, the interests of DOE/RL and Benton County are diametrically opposed. DOE/RL knows that the repository will not be built at the former BWIP site, that site characterization there is a dead letter, and thus wants to minimize the amount of the PETT payment to Benton County. On the other side, Benton County wants to obtain the highest possible PETT payment, based on the status of the site characterization done before the 1987 amendments to the NWPA eliminated the BWIP as a potential repository location. During the course of this appeal, the parties have held to their extreme positions, with Benton County seeking an amount ($45 million, plus additional interest) that is more than one hundred times greater than the amount DOE/RL is prepared to pay ($400,000). To our knowledge, the parties have not seriously attempted to resolve their differences or negotiate a compromise, and the matter is now before OHA to decide.

In the ensuing sections of this decision, we address a series of complex issues concerning the proper appraisal of the BWIP real estate. The BWIP appraisal forms the basis for the County's assessment of real property taxes, which in turn constitute the principal factor in determining the amount of Benton County's PETT grant. First, we must decide when the BWIP should have been appraised. Benton County contends the BWIP appraisal should have been done during the 22-month period of PETT eligibility in 1986-1988, and DOE/RL maintains it was proper to have done the appraisal in 1993. Resolving the timing issue requires us to examine the historical context in which the NWPA was enacted, and the manner in which DOE's Nevada Operations Office (DOE/NV) approached its PETT obligation to Nye County for site characterization activities at Yucca Mountain. On these issues, we find that the NWPA requires the payment of PETT grants to be roughly contemporaneous with the tax year concerned, and that the BWIP appraisal should have been done during the 22-month period of PETT eligibility. We also find that although it was resolved by a negotiated settlement, DOE/NV's approach to its PETT obligation vis-à-vis Nye County properly considered the appraised value of the Yucca Mountain real estate at the beginning of the PETT eligibility period. In DOE/NV's Nye County PETT settlement, a substantial portion (approximately 40 percent) of the funds expended on Yucca Mountain before May 28, 1986 was reflected in residual value as improvements to real estate used in connection with site characterization activities. We find that DOE/NV's approach is more consistent with the Department's statutory PETT obligation under the NWPA than the approach used by DOE/RL in its initial Benton County PETT determination, and that the DOE/NV interpretation should be adopted in our analysis of the present appeal.

Second, we discuss generally-accepted principles of real estate appraisal that are relevant to the Benton County appeal. These include the concept of appraising real estate at a property's "highest and best use," and the three fundamental approaches used by professional appraisers to estimate the value of real estate, including both bare land and improvements. Third, we apply those principles to analyze the parties' positions on the proper determination of the highest and best use of the BWIP site. We find that Benton County correctly specified the highest and best use of the BWIP during the relevant period as "industrial

use" for site characterization as a potential high level nuclear waste repository under the NWPA. Fourth, we consider a contested issue on the proper appraisal of one portion of the bare land on the BWIP site. Based on our determination of the highest and best use of the BWIP during the relevant period, we affirm DOE/RL's position on that parcel and find that it should have been appraised at a lower value than claimed by Benton County.

The fifth issue we consider is the proper appraisal of the improvements to real estate on the BWIP site. Under the NOIP, this entails determining the amount of money expended prior to May 28, 1986 that was reflected in residual value as improvements to real estate used in conjunction with site characterization activities at the BWIP during the relevant 22-month period. Up until its post-hearing brief, Benton County has argued that the entire amount of more than $400 million spent by DOE on the BWIP should be included in the appraisal as improvements. DOE/RL has maintained that none of the money spent on the BWIP should be considered as improvements for appraisal purposes. Benton County has introduced evidence of other business properties under development that were appraised in Washington State to include costs similar to site characterization as improvements. Accepting Benton County's position on the highest and best use of the BWIP for purposes of argument only, DOE/RL has introduced many contrary examples. After analyzing this evidence, and considering the arguments of the parties, we find that some portion of the money expended on the BWIP prior to May 28, 1986 was reflected in residual value as improvements to real estate. Finally, we acknowledge Benton County's willingness to use the methodology in the Nye County PETT settlement to resolve its present appeal.

We conclude the decision by directing DOE/RL to confer in good faith with Benton County and apply the approach used to negotiate the Nye County PETT settlement to resolve this case within a specified time period, according to principles of alternative dispute resolution applicable to government agencies. The parties are directed to submit a detailed report to the OHA appeal panel at the expiration of the remand period, if they are unable to reach a resolution by that time. In the event that the parties fail to resolve the case through a negotiated settlement on remand, the OHA will issue a supplemental order fixing the amount of Benton County's PETT grant.

B. The Proper Date for Doing the BWIP Appraisal

1. Historical Context of the NWPA's PETT Provision

The payment of PETT grants to affected jurisdictions has historical precedent in the disbursement by DOE and its predecessors of "payments in lieu of taxes" ("PILT") and payments for "special burdens" to assist local governmental entities in "atomic communities," e.g., Los Alamos, Oak Ridge, and Richland, that were built by the government during World War II to house the people who worked for the Manhattan Engineer District. In the Atomic Energy Act of 1946, the Congress determined that it was necessary to compensate local jurisdictions for the expenses of providing public services to those communities, even though the activities of the federal government were exempt from taxation under the doctrine of sovereign immunity. *See* Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2208; Atomic Energy Community Act of 1955, 42 U.S.C. § 2301; § 2391 ("Assistance to local governmental entities"); DOE Order 2100.12 (6-9-92) ("Payments for Special Burdens and In Lieu of Taxes"). The Atomic Energy Community Act authorized an ongoing process of annual payments to local entities. It can be inferred from this historical context that Congress envisioned that the cycle for the payment of PETT grants under the NWPA would follow a similar pattern, in which the process of determining the amount of payments-equal-to-taxes would occur on an ongoing basis that was roughly contemporaneous with the tax year concerned. This is reflected in the language of section 116(c)(3) of the NWPA, which requires PETT grant payments "each fiscal year equal to the amount such [jurisdictions] would receive were they authorized to tax such site characterization activities," and directs that "[s]uch grants shall continue until such time as all such activities . . . are terminated at such site." 42 U.S.C. § 10136(c)(3) (emphasis added).

We would probably not be considering this appeal if the DOE had been able to put the PETT process into

motion on a timely basis. The difficulty in this case arises from the fact that the DOE did not implement the PETT process during site characterization of the BWIP, and several more years passed after the 1987 NWPA amendments before DOE set ground rules for the payment of PETT grants. These time delays were detrimental to Benton County, and they should not be allowed to produce a different result in this case. As indicated below, we have concluded that DOE/RL was obliged under the NWPA to consider Benton County's PETT submission on a retrospective basis as if it had been filed during the 22-month period that commenced on May 28, 1986. The legislative purpose of the statute cannot be achieved if the real estate appraisal and assessment process, which forms the principal basis for determining the amount of Benton County's PETT grant, is distorted by hindsight.

2. DOE/NV's Approach to the Nye County PETT Grant, and the Need for One Consistent Departmental Interpretation of DOE's Statutory PETT Obligation Under the NWPA

Since Benton County and Nye County, Nevada were the only two counties eligible under the NOIP to submit PETT estimates, it is relevant for purposes of Benton County's appeal to consider the manner in which DOE handled the PETT process with Nye County. The PETT claim of Nye County was resolved through a negotiated settlement. The present record includes some documents that reveal the process leading up to that settlement. *See* Benton County Post-Hearing Brief Exhibits 1 and 2. In particular, these documents show that Nye County submitted a PETT estimate based on a 1992 appraisal of Yucca Mountain, which was done by a contract appraisal firm, Robert L. Foreman Associates of Newport Beach, California. The Foreman appraisal, which used the cost approach, is in the record as Benton County Hearing Exhibit 27. DOE/RL's counterpart, the DOE Nevada Operations Office (DOE/NV), used the Foreman Yucca Mountain appraisal as a starting point for determining, through its negotiations with Nye County, the value of the site at the beginning of the PETT eligibility period in the NOIP, i.e. May 28, 1986. By contrast, DOE/RL declined to apply the cost approach to appraise the BWIP at the beginning of the PETT eligibility period on May 28, 1986. For purposes of the present appeal, we will take judicial notice of the facts leading up to the Nye County PETT settlement. *See* Fed. R. Evid. 201(b); Mack v. Bay Beer Distributors, 798 F.2d 1279, 1282 (9th Cir. 1986).

For the reasons discussed below, we find that DOE/NV's interpretation of its PETT obligation vis-à- vis Nye County was more consistent with the statutory objectives of the NWPA than the interpretation used by DOE/RL to determine the amount of Benton County's PETT grant. DOE/NV's interpretation of its PETT obligation to Nye County was also more consistent with the generally accepted principles of real estate appraisal, and in particular, with the principles underlying the cost approach to the appraisal of special purpose properties. There is nothing in the NWPA statute or the NOIP that would warrant using fundamentally inconsistent interpretations of DOE's PETT obligation under section 116(c)(3) to determine the amount to be paid to the two different counties where the candidate sites were located. This is especially true for the period before the termination of site characterization activities at the BWIP in March 1988, when the two candidate sites enjoyed equal status under the law. We therefore find that DOE, to the extent possible, should adopt one consistent interpretation of its PETT obligation in section 116(c)(3) of the NWPA. We also find that the DOE/NV interpretation is the preferable one, which we shall apply in the analysis of this appeal. As explained in the remainder of this decision, this finding means that some of the factual and legal bases for DOE/RL's initial PETT determination are erroneous, and that the corresponding points of Benton County's appeal have merit.

Computation of the appropriate tax equivalent on the BWIP site requires us to consider the value of the land and improvements to real estate under Washington State law. *See* NOIP, 56 FR at 42319. For this purpose, a thorough and well-documented appraisal is critical. The views of Benton County and DOE/RL regarding the proper appraisal of BWIP differ significantly. According to the County, the amount of its PETT payment under the NWPA should be based on the appraised value of the BWIP site as it existed during the period May 28, 1986 through March 21, 1988, when NWPA- sanctioned site characterization activities were being conducted there. This is similar to the way in which DOE/NV treated Nye County in the settlement of its Yucca Mountain PETT claim. We find it is the proper way to treat Benton County's claim under the NWPA and the NOIP, as well. DOE/RL's appraisal contractors specifically repudiated

Benton County's "industrial use" classification and appraised nearly the entire BWIP site in 1993 as "unimproved range land" valued at $300 per acre. Even though DOE/RL properly assigned a higher value to a 23 acre "primary site" where the "Near Surface Test Facility" had been located, its contract appraiser was apparently instructed to proceed with an estimate based on the assumption that there were no improvements on the BWIP site during the 22-month period when Benton County was eligible for PETT. This *post hoc* view of the BWIP appraisal, however well-intentioned, is inconsistent with the policy underlying the PETT provision of the NWPA, as interpreted by DOE in the NOIP:

These excerpts from the legislative history demonstrate the Congress intended to provide a level of compensation for the affected jurisdictions that would be coextensive with the amounts the taxing jurisdictions otherwise could collect as taxes if site characterization activities were carried on by private parties.

NOIP, 56 FR at 42317.

It would not be fully in accord with this provision and Congressional intent if we were to value the BWIP real estate as "unimproved range land." The record shows that DOE spent nearly a decade doing preliminary studies at the Hanford site, expended hundreds of millions of dollars in the process, and completed 22 months of official, NWPA-sanctioned "site characterization" activities at the BWIP after being selected as one of three potential repository locations approved by the President under NWPA section 112(c). Any reasonable application of generally accepted principles of real estate appraisal dictates that some of the costs incurred in connection with these activities should properly be taken into account when valuing the BWIP site and determining the amount of Benton County's PETT grant. We therefore conclude that DOE/RL's initial DOE determination of the appraised value of the BWIP land and improvements as they existed in 1993 was erroneous in fact and in law, and failed to meet the Department's statutory obligation under the NWPA.

C. Generally-Accepted Principles of Real Estate Appraisal Relevant to the PETT Process

We next turn our attention to the real estate appraisal process itself. A basic principle of real estate appraisal is that land should be appraised at its "highest and best use." This is defined by Washington State tax regulations as "the most profitable, likely use to which a property can be put. It is the use which will yield the highest return on the owner's investment." Washington Administrative Code (hereinafter cited as WAC) § 458-12-330. The Appraisal Institute, a trade association of professional real estate appraisers, defines "highest and best use" similarly:

the reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value.

The Appraisal of Real Estate at 275 (10th ed. 1992). A substantial amount of the conflicting expert testimony at the hearing in this case concerned the proper application of the highest and best use concept to the BWIP appraisal.

Once the highest and best use is determined, the next steps in the appraisal process are estimating the value of the bare land, and estimating the value of any improvements to the real estate involved. There are three fundamental approaches that appraisers use to estimate the value of real estate: (1) the cost approach; (2) the sales comparison or market approach; and (3) the income capitalization approach. In the cost approach, the value of a property is derived by adding the estimated value of the land to the current cost of constructing a reproduction or replacement for the improvements and then subtracting the amount of depreciation. In applying the cost approach, both direct (or "hard") costs, such as construction materials and labor, and indirect (or "soft") costs, such as professional fees, design, planning, and other pre-construction activities, are generally included in the appraised value of property. The Appraisal of Real Estate, *supra*, at Chapter 14 ("The Cost Approach"). This approach is particularly useful for valuing "special use" properties that are not frequently exchanged in the market. In the sales comparison or market

approach, the appraisal is based on transactions in comparable properties. The market approach is commonly used when a number of similar properties have recently been bought and sold. In the income approach, the present value of the future benefits of property ownership is projected by mathematical formulas using estimates of a property's income streams, its future resale value, and a rate of return on the invested capital. An appraisal will often use more than one approach, or techniques drawn from different approaches. If more than one approach is used, the appraisal will conclude with a reconciliation of the various estimates.

In this case, it was evident that neither the market approach nor the income approach could alone provide a complete answer to the question of how much the BWIP real estate was worth, given the special nature of the BWIP site. Instead, a combination of approaches was used. To assess the value of the bare land, the Benton County appraiser used a market approach and we endorse that choice. However, since site characterization for a potential nuclear waste repository is a unique and unprecedented activity, neither the market approach nor the income approach, each of which relies on data drawn from properties with comparable characteristics, could be used to appraise the value of improvements to the BWIP real estate. Attention thus centered on the cost approach. As with the related highest and best use issue, there was a substantial amount of conflicting expert testimony presented at the hearing on the proper application of the cost approach to the BWIP appraisal.

D. Highest and Best Use Analysis

The appraisal of the BWIP site is a complex problem that involves the analysis of a number of related issues. The first issue to resolve in the appraisal process is the proper specification of the highest and best use of the BWIP site during the relevant period.

Benton County hired an experienced local appraiser, Nick Yaksic, to conduct the appraisal which formed the basis for its PETT claim. *See* "Appraisal Report B.W.I.P." in Appendix B to Benton County's Appeal. Yaksic determined that the highest and best use of the BWIP during the PETT eligibility period was "industrial use" for site characterization as a potential high-level nuclear waste repository, which was the actual use of the property at that time.

DOE/RL's principal argument why its BWIP appraisal (mostly range land without any improvements) is more appropriate than the Benton County appraisal centers on the concept of highest and best use. A trio of expert witnesses summoned by DOE/RL asserted that the County's appraisal was based on the erroneous premise that the highest and best use of the BWIP was a high level nuclear waste repository. These witnesses attacked each and every element of the underlying highest and best use analysis which DOE/RL attributed to the Benton County appraisal. However, we find that DOE/RL's evidence on this issue, while credible in theory, was based on a fatal mischaracterization of the Benton County appraisal, and missed the point. It addressed the wrong issue. Moreover, our analysis shows that when the status of the BWIP during the PETT eligibility period is viewed from the contemporaneous perspective under the applicable provisions of the NWPA and the DOE repository siting process regulations in 10 C.F.R. Part 960, it is the Benton County appraisal, not the DOE/RL appraisal, that is clearly more appropriate.

The Benton County appraiser determined that the highest and best use of the BWIP was "industrial use" for site characterization as a potential nuclear waste repository. This was based on DOE's own guidance in the NOIP for the submission of PETT estimates. It is also clearly correct, since by definition, once a candidate site was approved by the President for characterization as a potential repository location under the NWPA, the "industrial activities" on that site would give rise to an obligation on the part of DOE to make PETT grants to the local taxing authority. It is difficult to read this underlying principle of the Benton County BWIP appraisal in the manner that DOE/RL read it, i.e. that the highest and best use of the BWIP was an operating high level nuclear waste repository. Nevertheless, much of DOE/RL's attack on Benton County's appraisal is based on this erroneous assumption.

For example, DOE/RL argues that the Benton County Assessor should have considered the fact that there

was local political opposition in Washington and Oregon to the selection of the Hanford site as one of the three candidates for the repository. See DOE/RL Post-Hearing Comments at 22. The implication is that knowledge of this factor should have led the County to conclude that the BWIP would never be selected as the repository and that the appraisal was flawed as a result. Valuation of the BWIP site is not an ordinary exercise in real estate appraisal, and there is no basis for this conclusion. First, the BWIP's chance of being selected as the repository was irrelevant at the time concerned. According to Benton County, the highest and best use of the BWIP during the PETT eligibility period was for site characterization as a potential repository, not an actual repository. This work was ongoing in the 1986-1988 period, despite any local opposition. Second, the existence of local political opposition is a given, and certainly not unique to Benton County. One need only look at the State of Nevada's vigorous and thus far unsuccessful opposition to the selection of the Yucca Mountain site for characterization as a potential repository to elucidate this point. We take judicial notice of the fact that many U.S. citizens would not want a nuclear waste repository in their back yard, their county or even their state. The mere fact that there is political opposition to the characterization of a site as a potential repository does not mean the site cannot be appraised as if its actual use at the time is its highest and best use.

Similarly, DOE/RL is unpersuasive in its arguments that the Benton County appraisal failed to take proper account of zoning restrictions, or the lack of a repository license from the Nuclear Regulatory Commission. Id. at 23-25. Under the NWPA, zoning restrictions are simply not relevant to the retrospective appraisal of the BWIP as it existed during the PETT eligibility period. Nor is the final approval of a repository license by the NRC relevant to the PETT eligibility period. These points simply underscore the faulty premise and inapt comparisons on which DOE/RL has based its highest and best use argument.

Instead, for the purpose of this case, it is sufficient that the BWIP had met all of the then-relevant criteria for selection as one of three candidate sites for characterization as a potential repository location under the governing statutory and regulatory scheme. As noted by DOE in the preamble to 10 C.F.R. Part 960 ("Nuclear Waste Policy Act of 1982; General Guidelines for the Recommendation of Sites for Nuclear Waste Repositories"), 49 FR 47714 (December 6, 1984), the siting process is divided into the following phases: (1) screening, (2) site nomination, (3) site recommendation for characterization (4) site characterization, and (5) site selection (recommendation as a repository). By May 28, 1986, only Yucca Mountain and the BWIP had made it through a labyrinth of scientific and political obstacles to reach the fourth phase of the siting process:

The selection of sites in basalt and tuff began on the basis of land use: the DOE began to search for suitable repository sites on some Federal lands where radioactive materials were already present; this approach was recommended by the Comptroller General of the United States and a House resolution. Although land use was the beginning basis for this screening of Federal lands, the subsequent progression to smaller land units was based primarily on evaluations of geologic and hydrologic suitability. The studies began at roughly the area stage, and the screening has now progressed to two sites: the site in basalt is on the Hanford Site, and the site in tuff is adjacent to the Nevada Test Site.

49 FR at 47716 (footnotes omitted). (No activities eligible for PETT payments ever took place at the third site that was selected by the President for characterization, in Deaf Smith County, Texas.) Despite the fact that the BWIP had met every *relevant* type of criterion that governed its selection for the industrial use of site characterization activities, DOE/RL's expert appraisal witnesses opined that Benton County's highest and best use analysis was deficient. *See, e.g.*, Jan. 11 Tr. at 113-25, 167-77; Jan. 12 Tr. at 11-16, 55-56. We find that testimony uniformly unconvincing. Colored by hindsight, it failed to use the proper contemporary frame of reference as specified in the NWPA and the NOIP. We find that for real estate appraisal purposes, computing a value for the BWIP site must properly take into account activities in furtherance of site characterization undertaken because BWIP was a potential nuclear waste repository. Finally, it is significant to note that none of these witnesses, Paula Thoreen, Douglas Main and Joseph Eckert, had ever conducted an appraisal of the BWIP site, and none of them had ever performed a highest and best use analysis of the BWIP. (Nor, in all fairness, had either of Benton County's expert witnesses,

Joseph Simmonds and Michael Goodwin, ever performed these functions for the BWIP.) No assemblage of appraisal experts could justify DOE/RL's rejection of the highest and best use analysis in Benton County's appraisal, and DOE/RL's consequent low appraisal of the BWIP. We find that DOE/RL erred in failing to accept Benton County's characterization of the highest and best use of the BWIP as "industrial use" for site characterization as a potential high level nuclear waste repository.

E. Appraisal of the Bare Land on the BWIP Site

Once he determined the highest and best use of the BWIP during the PETT eligibility period was industrial use for site characterization as a potential nuclear waste repository, the Benton County appraiser had to estimate the value of the bare land on the BWIP site. Since there were no sales of comparable potential repository properties, and no operating repositories from which to obtain the data needed for the income capitalization approach, Yaksic concluded that the cost approach was the most appropriate way of appraising the BWIP. As the first step in using the cost approach for the overall appraisal, Yaksic followed generally accepted appraisal practice and borrowed a technique from the market approach to appraise the bare land. He looked to recent sales of comparable industrial properties in the Pacific Northwest area to estimate the value of the various parcels of BWIP land. He divided the 11,520 acre BWIP site into three types of land and assigned a per acre valuation to each, as follows: (1) a 23 acre primary industrial site valued at $8,700 per acre; (2) 3,340 acres of buffer land valued at $300 per acre; and (3) 8,157 acres of land allocated to the actual repository at $1,500 per acre (the "maximum potential underground facility" or "MPUF"). The MPUF valuation was based on what Yaksic found to be sales of comparable property in a neighboring Oregon county, properties purchased for hazardous waste disposal, long term storage of solid waste or area landfill. *See* Jan. 10 Tr. at 129-32; Jan. 11 Tr. at 108-12.

DOE/RL's September 24, 1993 initial DOE determination agreed with Benton County's valuation of the primary site and the buffer land, but denied the County's $1,500 per acre valuation for the MPUF land. It substituted a value of $300 per acre based on a BWIP appraisal done for DOE/RL by Ross Mellor. DOE/RL challenged Yaksic's use of market sales of landfills in valuing the MPUF land on the ground that no permit to operate a landfill at the BWIP site had been issued. DOE/RL argued that without a permit, the MPUF parcel was more comparable to unimproved range land worth $300 per acre than to a potential landfill site. In its briefs, through the testimony of its witnesses at the hearing, and by the documentary evidence it submitted in this appeal, DOE/RL also argued that the BWIP site did not have a highest and best use as a high-level nuclear waste repository site. *See* Jan. 11 Tr. at 109-11, 177. DOE/RL maintains that the BWIP should not have been appraised as a nuclear waste repository because no license had been obtained and it was uncertain if the site could ever qualify for such a highest and best use. Based on its contention that the BWIP did not have a highest and best use as a repository, DOE/RL asserts that there was no basis for assessing the MPUF as anything other than buffer land bordering the Near Surface Test Facility.

The resolution of this issue follows from our previous holding that DOE/RL erred in appraising the BWIP as it existed in 1993, instead of doing a retrospective appraisal of the real estate as it existed during the PETT eligibility period in 1986-1988. This holding is a double-edged sword, favoring Benton County's position on some issues, and favoring DOE/RL's position on other issues. During the period of PETT eligibility, the BWIP was not a repository, and its facilities did not include an actual MPUF. The MPUF was only a theoretical concept. Ultimately, if development and activity at the site had proceeded, the MPUF would have become relevant. In the preamble to the repository siting regulations in 10 C.F.R. Part 960, DOE described the site characterization process:

During site characterization, the DOE will collect detailed information on the geologic, hydrologic, and other characteristics that determine compliance with the siting guidelines requiring site characterization. Standard geophysical tests and exploratory drilling from the surface will continue throughout site characterization. For subsurface investigations, exploratory shafts will be constructed to the depth at which a repository will be built. Limited subsurface excavations (tunnels and rooms) for testing purposes will be made in the host rock in the immediate vicinity of the shafts. The shafts will be large enough to allow

people and test equipment to be transported from the surface to the rooms. The shafts, tunnels, and exploratory rooms will allow detailed study of the host rock, including lateral exploratory drilling. A variety of tests will be performed in these underground facilities, including, for example, measurements of in-situ stress and permeability and heat transfer experiments. Every 6 months, the DOE will report to the NRC and to the affected States and Indian tribes on the nature and extent of the site-characterization activities and the information obtained from these activities.

49 FR at 47717 (emphasis added).

However, at the relevant time for the appraisal, i.e. during the period of PETT eligibility, the BWIP was undergoing only limited site characterization activities. The principal exploratory shaft had not yet been drilled beneath the Near Surface Test Facility, nor had subsurface testing activities begun. Those testing activities would have included lateral exploratory drilling, which would have been necessary to map out the MPUF if the process had continued. Only a series of exploratory boreholes had been drilled to ascertain some of the geological and hydrological characteristics of the underlying basalt flows. *See* Brief of Petitioner at 41, citing Site Characterization Report for the Basalt Waste Isolation Project, DOE/RL 82, vol. 1 at 3 (November 1982), Benton County Hearing Exhibit 2. According to Benton County witness Raymond Isaacson, there never was a final design of the underground facility before the BWIP was canceled. Isaacson Deposition at 37-38. Thus, we find that the BWIP site characterization process had not reached the stage where there was a sufficient level of "activities that impact the assessed value of real property" relating to the potential Hanford repository, except on the 23 acre primary site where the Near Surface Test Facility was located, and in the related program support activities taking place elsewhere within Benton County. *See* NOIP, 56 FR at 42318. On this issue, we agree with DOE/RL that the status of the BWIP during the PETT eligibility period was not comparable to the status of a parcel of land purchased by a waste disposal firm for use as a landfill. The BWIP site characterization would have had to have progressed far beyond the preliminary stage where it was during the period 1986-1988 before it would be appropriate to consider its highest and best use to be a high-level nuclear waste repository, and appraise the 8,157 acres of MPUF land (which Benton County allocated to the actual repository) at $1,500 per acre. During the relevant period, the "actual repository site" represented by the MPUF, as described by Benton County, was more potential than real. No separate parcel of land was ever specifically set aside for that purpose. Isaacson Deposition at 37-38. It therefore was not eligible for a $1,500 per acre appraisal for purposes of determining the amount of the County's PETT grant. Instead, we find that this parcel should have been appraised as part of the buffer land, with a value of $300 per acre. On remand, this determination should be taken into account by DOE/RL in recalculating the value of the BWIP land and improvements as they existed at the beginning of the PETT eligibility period on May 28, 1986.

In the final analysis, however, our rejection of Benton County's appraisal of the bare land which it allocated to the MPUF does not have a great impact on the proper determination of its PETT grant amount. This result occurs because under the cost approach, the value of a property is derived by adding the estimated value of the bare land to the current cost of constructing a reproduction or replacement for the improvements and then subtracting the amount of depreciation. As explained more fully below, by far the largest item to be considered in appraising the BWIP under the cost approach is the value of the improvements as they existed during the 22-month PETT eligibility period.

F. Proper Appraisal of Improvements to the BWIP Real Estate

The next issue is the proper appraisal of the improvements to real estate on the BWIP site. In the cost approach, the value of a property is derived by adding the estimated value of the land to the current cost of constructing a reproduction or replacement for the improvements and then subtracting the amount of depreciation. As noted above, when estimating reproduction or replacement cost of improvements it is appropriate to consider both direct (hard) costs and indirect (soft) costs. *See* The Appraisal of Real Estate at 317. Under the NOIP, an important step in this process entails determining the amount of money expended prior to May 28, 1986 that was reflected in residual value as improvements to real estate used in conjunction with site characterization activities at the BWIP during the relevant 22-month period. As

indicated earlier in this decision, we find that DOE/RL erred in its determination that none of the money DOE spent on the BWIP had any residual value for appraisal purposes.

Benton County maintains that during the 1986-1988 PETT eligibility period, all DOE funds spent on BWIP, minus the sum of those funds either conferred as "grants" or spent on "capital improvements," had residual value which should have been counted as "improvements to real estate," and added to the estimated value of the land.(2) The net amount of money DOE spent on the BWIP was over $400 million. The effect of including all or a part of this sum as "improvements" in the appraised value of the property dramatically influences the amount of Benton County's PETT grant. Benton County maintains that it is proper to include the entire amount of these DOE expenditures as improvements under the cost approach, since they would have to be expended by an owner trying to replicate the BWIP as of the effective date of the appraisal. While adhering to its position that none of the money spent on the BWIP should be considered as improvements for appraisal purposes, DOE/RL contends for purposes of argument that Benton County did not estimate the value of improvements on the BWIP in a manner consistent with Washington State appraisal practice.

In support of its argument that it was proper under Washington State law and appraisal practice to include as "improvements" all or a significant portion of the costs expended on the BWIP prior to the 1986-1988 PETT eligibility period, Benton County relies on the expert testimony of two witnesses, Joseph D. Simmonds and Michael W. Goodwin. Simmonds is the Property Tax Manager - Southern Region, for the State of Washington Department of Revenue, Property Tax Division. *See* April 22, 1994 Affidavit of Joseph D. Simmonds (attached as Exhibit A to Simmonds' December 1, 1994 Deposition). According to Simmonds, responsibility for the appraisal of real (and personal) property typically rests with the individual county in which the property is located. Jan. 10 Tr. at 10. After reviewing the two Benton County PETT claim submissions, Simmonds affirmed that their use of the cost approach was "consistent with applicable . . . statutes, regulations, and appraisal practices in the State." *Id.* at 2; *see also* Jan. 10 Tr. at 25-27. He also stated that the cost approach is regularly used by his Department "in cases where a unique special purpose property like the BWIP is under construction and where information is nonexistent for developing other traditional approaches." Simmonds Affidavit at 2. Finally, Simmonds opined that the "?site characterization' costs incurred as part of the BWIP are among the types of ?soft' costs which the State of Washington typically includes in the appraisal of real property improvements." *Id.* at 3; *see also* Jan. 10 Tr. at 27.

Goodwin is an independent consultant on the appraisal of special purpose properties who has worked for state and local assessing agencies in over 30 states. Before he was retained by Benton County for the present appeal, Goodwin had testified as an expert valuation witness before administrative tax boards, state courts and federal courts in 22 states, including Washington. *See* April 29, 1994 Affidavit of Michael W. Goodwin; Jan. 10 Tr. at 109. However, Goodwin admitted that he is not certified as an appraiser in Washington State. Jan. 10 Tr. at 172. Goodwin also supported Benton County's use of the cost approach to appraise the BWIP. It was his opinion with regard to the indirect cost issue that "all costs incurred by the DOE as a part of the site characterization process must be included in the cost of improvements, whether incurred on-site or off-site." Goodwin Affidavit at 2-4; Jan. 10 Tr. at 109-13. Goodwin cited the example of electric utilities to illustrate "the normal practice of including indirect costs of property in private industry." Goodwin Affidavit at 4; Jan. 10 Tr. at 158-59. He noted that the Federal Energy Regulatory Commission (FERC) has promulgated regulations prescribing the inclusion of indirect costs in its uniform system of accounts for electric utilities at 18 C.F.R. Part 101. Jan. 10 Tr. at 160. According to Goodwin, several types of studies which the FERC regulations permit utilities to include as indirect costs are similar to the site characterization costs incurred by DOE for the BWIP. These include nuclear operational, safety, or seismic studies, and environmental studies mandated by regulatory bodies relative to plants under construction. Goodwin Affidavit at 4. He asserted that these indirect costs are included in the cost approach in property tax appraisal of public utilities which are assessed by the Washington Department of Revenue. *Id.* In addition, Goodwin opined that Benton County's inclusion of those costs was "conservative" because it omitted several categories of costs that would normally be included in an appraisal using the cost approach. Jan. 10 Tr. at 165. These omitted categories included entrepreneurial

profit, interest during construction, amounts attributed to grants (which were here deducted from the cost of improvements), cost increases attributable to inflation (which were not taken into account by "indexing" to current cost levels). Goodwin Affidavit at 5-8. Finally, Goodwin stated that DOE/RL's appraisal of the BWIP was erroneous because it failed to recognize the large expenditures made for "site characterization" and preliminary costs of a related nature, which would be considered together as "site development" costs in the private sector. *Id.* at 8.

Benton County has drawn on the basic principles laid out in the testimony of Simmonds and Goodwin to support its PETT claim. The County compared the BWIP to a number of different types of industrial properties in Washington State that have been taxed before they were fully developed or operating, including a nuclear power plant under construction, land purchased for a gold mine, and land purchased for solid waste disposal in a landfill.

1. Benton County's Examples of Costs Appraised as Improvements to Real Estate

The County cites Washington State real property tax cases involving partially completed nuclear power plants, in which private utilities' shares in the WNP-3 reactor in Grays Harbor County were appraised at cost during construction for purposes of determining property tax liability. *See, e.g.*, Pacific Power & Light et al. v. Easter, BTA No. 88-15, 1990 Wash. Tax LEXIS 24, *5-6 (Feb. 15, 1990). As Benton County's expert witness Goodwin observed in his affidavit, utilities are required under the FERC accounting regulations to accumulate certain costs incurred each year while the plant was under construction, and to report their cumulative value to the state for assessment purposes. Under the FERC regulations, the amounts of indirect costs recorded in certain capital accounts can form the basis for taxation by state and local authorities, even before the project is completed. Benton County claims that many of the indirect costs incurred by DOE at the BWIP (including the types of studies mentioned above in the discussion of the Goodwin affidavit) would give rise to taxation if they had been expended by a utility as part of the process of constructing a new power plant. This type of real property appraisal for taxation is generally known as the "utility under construction model."

In addition, Benton County witnesses pointed to the manner in which land purchased for a gold mine was taxed in Okanogan County, Washington, even though the mine had not received the necessary permits for minerals production, and no gold had as yet been produced from the site. *See* Deposition of Scott Furman at 11-14; *see also* Deposition of John Sweetman at 21-23. John Sweetman, the Ferry County Assessor, explained that he looks for "indicators of value" to determine when an activity has crossed the line from a speculative venture to one where there is a defensible appraisal value. Sweetman Deposition at 9. One of Sweetman's tests was whether or not the mining activity is taking place in "elephant country"--that is, areas in which productive mines have historically operated. *Id*. at 33. Benton County emphasizes the fact that the BWIP's location in and adjacent to the 200 West "waste management" area of the Hanford Reservation was an indicator in 1986 of its potential for development as a high level nuclear waste repository. The County also relies on the general practice in Washington and Oregon counties of taxing land purchased for solid waste disposal after the required types of environmental landfill permits are issued but before the landfills are placed into actual use.

Finally, Benton County points out that its BWIP appraisal uses the same approach that the Nye County appraiser used to value Yucca Mountain. As noted above, both the Yaksic BWIP appraisal and the Foreman Yucca Mountain appraisal determined that the present (during their respective periods of PETT eligibility) use of the sites for characterization as potential repositories was the highest and best use for appraisal purposes. *Compare* Tr. at 244 (Yaksic testimony) *with* Benton County Hearing Exhibit 27 at 25 (Foreman Yucca Mountain Appraisal). According to Benton County, the Foreman appraisal of Yucca Mountain is consistent with the Washington State appraisal practices discussed above, and it further supports the validity of Benton County's BWIP appraisal. Benton County emphasizes that the appraisals of both potential repository sites recognized that the sites derived value from their potential use as repositories, just as the WNP-3 nuclear power plant in Grays Harbor County and the pre-permitted mine in Okanogan County derived taxable value from their potential for development or operation. Benton

County Post-Hearing Brief at 32.

2. DOE/RL's Contrary Examples of Costs Not Included in Appraisals as Improvements

By contrast, under DOE/RL's restrictive approach to Benton County's PETT claim, no improvement costs were added to the BWIP appraisal value. The BWIP was appraised as of 1993, on the assumption that there were no improvements to the real estate. DOE/RL's appraisal considered that after enactment of the 1987 amendments to the NWPA, there was no chance that the BWIP would be selected as the repository site. Based on hindsight, DOE/RL argued that Benton County erred in appraising the BWIP with a highest and best use as a potential repository site. Three of the appraisal professionals called as expert witnesses by DOE/RL at the hearing supported the proposition that Benton County had based its appraisal on this faulty highest and best use analysis. *See, e.g.,* Jan. 11 Tr. at 113-14 (Paula Thoreen), 175 (Joseph Eckert); January 12 Tr. at 14 (Douglas Main). These witnesses testified that it was never likely enough that the BWIP would be selected as the repository site for the County to consider its highest and best use as a potential repository. According to DOE/RL's theory of the case, none of the more than $400 million dollars expended by DOE on the BWIP had any residual value on the PETT eligibility starting date of May 28, 1986. As explained more fully below, DOE/RL therefore argued that there could be no costs, either direct or indirect, available to be taken into account as improvements to real estate in estimating the value of the BWIP for appraisal purposes.

At the early stages of the present appeal, DOE/RL advanced two arguments on the improvements issue that can be summarily rejected before we turn to the questions of appraisal theory and practice that were debated at the hearing. DOE/RL asserted in its pre-hearing brief that "improvements" could include only "fixtures," and argued that any fixtures that had once been attached to the BWIP real estate were gone by the time its contractor Mellor did his appraisal in 1993. Comments of Respondent at 11-13. DOE/RL also argued that the information generated from the preliminary studies of the BWIP done before May 28, 1986, and from NWPA site characterization after that date, had no residual value as an improvement, since the information was all in the public domain. Id. at 14. These early arguments reflect DOE/RL's initial lack of familiarity with the generally accepted principles of real estate appraisal that were later presented during the hearing process, and they have no merit. It is generally agreed by professional appraisers that under the cost approach, indirect or "soft" costs of pre-development studies are to be considered improvements to real estate if they add value to the property, and would have to be incurred to reproduce or replicate the property. *See generally* The Appraisal of Real Estate, *supra,* at Chapter 14 ("The Cost Approach"). DOE/RL's argument that the BWIP information had no market value as intellectual property because it was in the public domain is equally irrelevant in the context of applying the cost approach to appraisal of soft costs as improvements to real property. In this instance, the relevant measure is the amount of costs incurred by DOE that added value to the BWIP before May 28, 1986, not the market value of the BWIP information as intellectual property in 1993. Indeed, both of these arguments fail as a result of our determination that DOE/RL should have appraised the BWIP as it existed during the PETT eligibility period in 1986-1988, when the BWIP site was under active consideration as a potential waste repository site.

In defense of its initial DOE determination, DOE/RL specifically challenged every instance in which Benton County compared the BWIP to another type of industrial property during the developmental stage, when certain direct and indirect costs would be subject to taxation by local authorities under Washington State law and assessment practice. DOE/RL attacked Benton County's gold mine example on the grounds that the Ferry County Assessor, John Sweetman, testified that he would only tax land purchased for mining if it was "in elephant country," i.e. if it were situated in an area known to contain gold. According to DOE/RL, the BWIP never attained that status because it was at best only one of three potential repository sites approved by the President for site characterization under the NWPA. Likewise, DOE/RL discounted Benton County's comparison of the BWIP to a landfill site or a partially completed nuclear power plant on the grounds that those examples were inappropriate because the BWIP lacked any of the permits necessary for development of those types of industrial land use projects. In connection with Benton County's reliance on the "utility under construction model," DOE/RL presented testimony from Lorin Drennan, an expert on

the FERC utility accounting regulations, who maintained that under the FERC accounting system, none of the BWIP expenditures could be credited to the specific capital account that would give rise to a taxable presence in Washington State. Jan. 11 Tr. at 95-99. DOE/RL contends that every dollar of the more than $400 million spent at BWIP by DOE over the years constituted "sunk costs."

DOE/RL introduced several examples of industrial properties in Washington State that were not taxed by different state and local authorities while they were under development, to illustrate its point that the BWIP was at too early a stage in its development during the period of PETT eligibility to warrant its taxation in the manner asserted by Benton County. The first example cited in DOE/RL's Post Hearing Comments involved the proposed Creston electric generating plant in Lincoln County. The utility company spent $11 million on the project before it was abandoned, and Drennan testified that all the costs would be booked into FERC Account 183. *Id*. at 95. DOE/RL asserted that cost method appraisals administered by the Washington State Department of Revenue do not count expenses logged by utilities in that account. DOE/RL Post Hearing Comments at 7. According to DOE/RL, this testimony shows that if the BWIP had been a nuclear power plant under construction, the "soft costs" which the County included in its appraisal as "improvements" would not have given rise to a taxable presence.

The second example concerned a proposed Waste Management Incorporated landfill project in Adams County. According to the deposition testimony of Adams County Assessor Gerald Crossler, the $5 million in expenditures for a preliminary environmental impact statement (EIS) at the project do not add value to the site for assessment purposes. DOE/RL Post Hearing Comments at 8. The third example cited by DOE/RL was an expansion project for the Boeing Company's 747 Assembly Plant at Everett, Washington in Snohomish County. Gary Pickett, a commercial appraisal supervisor for Snohomish County, testified in his deposition that Snohomish County did not tax construction costs for projects like the 747 Assembly Plant until construction is partially complete. *Id.* at 9. According to DOE/RL, the Snohomish County practice is supervised by the Washington State Department of Revenue, which suggests that the approach taken by DOE/RL on the BWIP appraisal is generally in accord with typical Washington State taxation practices. Since, in the Boeing 747 Plant example, not even actual construction was deemed to add value until partially complete, DOE/RL argues that pre-construction EIS and site characterization activities certainly do not add to value. *Id.* at 10. DOE/RL gives the further example of several exploratory oil and gas wells located in Benton County. DOE/RL argues that these properties are not taxed at all in Washington State unless they are actually placed into production, to support its position that Benton County's appraisal of the BWIP would not be permitted for other types of industrial properties under development in Washington State. *Id.* at 10-13.

DOE/RL also argues that the Benton County Assessor changed the treatment of another property after the filing of the present PETT appeal, in order to buttress the County's claim that environmental planning and EIS work for the BWIP add value for purposes of applying the cost approach. This was the Seneca Foods spray field waste disposal project at Prosser, Washington. There, Benton County did not initially increase the appraisal to include the costs of a full EIS, but later reassessed the property to include the value of those site preparation costs. DOE/RL claims this represents a departure from Benton County's historic practice, and contrasts the treatment of the sludge field project of B&B Enterprises, for which the Benton County Assessor added no value for the costs of work done to obtain permits necessary during the development stage. *Id.* at 14-15. DOE/RL argues that since the BWIP was never even close to the stage where an EIS for construction of a repository would be required, it was improper for the County to infer that any of the funds expended by DOE on the BWIP from the beginning of the project up through the enactment of the 1987 Amendments to the NWPA should be recognized as "improvements" for appraisal purposes.

In addition to its arguments about the examples discussed above, DOE/RL challenges Simmonds' fundamental testimony about the tax assessment practices in other Washington counties which he claims use the cost approach to include indirect costs as "improvements to real estate." DOE/RL points out that on cross-examination at the hearing and in his depositions, Simmonds was generally unable to answer questions about a number of specific cases which Benton County used to support its PETT claim. In

addition, Simmonds admitted that he had not done an appraisal of the BWIP itself. *E.g.*, December 1, 1994 Deposition of Joseph Simmonds at 11; Jan. 10 Tr. at 39.

DOE/RL also takes issue with Goodwin's opinions about Benton County's inclusion of the entire value of DOE's BWIP expenditures as "improvements to real property" under the cost approach. According to DOE/RL, the Benton County appraisal "did not employ the cost approach in a competent manner." DOE/RL Post-Hearing Comments at Comment V. In particular, DOE/RL maintains that Benton County did not properly deduct depreciation from the value of the expenditures, and it failed to mention the concepts of reproduction or replacement costs of the BWIP facilities, as required to apply the cost approach. In this vein, DOE/RL's witness Joseph K. Eckert, an economist who is an expert in the mass assessment of urban real estate, conceded that the BWIP appraisal presented an unusual challenge because its situation was unique and unprecedented. Jan. 11 Tr. at 152. Eckert suggested that perhaps Benton County should have performed a study to make a better determination of what the actual replacement or reproduction cost would be to bring the BWIP to the same level of development where it stood at the beginning of the PETT eligibility period. *Id*. at 95-99.

3. Analysis of the Improvements Issue

As shown in the preceding discussion of the parties' detailed arguments regarding the proper appraisal of the BWIP improvements under the cost approach, they have each embraced extreme positions. Benton County has argued for the highest possible appraisal value, and DOE/RL has argued for the lowest possible value. In our view, neither side in this dispute is entirely persuasive, and the correct answer to the BWIP appraisal problem lies in between the two extremes they have staked out. For the reasons explained below, we have concluded that Benton County's solution to the BWIP appraisal problem is correct in its basic theoretical approach, and thus significantly closer to the result which a reasoned and proper application of the law requires.

In its Notice of Interpretation and Procedures for the PETT process, DOE recognized that money spent by the Department before the May 28, 1986 selection date, on preliminary studies of candidate sites that are similar in nature to activities which would qualify as "site characterization" after that date, could have residual value that would be taxable as "improvements" by affected jurisdictions. NOIP, 56 FR at 42317-19. Therefore, DOE has unquestionably acknowledged that improvements add value to a site characterization property. It is difficult to argue, as DOE/RL has done in this case, that the money expended by DOE on the BWIP had no residual value whatsoever at the commencement of the 22-month PETT eligibility period, when at the same time DOE/NV has determined that the money expended by DOE at Yucca Mountain during a similar period had a considerable residual value. Here it is important to note that at the beginning of the PETT eligibility period on May 28, 1986, both the Nye County and Benton County locations were in the same position under the law as potential repository sites under the selection process mandated by the NWPA and the DOE regulations in 10 C.F.R. Part 960. DOE/RL's position is therefore erroneous and cannot stand.

None of the many examples the parties cited to show how county Assessors in Washington State appraised business properties "under development" provides an easy answer to the BWIP appraisal problem. None of them involved exactly the same factual and legal situation as the status of the BWIP during the relevant period under the NWPA's PETT provision. Even though the process is subject to some limited oversight by state government officials (like Simmonds) from the Department of Revenue in Olympia, the Assessors in different Washington counties work independently. This becomes clear after examining some of the examples debated by the parties in their post-hearing briefs. The diversity of results in those examples confirms that the appraisal process varies from county to county and from case to case. Nevertheless, the expert testimony presented by both parties about generally accepted appraisal principles, and their varied application by county Assessors, is useful, because it provides a theoretical foundation for resolving the BWIP appraisal dispute.

To illustrate the principle that it is a common practice to include indirect costs such as pre- development

studies in an appraisal using the cost method, Benton County witness Goodwin cited the example of the FERC accounting regulations for utilities. Jan. 10 Tr. at 160. In response, DOE/RL presented an expert in the FERC accounting regulations, Lorin Drennan. He opined that if the BWIP were a utility, it would have to put the costs that DOE expended for studies into FERC Account 183, which would not be taxable under Washington State assessment practice. Jan. 11 Tr. at 97. The problem with this colloquy of experts is that the BWIP is not a utility, and thus the analogy drawn by Benton County can be readily attacked because it does not fit the present situation exactly. The FERC rules do not control in this situation, nor is there an exact parallel at the state level. Notwithstanding, the fact that the BWIP appraisal presents a unique problem does not mean that the application of the principle underlying the analogy to utilities is wrong. Clearly some portion of the $400 million that DOE spent on the BWIP in the decade before May 28, 1986 represented the type of indirect, pre-development costs that added contemporaneous value to the site, and should properly be included as improvements for purposes of applying the cost approach.

Since the BWIP appraisal involves a unique constellation of factual, legal and temporal circumstances, a flexible approach to the valuation problem, tailored to this specific situation, was required in order for DOE/RL to carry out its statutory obligation under the NWPA. DOE/RL failed to meet this statutory obligation by viewing the BWIP from a 1993 perspective based entirely on hindsight. The testimony of Ferry County Assessor John Sweetman is instructive on this score. *See* December 22, 1994 Deposition of John Sweetman. Sweetman was one of the more credible of the many appraisal experts whose testimony is in the record of this case. His testimony dealt with the principles of real estate appraisal as they are actually applied in Washington State. Unlike Simmonds, who stated those principles in the abstract but avoided any discussion of their application to actual cases, Sweetman was acquainted with a wide variety of examples from several counties in Washington and Oregon, and he candidly discussed the appraisal theory behind these examples. Sweetman was both helpful and believable because he readily admitted that the appraisal process was flexible in its application of the cost approach, that it involved the exercise of professional judgment, and that appraisal disputes often were resolved by negotiation and settlements, rather than continuing before the Board of Tax Appeals. Indeed, we reached this same conclusion after reviewing the many examples submitted by the two parties.

According to Sweetman, there is "no real bright line" that tells an Assessor when something has enough indication of value to be on the tax rolls, but "there comes a certain point when an activity has a calculable or discernable and arguable value." *Id.* at 7. For example, in the appraisal of the Echo Bay mining property in Ferry County, Sweetman stated that he found "evidence of value" after the company had "put in a rather extensive amount of pre-development work, exploration drilling and geophysics." *Id.* at 19-20. Even though it was not yet certain whether the mine would eventually be economic, Sweetman determined that the taxable value of the activity "bore at least some relationship to cost." *Id.* at 20. Sweetman stated that a property can have taxable value before the requisite permits are issued. *Id.* at 21. At the pre-permit stage, Sweetman indicated that all exploration costs that had enhanced the value of the project would be taken into account, and that for a beginning year (in the life cycle of a project), you can look at almost all the costs as being effective in adding value. *Id.* at 29, 35. However, the costs would be reexamined over time, and certain costs when viewed backward in time may eventually be considered to have not created much value. When that occurred, those costs could be considered "sunk." *Id.*

The foregoing discussion illuminates the critical difference between DOE/RL's 1993 appraisal, and Benton County's appraisal of the BWIP as it existed at the beginning of the PETT period, when almost all costs expended by DOE to get the BWIP to that stage could be viewed as effective and creating value. Once the BWIP was eliminated as a potential repository candidate site, the costs expended by DOE could be viewed as "sunk," i.e. having lost all value that they may have created while site characterization was proceeding. However, based on our finding that the process of paying PETT grants to affected jurisdictions was intended to be ongoing, roughly contemporaneous with the tax year concerned, and done on an annual basis, we can only conclude that DOE/RL erred in looking backward in time at the value of the BWIP expenditures.

During the PETT period, the highest and best use of the BWIP was "industrial use" for site

characterization as a potential high level nuclear waste repository under the NWPA, no different from Yucca Mountain's highest and best use at that time. For what it was, BWIP had all the permissions needed to go ahead with site characterization at that stage in the NWPA process. To use Sweetman's phrase, we agree that the BWIP was in "elephant country," in a place chosen (as noted in the preamble to 10 C.F.R. Part 960) because it was on a large federal reservation where the government had been storing nuclear waste since the 1940s. The value of preliminary site assessment work done before BWIP was approved by the President under the NWPA included many of the kinds of costs that an appraiser trying to replicate the BWIP under the cost approach should take into account. However, we do not know their precise value because the physical site on the Hanford Reservation has been restored, the personal property transferred to other DOE projects, and some of the records were lost. We do have the pre-May 28, 1986 site evaluation studies done on the BWIP as evidence that the costs incurred before the PETT eligibility period had a substantial residual value when the BWIP was approved by the President for characterization as a potential repository site. At this point in history, nearly nine years after the BWIP was terminated, it is senseless to suggest that Benton County could do a new study to determine what costs a hypothetical owner would have to expend to get the BWIP to the point where it could pass muster for selection as a candidate for site characterization as a potential repository. Fortunately, that course of action is not necessary to discharge DOE's PETT obligation under the NWPA.

Since we find that the DOE expenditures on the BWIP before May 28, 1986 had a substantial residual value at the beginning of the PETT eligibility period, we must next determine what portion of the value of those expenditures should be properly considered as "improvements to real estate" for appraisal under the cost approach. It is clear that Benton County's original position is overstated to a significant extent. The County initially argued that the value of all DOE funds spent on BWIP, minus the sum of those funds either conferred as "grants" or spent on "capital improvements," was "improvements to real estate." Under the cost approach to the overall BWIP appraisal, this amount was added to the appraised valuation of the bare land used to determine the equivalent amount of real property taxes.

4. Application of the Nye County Approach to Benton County

After the January 1995 evidentiary hearing, Benton County obtained DOE records pertaining to the settlement agreement between DOE/NV and Nye County, through the Freedom of Information Act. This agreement resolved Nye County's PETT claim based on site characterization activities that had taken place and would be taking place at Yucca Mountain. Benton County asks that OHA accept these documents as newly discovered evidence, and we have determined that they should be made part of the record. In its Post-Hearing Brief filed in July 1995, Benton County has indicated that it may be willing to moderate its position, following the example of the Yucca Mountain settlement between DOE/NV and Nye County, and agree that there should be some downward adjustment of the amount DOE expended on the BWIP. Benton County Post-Hearing Brief at 40, Exhibits 1-3. Specifically, in calculating the PETT liability to Nye County for the Yucca Mountain Project, DOE/NV used total costs incurred for FY 1983 through FY 1986, less certain cost categories, to generate a base value for the year 1987. DOE/NV then applied the applicable Nevada assessment and tax rates to that base value in order to determine the property tax due for 1987. *Id.* For 1988, DOE/NV adjusted the 1987 base value upward by 3.5 percent and then computed the taxes due. DOE/NV used cost as the indicator of value in determining the PETT liability to Nye County for site characterization activities at Yucca Mountain, just as Benton County did in the PETT estimate it submitted to DOE/RL. Although it is not clear which specific cost categories DOE/NV eliminated to compute the base value at the start of the PETT period, the process is consistent with the cost approach principles, discussed by several witnesses in this case, that some downward adjustments are necessary to account for depreciation and to reflect the proper reproduction or replacement costs of the BWIP as it existed on May 28, 1986. Jan. 11 Tr. at 133-37, 163-64, 188-93. We will adopt the same approach here.

Benton County has submitted a summary chart as Exhibit 3 to its post-hearing brief which, it claims, calculates the County's PETT amount (prior to interest and interest penalties and for 1987-1988 only) using the same methodology employed by DOE/NV for Yucca Mountain. The methodology used to

generate the numbers on this chart is not fully explained in Benton County's post-hearing brief. However, it appears that Benton County took the ratio of the total amount of costs incurred at Yucca Mountain in FY 1983 through FY 1986 (which was apparently based on the number submitted to DOE/NV in the Foreman appraisal) to the Yucca Mountain base value amount for the 1987 tax year, and applied that ratio to the total amount of costs incurred at the BWIP during some comparable period (presumably fiscal years 1983 through 1986) to get a BWIP base value figure for 1987 of $164,350,000 for " land & improvements." Benton County Post-Hearing Brief at 40; Exhibits 1-3. This is approximately 40 percent of Benton County's initial estimate (for the value of the BWIP real property in the 1987 tax year) submitted to DOE/RL on May 28, 1993.

The Nye County settlement documents make it clear that DOE/NV gave Nye County a healthy credit for costs incurred before May 28, 1986 for preliminary work in the nature of site characterization at Yucca Mountain. If the same methodology were applied to Benton County's PETT claim, a similar result would occur. In the language of the appraisal profession, what DOE/NV did in the Nye County PETT settlement could be described in the following way: DOE/NV applied the cost approach to the Yucca Mountain appraisal, and concluded that the amount expended for preliminary site characterization costs incurred prior to the beginning of the PETT period on May 28, 1986 had added value to the project, which should be appraised as "improvements to real estate" for purposes of generating a starting value for "land and improvements." In the language of the NOIP, which set out the ground rules for the PETT process, DOE/NV determined that a portion of the funds expended for preliminary work in the nature of site characterization had "residual value" that was reflected in improvements at the beginning of the PETT eligibility period. In view of our determination above that the PETT process was intended to be ongoing and contemporaneous, and that the value of "improvements to real estate" under the cost approach must be viewed at the beginning of the PETT eligibility period, we have concluded that Benton County should be treated the same in this respect as Nye County, and the same methodology must be used to calculate the amount of Benton County's PETT grant.

V. Conclusion

For the reasons explained in the preceding portion of this decision, after having reviewed the entire record in this proceeding, we have reached the following determinations on the major issues involved in this appeal:

(1) DOE/RL was correct in beginning with May 28, 1986 in calculating the amount of Benton County's PETT grant.

(2) DOE/RL was correct in excluding statutory interest penalties calculated under Washington State law from the amount of Benton County's PETT grant.

(3) DOE/RL was correct in excluding personal property taxes for 1986 from the amount of Benton County's PETT grant.

(4) DOE/RL erred in basing its PETT determination on an appraisal of the BWIP through hindsight as it existed in 1993, rather than on a retrospective appraisal of the BWIP as it existed during the period of PETT eligibility (May 28, 1986 through March 21, 1988).

(5) DOE/RL erred in determining that the highest and best use of the BWIP was other than "industrial use" for site characterization as a potential high level nuclear waste repository.

(6) DOE/RL erred in failing to measure properly the residual value of improvements to the BWIP under the cost approach to real estate appraisal as of the beginning of the period of PETT eligibility.

(7) DOE/RL erred in failing to treat the determination of Benton County's PETT amount for the BWIP site characterization in the same general manner as DOE's Nevada Operations Office treated the determination

of Nye County's PETT amount for the Yucca Mountain site characterization.

Accordingly, the Benton County appeal will be denied in part, and granted in part. We have determined that the matter should be remanded to DOE/RL for the recalculation of Benton County's PETT grant amount in a manner consistent with the principles set forth above in this decision. In practice, this remand will require DOE/RL and Benton County to work together to carry out the mandate of this decision. Having resolved the areas of dispute which led to the present appeal, we believe we have established a set of ground rules which the parties, acting in good faith, can use to conclude this matter quickly by fixing a reasonable amount for Benton County's PETT grant, using the same cost methodology for improvements to real estate as in the settlement between DOE/NV and Nye County. In effect, we have placed the parties back where they would have been had this dispute not occurred.

The remand is necessary because we do not know precisely how Benton County derived the numbers presented in Exhibit 3 to its Post-Hearing Brief, and we do not have sufficient information in the record to enable us to order DOE/RL to pay Benton County a sum certain. In order to implement our findings on the merits, we will direct the parties to confer in good faith and agree upon the proper baseline numbers to use for the Nye County settlement methodology. That will enable them to produce a figure for the value of the BWIP land and improvements at the commencement of the PETT eligibility period on May 28, 1986. All the interest figures must be recalculated and brought up to date. In calculating the amount of interest, the parties should give proper consideration to the payment of $770,709 that Benton County received in July 1992. Since we want to expedite the final resolution of this appeal, we will set a 90 day time limit for DOE/RL and Benton County to recalculate the proper amount of Benton County's PETT grant. Interest on the amount of the late payments should be calculated through March 31, 1997.

It is imperative that the parties work together on the final resolution of this case in a spirit of cooperation. When they confer, they should bear in mind that the appraisal of real estate is an art, not a science. When there is a conflict over the assessment of a property, the owner may submit his own appraisal, and the difference is often settled through negotiation or by some form of alternative dispute resolution. As the Ferry County Assessor noted in his testimony about Washington State practice, only in the rarest cases does a dispute culminate in litigation. When there have been disputes between DOE's predecessors and local governmental entities in atomic communities about the amount of their PILT payments, these disputes have also been resolved through negotiation. The Alternative Dispute Resolution Act, Pub. L. No. 101-552, encourages the use of alternative means of resolving disputes involving government agencies.

We will require DOE/RL and Benton County to submit a joint report on their progress by March 31, 1997. This report must set forth the full status of the negotiations between the parties and explain all numbers they have agreed upon to implement the mandate of this Decision and Order. If for some reason the parties are unable to reach a final resolution on the amount of the Benton County PETT grant by the date of the required report, the OHA will proceed to issue a supplemental order fixing the amount of the PETT grant. Our determination of the amount of the PETT grant will be based on the entire record, including the information submitted in the March 31, 1997 report.

IT IS THEREFORE ORDERED THAT:

(1) The appeal filed by Benton County, Washington, of the September 24, 1993 initial DOE determination by the Department of Energy Richland Operations Office (DOE/RL), of the amount of Benton County's payments-equal-to-taxes (PETT) grant under section 116(c)(3)(A) of the Nuclear Waste Policy Act of 1982, OHA Case Number LPA-0001, is hereby denied in part, and granted in part, as set forth in paragraphs (2) and (3) below.

(2) The following portions of DOE/RL's September 24, 1993 initial DOE determination are hereby affirmed:

(a) that DOE/RL should not calculate the amount of Benton County's PETT grant beginning with the 1983

tax year,

(b) that DOE/RL should not include statutory interest penalties calculated under Washington State law in the amount of Benton County's PETT grant; and

(c) that DOE/RL should not include personal property taxes for 1986 in the amount of Benton County's PETT grant.

(3) The following portions of DOE/RL's September 24, 1993 initial DOE determination are hereby reversed and set aside:

(a) DOE/RL's determination of the amount of Benton County's PETT grant based on an appraisal of the Basalt Waste Isolation Project (BWIP) through hindsight as it existed in 1993, rather than on a retrospective appraisal of the BWIP as it existed during the period of PETT eligibility (May 28, 1986 through March 21, 1988);

(b) DOE/RL's determination that the highest and best use of the BWIP was other than "industrial use" for site characterization as a potential high level nuclear waste repository;

(c) DOE/RL's failure to measure the "residual value" of improvements to real estate on the BWIP under the cost approach to real estate appraisal as of the beginning of the period of PETT eligibility, rather than on the basis of hindsight several years after the BWIP was terminated; and

(d) DOE/RL's failure to treat the determination of Benton County's PETT amount for the BWIP site characterization in the same manner as DOE's Nevada Operations Office treated the determination of Nye County's PETT amount for the Yucca Mountain site characterization.

(4) This matter is hereby remanded to DOE/RL, which shall confer with Benton County, and, within 90 days of the date of this Decision and Order, implement the findings and conclusions set forth herein by issuing a revised determination on the amount of Benton County's PETT grant under the NWPA. The amount of interest on the Benton County PETT grant shall be calculated through March 31, 1997.

(5) No later than March 31, 1997, the parties shall submit a joint report to the Office of Hearings and Appeals, explaining their progress toward a final resolution on the amount of Benton County's PETT grant. If for some reason the parties are unable to reach a final resolution on the amount of the Benton County PETT grant before submitting their March 31, 1997 report, the Office of Hearings and Appeals will issue a supplemental order fixing the amount of the PETT grant.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 19, 1996

(1) In 60 FR 15015 (March 21, 1995), the PETT appeal provision in the NOIP was modified to refer to the newly revised OHA appellate procedures in 10 C.F.R. Part 1003, Subpart C, which replaced 10 C.F.R. Part 205, Subpart H.

(2) "Capital improvements," as that term was used in DOE's BWIP accounting system, are different from "improvements to real estate," as the latter term is used in this case with reference to the cost approach to real estate appraisal.

January 31, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Chevron USA Inc.

Date of Filing: June 15, 2003

Case Number: TEA-0001

Chevron USA Inc. (ChevronTexaco) appeals a determination by the Principal Deputy Assistant Secretary for Fossil Energy (PDASFE) of the Department of Energy (DOE). *See Decision Finalizing Participating Percentages in Production from the Stevens Zone, Naval Petroleum Reserve No. 1* (June 2002). The matter in controversy has been fully briefed. Oral argument was held in Washington, DC on October 13, 2004. As explained below, we have determined that the appeal should be granted in part.

I. BACKGROUND

This case concerns the Elk Hills oil field, also referred to as Naval Petroleum Reserve No. 1. A detailed history of the Reserve is set forth in United States v. Standard Oil of Cal., 545 F.2d 624 (9th Cir. 1976). For the purposes of this decision, a brief history will suffice.

Congress established the Reserve in 1912 to conserve oil for the national defense. The Reserve was comprised of parcels of land – some owned by the federal government and others owned by Standard Oil of California (Standard), now ChevronTexaco. Initially, the Navy had jurisdiction over the federal government's interest in the Reserve. In 1977, Congress transferred that jurisdiction to the newly established DOE.

In the early 1940s the federal government considered acquiring Standard's parcels through the right of eminent domain. As an alternative, the parties agreed, on November 20, 1942, to a unit plan contract that would govern the management of the Reserve. The Attorney General expressed concerns about the legality of the agreement, and the parties terminated the agreement and sought approval for a unit plan contract from Congress. Congress held

hearings and, in 1944, authorized a plan. *See* 10 U.S.C. § 7426. The parties executed a unit plan contract several days later (the UPC).

The UPC provided for ultimate Navy control over decisions related to the Unit. The UPC provided that each party's percentage participation in each commercially productive zone was equal to the acre-feet of hydrocarbons in that zone underlying its lands on November 20, 1942 divided by the acre-feet of hydrocarbons in that zone underlying the Unit on that date. The UPC established an "initial" percentage participation for each party for each zone. The UPC further provided for subsequent redeterminations of those percentages, which would be retroactive to November 20, 1942.

In 1995, Congress enacted legislation that required the DOE to sell the federal government's interest in the Reserve. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106 (NDA Act), §§ 3412-3416, 10 U.S.C. § 7420 note. The NDA Act required that the DOE and ChevronTexaco finalize their percentage participations. The NDA Act instructed the DOE to seek the recommendation of an independent engineer, which the DOE could accept or "use such other method to establish final equity interest in the reserve as the Secretary considers appropriate." 10 U.S.C. § 7420 note.

In anticipation of the sale, the DOE and ChevronTexaco established a process for the issuance and review of final equity determinations. *See* May 1997 Agreement Regarding Equity Redetermination Process (1997 Agreement). The parties agreed that the DOE's Assistant Secretary for Fossil Energy (ASFE) would issue a final equity determination for each zone in the Unit, and ChevronTexaco could appeal that determination to the OHA, which would render a final decision.

This case concerns the Stevens Zone, the largest producing zone in the Unit. The dispute concerns the factor used to convert the volumes of gas underlying the Unit to barrel-of-oil equivalents (BOEs) in order to determine each owner's percentage participation.

If the oil and gas were evenly distributed under the Unit, the parties would not need to convert gas to BOEs: a party's percentage participation for oil would be the same as its percentage participation for gas and that percentage could be used to divide Unit revenues. But the oil and gas were not evenly distributed: the DOE had a greater share of gas than of oil, and ChevronTexaco had the reverse. As a result, a single percentage

participation based on BOEs was needed. The use of BOEs required employing a factor to convert volumes of gas underlying the Unit to BOEs. A gas conversion factor that assigns little relative value to gas (fewer BOEs) is favorable to ChevronTexaco, and a conversion factor that assigns high relative value to gas (more BOEs) is favorable to the federal government.

In his provisional recommendation, the independent petroleum engineer (IPE) used relative thermal value to convert volumes of gas to BOEs. The IPE stated that he would have used relative current prices, but he believed that an agreement between the parties barred the use of relative price.

ChevronTexaco objected to the provisional recommendation, and the issue was referred to an independent legal adviser (ILA). The ILA opined that relative current prices should be used, and he sought the parties' agreement on what constituted current prices. The parties agreed to an average of prices over a twenty month period from June 1, 1996 to January 31, 1998 (1996-1998 prices). ChevronTexaco Brief, Ex. 30. Accordingly, the engineer's final recommendation used a conversion factor based on 1996-1998 prices of gas and oil. *See* NSAI [Netherland, Sewell & Associates, Inc., the IPE] Recommendation of Final Equity Participations for the Stevens Zone, Appendix A, Equity Calculations (March 2000). Both parties then filed comments with the ASFE.

In November 2001, the ASFE issued a preliminary decision. *See ASFE Preliminary Decision Finalizing Participation Percentages in Production from the Stevens Zone, Naval Petroleum Reserve No. 1,* A.R. No. 50 (the Preliminary Decision). The ASFE adopted a conversion factor which was the average of two conversion factors: one based on 1996-1998 prices and one based on thermal value. The ASFE found that the UPC did not require a particular conversion factor. Accordingly, the ASFE found that he had the discretion to choose a method so long as it was "fair and equitable to both parties" and "consistent with the UPC and sound oil field engineering principles." The ASFE determined that 1996-1998 prices and thermal values met that standard. He stated that current prices and thermal value were both used in financial reports to value reserves, that 1996-1998 prices were relatively close to the time of production, and that thermal values represent the inherent value of the substances and do not change over time. The parties filed comments, and, in June 2002, the PDASFE[1] issued a final

[1]The individual who issued the preliminary decision as the Acting ASFE issued the final decision as the PDASFE.

determination. *See Decision Finalizing Participating Percentages in Production from the Stevens Zone, Naval Petroleum Reserve No. 1* (June 18, 2002) (the Determination). The PDASFE adopted the conversion factor methodology set forth in the Preliminary Decision.

In June 2003, ChevronTexaco appealed the Determination. In its appeal, ChevronTexaco challenges the PDASFE's interpretation of the UPC. ChevronTexaco maintains that the plain language of the UPC requires that the conversion factor reflect the relative price of gas and oil as of November 20, 1942 and that the parties have contemporaneously construed the UPC in that way. In the alternative, ChevronTexaco argues that the UPC does not permit conversion but instead requires the calculation of separate percentage participations for gas and oil.

As indicated below, neither party's methodology complies with the UPC.

II. ANALYSIS

A. The UPC Requires That Percentage Participations Result in Each Party's Eventual Receipt of the Volumes of Recoverable Hydrocarbons Underlying its Lands in 1942

The UPC requires that percentage participations be based on the volume of the hydrocarbons underlying the parties' lands in 1942. Under Section 2(b) of the UPC, each party's percentage participation in a zone is based on the "acre-feet" of hydrocarbons in that zone underlying its lands relative to the "acre-feet" of such hydrocarbons underlying the Unit as a whole. Section 2(b) provides:

> **Navy and Standard shall, subject to the further provisions of this contract, share in the oil, gas, natural gasoline and associated hydrocarbons produced from each commercially productive zone underlying the Reserve upon the basis of the percentages representing the ratio between (1) the estimated acre-feet . . . of oil and/or gas bearing formations within the Estimated Limiting Line of Commercial Productivity for each such commercially productive zone as of November 20, 1942 and (2) the total of such estimated acre-feet within the Estimated Limiting Line of Commercial Productivity for such zone as of November 20, 1942. . . .**

UPC § 2(b) (emphasis added). Consistent with Section 2(b), Recital 6(d)(iv) refers to each party's receipt of the "quantities" of hydrocarbons underlying its lands:

> **Recital 6. The following considerations have led Navy and Standard to conclude that the most desirable and effective means of protecting the Reserve and of assuring the maximum ultimate recovery of oil, gas, natural gasoline and associated hydrocarbons from the Reserve is to develop and operate all lands in the Reserve as a unit:**
>
> > **(d) The unit plan of development and operation as set out herein will:**
> >
> > > **(iv) Result in the eventual receipt by Navy and Standard, respectively, from the various commercially productive zones underlying the Reserve of the quantities of recoverable oil, gas, natural gasoline and associated hydrocarbons underlying their respective lands as of November 20, 1942.**

UPC Recital 6(d)(iv) (emphasis added). Accordingly, it is clear that the UPC intended that percentage participations be based on the quantities of recoverable hydrocarbons, rather than their economic or thermal value.

Moreover, the UPC requires that the methodology for calculating the percentage participations insure that, if the Unit were produced until the recoverable reserves were exhausted, each party would receive production in proportion to the volume of recoverable hydrocarbons underlying its lands as of 1942. The UPC does not contain a termination date and, therefore, could have continued until the production of all the recoverable reserves. Recital 6(d)(iv) states that the UPC "will [r]esult in the eventual receipt" by the parties of the "quantities" of recoverable hydrocarbons underlying their respective lands in 1942. Accordingly, percentage participations must be calculated in a way that achieves that result.

B. To Insure Each Party's Eventual Receipt of its 1942 Quantities of Recoverable Hydrocarbons, the Percentage Participations Must be Based on a Conversion Factor that Reflects the Prices Received for the Hydrocarbons

Since the purpose of the percentage participation was to insure each party's eventual receipt of its 1942 quantities of recoverable hydrocarbons, the conversion factor must likewise accomplish that purpose. To do that, the conversion factor must be based on the prices received for the Unit's production. If revenues from oil sold at price "P_o" and gas at price "P_g" are allocated based on a conversion factor other than "P_o:P_g," the revenues will not be allocated consistent with the percentage ownership of quantities of recoverable hydrocarbons that produced them. This is simple mathematics.

Consider a unitized property with reserves of 3 units of X and 3 units of Y. Owner 1 owns X; Owner 2 owns Y. In each of three successive years, a unit of X and a unit of Y are produced. The sale price of X is $1. The sale price of Y is $.07 in the first year, $.12 in the second, and $.20 in the third, for a weighted average price of $.13 per unit. Thus, total revenues are $3.39. If units of Y are converted into units of "X equivalents" based on the relationship of the X and Y sale price at the time of sale (or of the weighted average price over the time of production), then Y=.13X. Use of a conversion factor that is not based on the weighted average price of production will yield revenues for an owner that are more than, or less than, the revenues received for that owner's portion of the reserves. For example, if the conversion factor is based only on relative first year prices, then Y=.07X, and Owner 1 receives more than the $3 he is entitled to receive. If the conversion factor is based only on relative third year prices, then Y=.2X, and Owner 1 receives less than the $3 he is entitled to receive.

A more specific example involves a unitized property with 10 barrels of recoverable oil reserves and 10 thousand cubic feet (mcf) of recoverable gas reserves. Owner 1 owns 70 percent of the oil and 80 percent of the gas, and Owner 2 owns 30 percent of the oil and 20 percent of the gas. Assume that the unit produces and sells all of the recoverable reserves – 10 barrels of oil at $1 per barrel, and 10 mcf of gas at $.10 per mcf, producing $11 in actual revenues. Owner 1 would be entitled to $7.80 ($7 for 7 barrels of oil and $.80 for 8 mcf of gas) and Owner 2 would be entitled to $3.20 ($3 for 3 barrels of oil and $.20 for 2 mcf of gas). The

conversion of gas into oil based on the ratio of their respective sale prices yields the same result. Using the 10 to 1 conversion factor ($1 per barrel ÷ $.10 per mcf), the unit's reserves, at unit inception, are 11 BOEs. Owner 1 owns 7.8 BOEs (7 BOEs attributable to oil and .8 BOEs attributable to gas), his percentage participation is 70.9 percent (7.8/11), and upon sale he receives $7.80. Owner 2 owns 3.2 BOEs (3 BOEs attributable to oil and .2 BOEs attributable to gas), his percentage participation is 29.1 percent (3.2/11), and he receives $3.20. On the other hand, if gas is converted into oil based on a ratio of 15 to 1, Owner 1's share drops and Owner 2's rises;[2] if gas is converted into oil based on a ratio of 5 to 1, Owner 1's share rises and Owner 2's share decreases.[3] Although these percentages are small, they are significant when they are applied to a property with large revenues.

Based on the foregoing, it is clear that using sale prices limited to a specific date, *e.g.*, November 20, 1942, or a specific time period, *e.g.*, 1996-1998, will not result in each party's eventual receipt of its 1942 volumes of recoverable reserves and, therefore, not the percentage participations provided for in the UPC. Using 1942 prices, when gas had little value, as a benchmark to allocate oil and gas revenues during periods of significant gas production later at much higher prices, deprives the federal government of revenues attributable to its gas reserves. Conversely, using 1996-1998 prices, if gas had a high value relative to oil, deprives ChevronTexaco of revenues attributable to its oil reserves during periods when gas had a lower relative price.

We recognize that the foregoing approach requires adjustment of the conversion factor over the life of the Unit. As explained above, however, it is the only approach that will produce a percentage participation that, over the course of production of the

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[2]If gas reserves are converted to oil using a 15 to 1 ratio, the unit's reserves are 10.67 BOEs: Owner 1 owns 7.54 BOEs (7 BOEs attributable to oil and .54 BOEs attributable to gas), his share is 70.7 percent (7.54/10.67); and he receives $7.78; Owner 2 owns 3.13 BOEs (3 BOEs attributable to oil and .13 BOEs attributable to gas), his share is 29.3 percent (3.13/10.67), and he receives $3.22.

[3]If gas reserves are converted to oil using a 5 to 1 ratio, the unit's reserves are 12 BOEs. Owner 1 owns 8.6 BOEs (7 BOEs attributable to oil and 1.6 BOEs attributable to gas), his share is 71.7 percent (8.6/12); and he receives $7.89; Owner 2 owns 3.4 BOEs (3 BOEs attributable to oil and .4 BOEs attributable to gas), his share is 28.3 percent (3.4/12), and he receives $3.11.

recoverable reserves "will [r]esult in the eventual receipt by [the parties] ... of the quantities" of recoverable hydrocarbons "underlying their respective lands as of November 20, 1942." As explained below, the parties' arguments ignore the foregoing and are inconsistent with the UPC.

C. The Parties' Arguments

1. ChevronTexaco's Arguments

ChevronTexaco's principal argument is that the references in the UPC to "November 20, 1942" require that the gas conversion factor be based on November 20, 1942 prices, i.e., 1942 economic value. As explained above, the UPC requires that percentage participations be based on the parties' respective "acre-feet" or "quantities" of recoverable hydrocarbons. UPC § 2(b); UPC Recital 6(d)(iv). Accordingly, ChevronTexaco's argument that the UPC requires conversion based on 1942 economic value directly conflicts with the UPC.

ChevronTexaco also argues that the UPC requires that the gas conversion factor be based on relative 1942 prices because any other interpretation would conflict with Section 2(f) of the UPC, which concerns redeterminations. ChevronTexaco argues that Section 2(f) does not permit redeterminations for post-November 20, 1942 economic events and, therefore, supports its argument that the UPC requires conversion based on 1942 prices.

Contrary to ChevronTexaco's argument, Section 2(f) does not prohibit redeterminations based on post-November 20, 1942 economic events. Section 2(f) provides:

> The initial or any subsequently established percentage participations in the production from any commercially productive zone underlying lands in the Reserve shall be subject to revision from time to time in the manner hereinafter set forth. Whenever Navy or Standard is of the opinion that consideration should be given to revision of such percentages, it shall notify the other thereof in writing. The Engineering Committee shall promptly examine and review all available data, and if the Committee finds that any one or more of the following exist:
>
> > (1) The presence, as of November 20, 1942, of commercially productive oil and/or gas bearing formations

> extending beyond the Estimated Limiting Line of Commercial Productivity for any zone;
>
> (2) The absence or exhaustion, as of November 20, 1942, of commercially productive oil and/or gas bearing formations within the Estimated Limiting Line of Commercial Productivity for any zone;
>
> (3) A variation, as of November 20, 1942, from the acre-feet of commercially productive oil and/or gas bearing formations previously estimated to be contained within the Estimated Limiting Line of Commercial Productivity for any zone;
>
> (4) A variation, as of November 20, 1942, from the acre-feet of commercially productive oil and/or gas bearing formations previously estimated to underlie the respective lands of Navy and Standard; or
>
> (5) Any condition, fact or circumstance which will aid in a more accurate determination of the percentages as of November 20, 1942;
>
> said Committee shall thereupon determine, in accordance with the formula described in paragraph (b) of this Section 2, the revision, if any shall be made.

UPC § 2(f). The references in Subsections 1 through 4 to "commercially" productive zones necessarily take into account current production costs and sales prices. Subsection 5, which refers to "any condition, fact, or circumstance which will aid in a more accurate determination of the percentages as of November 20, 1942" is not limited to November 20, 1942 data and thus would permit redetermination to insure that each party receives revenues consistent with its 1942 quantities of recoverable hydrocarbons. Finally, any interpretation of Section 2(f) to the contrary is disfavored because it would be inconsistent with the clear requirement in Section 2(b) and Recital 6(d)(iv) that percentage participations be based on, and result in the parties' receipt of, the quantities of recoverable hydrocarbons underlying their respective lands as of 1942.

ChevronTexaco further argues that the parties' contemporaneous construction of the UPC supports its position. As an initial matter, we disagree with ChevronTexaco's argument that the parties have consistently construed the UPC to require conversion based on 1942 prices. The parties have considered other conversion

methods.[4] More importantly, however, what the parties have done in the past on this issue is not relevant since, as discussed above, the UPC requires a conversion method that results in the parties' eventual receipt of the quantities of recoverable hydrocarbons underlying their respective lands as of 1942, and the use of 1942 prices does not achieve that result.

Finally, ChevronTexaco argues that if the UPC does not require conversion based on 1942 prices, then the UPC does not permit conversion at all and the PDASFE should make separate equity determinations for oil and gas. We disagree. As an initial matter, we note that the use of separate percentages requires that unit costs be allocated to oil and to gas. The nature of oil field exploration, development and production makes this allocation difficult. In addition, the use of separate percentages affects the development of the field, as each party seeks to maximize its interests. The UPC does not provide for separate participating percentages for oil and gas. Instead, Section 2(d) of the UPC establishes single percentage participations for each zone, and the parties used single percentage participations over the life of the Unit. Accordingly, the establishment of separate oil and gas percentages would be inconsistent with the UPC and the parties' practice.

2. The PDASFE's Arguments

The PDASFE argues that a gas conversion factor is acceptable if it is consistent with the UPC and sound oil engineering principles. The PDASFE argues that the UPC is silent on the conversion factor and Section 2(b)'s reference to the use of "weighting factors in accordance with sound oil engineering principles" applies to the conversion factor. The PDASFE argues that a conversion factor based on relative 1996-1998 prices is consistent with sound oil engineering principles because financial reports use relative current prices to compute the conversion factor.

The PDASFE ignores the UPC's requirement that each party receive its 1942 quantities of recoverable hydrocarbons. The PDASFE's

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4 In the third Stevens Zone redetermination, the Engineering Committee discussed using 1942 prices, 1980 prices, or thermal value, but rejected 1980 prices as "rapidly changing" and thermal value as having "no industry precedent … at this time." Chevron Brief, Exs. 13, 14. The Carneros Zone final determination used a conversion factor for the Carneros Zone based on thermal value. Although ChevronTexaco argues that the conversion factor was rendered moot by the determination that it had no interest in the zone, the fact remains that the thermal method was used.

reference to financial reports is inapposite. Financial reports attempt to state the current value of reserves and, therefore, use current prices. The proper allocation of revenues over the life of the Unit pursuant to the provisions of the UPC is a different issue. As explained above, as a matter of simple mathematics, the use of a conversion factor that is divorced from the oil and gas selling prices producing the revenue being allocated does not allocate revenues consistent with the quantities of recoverable hydrocarbons underlying the parties' respective lands in 1942.

The PDASFE also argues that the use of 1996-1998 prices is reasonable because the 1996-1998 period is closer to the period of production than 1942 prices. The PDASFE is correct that use of 1942 prices to allocate revenues fails to reflect the subsequent increased relative price, and increased sales, of gas. However, the PDASFE does not go far enough. The use of relative prices frozen at ANY time does not produce a percentage participation that allocates revenue consistent with the ownership of the hydrocarbons producing that revenue. In any event, the PDASFE's argument implicitly recognizes that the use of prices contemporaneous with production yields the proper allocation of revenues and, therefore, the proper percentage participations.

Finally, the PDASFE argues that the use of relative thermal value is an appropriate conversion factor because it is used in financial reporting and does not change over time. We cannot accept this argument. The inherent heating value of oil and gas has no fixed relationship over time to the prices received for production and, hence, will not allocate production consistent with the quantities of recoverable hydrocarbons underlying the parties' respective lands in 1942.

D. The Calculation of the Conversion Factor

As indicated above, the UPC requires that the gas conversion factor be based on the prices of gas and oil over the life of the Unit. Accordingly, we are remanding the Determination to the PDASFE with instructions to (i) recalculate the conversion factor, (ii) provide supporting data and calculations to ChevronTexaco, (iii) consider ChevronTexaco objections to the recalculation, and (iv) issue a final equity determination that incorporates the new conversion factor. As part of the remand, the PDASFE should prepare a schedule with the following information:

(a) the Unit's revenues in each month,

(b) the Unit's revenues in each month as a percentage of total revenues,
(c) the per barrel price of oil in each month,
(d) the per thousand cubic feet price of gas in each month,
(e) the ratio of the price of gas to oil in each month,
(f) the result of multiplying (b) times (e), and
(g) the sum of the entries in column (f)

Item (g) is a conversion factor based on the weight-averaged monthly relative price of gas and oil. If the PDASFE determines that for technical reasons Item (g) is not the most accurate weight-averaged conversion factor, the PDASFE should explain why. In any event, ChevronTexaco may appeal to this Office any determination reached by the PDASFE.

III. SUMMARY AND CONCLUSION

The UPC requires single percentage participations for each party for each zone, which allocate revenues in a manner that results in the parties' eventual receipt of their respective 1942 quantities of recoverable hydrocarbons. Mathematically, this requires a conversion factor based on actual selling prices received over the life of the Unit's production of oil and gas. For that reason, we reject ChevronTexaco's argument that the UPC requires conversion of gas reserves to BOEs based only on November 20, 1942 prices, as well as its alternate argument that the UPC does not permit conversion. For the same reason, we reject the PDASFE's use of 1996-1998 prices and thermal values as inconsistent with the UPC. Accordingly, we are remanding the matter to the PDASFE for a recalculation of the gas conversion factor based on the price of gas and oil over the life of the Unit.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Chevron USA Inc. on June 15, 2003 be and hereby is granted as set forth below.

(2) The *Decision Finalizing Participating Percentages in Production from the Stevens Zone, Naval Petroleum Reserve No. 1* (June 2002) (the Determination) did not convert gas reserves to barrel-of-oil equivalents (BOEs) consistent with the Unit Plan Contract.

(3) The Determination is reversed and remanded to the Principal Deputy Assistant Secretary for Fossil Energy for further

consideration and issuance of a new determination consistent with the provisions of Paragraphs (4) and (5) below.

(4) The methodology used to convert gas reserves to BOEs shall be consistent with the Unit Plan Contract's provision that each party share in the volume of hydrocarbons produced over the life of the Unit based on its share of the volume of the recoverable hydrocarbons underlying their lands as of November 20, 1942.

(5) Gas reserves shall be converted to BOEs based on a weighted average of the ratios of the prices of gas and oil over the life of the Unit.

(6) The new determination issued pursuant to Paragraph (3) of this Decision and Order is appealable to this Office.

(7) This Order is not subject to judicial review.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 31, 2005

October 16, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Daniel Innamorato
Date of Filing:	August 12, 2003
Case Number:	TEA-0003

On August 12, 2003, Daniel Innamorato filed an appeal from a tentative cost comparison decision by the DOE's Office of Headquarters Procurement Services ("contracting officer") under the provisions of Office of Management and Budget Circular No. A-76 ("A-76" or "the circular"). For the reasons set forth below, we will deny the appeal.

I. *Background*

A-76 mandates that federal agencies compare the costs of performing certain "Government operated commercial" activities by the federal government against the costs of contracting out those activities to the "commercial sector." Implementation of the Federal Activities Inventory Reform Act of 1998, 64 Fed. Reg. 33927, 33931 (containing 1999 revision of A-76).[1] The circular further provides that the performance of such an activity should be converted from the government to a contractor, or from a contractor to government, if doing so will result in greater than "marginal estimated savings." *Id.*; *see* Circular No. A-76 Revised Supplemental Handbook (March 1996) (updated through transmittal memorandum 20, June 1999) [hereinafter Revised Supplemental Handbook] at 28.

An A-76 administrative appeal is a challenge to a cost comparison decision based on asserted errors in the cost comparison process. To be considered an eligible appeal subject to review by the administrative appeal authority, the issues must be raised by eligible appellants and meet criteria established in the Revised Supplemental Handbook (Chapter 3, Subpart K, Appeals of Tentative Waiver and Cost Comparison Decisions).

The cost comparison decision in the present case was made as part of the DOE's "Visual Information Service A-76 Study." The positions under study are currently located in the DOE's Office of Management, Budget and Evaluation, Office of Administration, Office of

[1] The most recent revision of A-76, with an effective date of May 29, 2003, is not applicable to the present case. 68 Fed. Reg. 32134 (May 29, 2003) (revised circular applicable to "[c]ost comparisons for which solicitations have not been issued before the effective date.").

Administrative Management and Support, Media Production Group ("the Group"). The Group combines printing, visual information, copier and library services.

Under the procedures set forth in A-76 and the Revised Supplemental Handbook, the agency prepares a performance work statement (PWS), a description of what the Government intends to buy, regardless of the outcome of the cost comparison, setting forth the requirements, performance measures and standards, workload and conditions of performance. The agency also prepares a Government Management Plan, the purpose of which is to develop and identify the organizational structures, staffing and operating procedures, transition and inspection plans, and equipment necessary to ensure that it can perform the activity in an efficient and cost effective manner. One of the documents included in the plan is the Government Most Efficient Organization (MEO), the cost of which is then compared to a single contractor bid chosen from among offerors by the contracting officer.

In this case, the total cost of in-house performance (i.e., by the MEO) was calculated to be $2,072,151 over five years, whereas the contract bid was $2,788,225. Thus, the cost comparison decision resulted in the MEO being selected. Daniel Innamorato, a Visual Information Specialist in the Media Production Group, filed the present appeal of the cost comparison decision.

II. *Analysis*

Chapter 3, Subpart K of the Revised Supplemental Handbook sets forth specific criteria that must be met for an administrative appeal to "to be eligible for review under the A-76 Administrative Appeals process, . . ." Revised Supplemental Handbook at 13. Two of these criteria are particularly relevant to the present case. First, to be eligible, an appeal must "[a]ddress specific questions regarding an agency's compliance with the requirements and procedures of the Circular [A-76], . . . or address specific questions regarding the costs entered by the Government on the applicable Cost Comparison Form and set forth the rationale for questioning those items." *Id.* Second, an eligible appeal must "[d]emonstrate that the items appealed, individually or in aggregate, would reverse the tentative decision." *Id.*

As discussed below, several of the items in Mr. Innamorato's appeal raise specific questions regarding either the DOE's compliance with the A-76 procedures or the costs entered on the Cost Comparison Form in this case.[2] However, Mr. Innamorato's appeal has not demonstrated that these items, individually or in the aggregate, would reverse the tentative decision, i.e., result in the selection of an outside contractor rather than the in-house MEO. Therefore, the appeal is not "eligible for review" under the A-76 Administrative Review Appeals procedures, and therefore must be denied.

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[2] The appellant also raises an issue that is not appealable in the A-76 Administrative Appeals Process. Mr. Innamorato contends that the function performed by DOE graphics employees is "inherently governmental." The activities at issue in the present case were identified as commercial activities eligible for competition in the FAIR Act Inventory of 2001. That determination was subject to administrative challenge and appeal by interested parties, but in a process separate from (and at an earlier stage than) the A-76 Administrative Appeals Process. 64 Fed. Reg. at 33930.

Mr. Innamorato raised the following issues regarding the DOE's compliance with the requirements and procedures of A-76:

(1) A-76 states that "Government performance of a commercial activity is authorized if a cost comparison . . . demonstrates that the Government is operating or can operate the activity . . . at an estimated lower cost than a qualified commercial source." 64 Fed. Reg. at 33932. The appellant contends that this provision "indicates a willingness under A-76 to allow the affected employees to restructure the activities, methods or processes (i.e., create a [MEO]) and reduce governmental costs or cost estimates *prior* to undergoing an A-76 study," but that "[n]o such cost comparison was conducted" in the present case. Appeal at 1.

(2) The Revised Supplemental Handbook states that A-76 is designed to "provide a level playing field between public and private offerors to a competition" and "encourage competition and choice in the management and performance of commercial activities." Revised Supplemental Handbook at iii. The appellant faults the Visual Information Service A-76 study for "failures to provide a 'clear, transparent and consistent' competition (i.e., a level playing field) by the deliberate disenfranchisement of all affected employees, customers and stakeholders" from participation in the process, and contends that a "flawed preliminary contractor A-76 Study . . . prejudiced any level playing field." Appeal at 1.

(3) The Visual Information Service A-76 Study did not allow "'full participation' in the development of any performance standards, performance work statements, etc. . . . to affected employees, customers or their representatives." Appeal at 1 (citing Revised Supplemental Handbook at 6 ("affected parties will have the opportunity to fully participate in the development of supporting documents and proposals, including the development of performance standards, performance work statements, management plans, and the development of in-house and contract cost estimates").

(4) The Revised Supplemental Handbook contemplates the formation of a cost comparison study team that "should document mission requirements and seek new and innovative ways to provide the required products or services" and states that the "participation of functional experts is essential to the quality of the cost comparison." Revised Supplemental Handbook at 10. Mr. Innamorato contends that the "affected employees *would* have been prime 'functional experts' and customers *would* have been instrumental in 'documenting mission requirements' but these stakeholders were excluded from participation." Appeal at 2.

(5) The PWS developed under the Visual Information Service A-76 study limits service options, "increase[s] the risk that customers will abandon the federal graphics office, and . . . is *not* performance-oriented since it has denied customer participation in helping establish what the performance requirements should be." The PWS also limits options

for providing the required products and services by "specifically limiting office hours and equipment for in-house production, . . ." Appeal at 2 (citing Revised Supplemental Handbook at 11 (PWS should not "limit service options" or "arbitrarily increase risk," "should be performance-oriented," and should not "limit[] the options available for providing the required product or service, . . .")).

(6) The Revised Supplemental Handbook provides for the establishment of a Source Selection Authority, which reviews contract offers "and identifies that offer which represents the 'best overall value to the Government.' This contract offer competes with the Government's in-house cost estimate." Revised Supplemental Handbook at 12. In this process, the Government is to ensure "that there are no potential conflicts of interest in the membership of the Authority." *Id.* The appellant contends that the participation of a particular Visual Information Specialist (Team Leader) constituted a conflict of interest. Appeal at 2.

While expressing no opinion on the merit of any of the above issues, we do find that they, on their face, raise "specific questions regarding an agency's compliance with the requirements and procedures of" A-76.[3]

The appeal goes on to "address specific questions regarding the costs entered by the Government on the applicable Cost Comparison Form." Specifically, the appellant notes that the "Management Plan budget allocates $82.00 annually for 'materials and supplies' and it is questionable whether this could satisfy the Program Mission requirements for any headquarters element . . ." Appeal at 2. The appellant also notes that in the MEO's in-house cost estimate, "the value entered for the column heading 'Maintenance' is zero dollars." *Id.* at 3.

Nonetheless, Mr. Innamorato's submission does not meet the necessary criteria to be "eligible for review under the A-76 Administrative Appeals process, . . ." Revised Supplemental Handbook at 13. Nowhere has the appellant attempted to "[d]emonstrate that the items appealed, individually or in aggregate, would reverse the tentative decision." *Id.* In the present case, a reversal of the tentative decision would result in the selection of the contract bid over the MEO, a result that the appellant does not seek.[4] Mr. Innamorato points out a number of instances where

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[3] The appellant raises another issue that does concern compliance with the requirements of A-76, but is not relevant to the present case. The Revised Supplemental Handbook states that an "activity will not be converted to or from in-house, contract or ISSA performance, on the basis of a cost comparison, unless the minimum differential is met." Revised Supplemental Handbook at 19. This provision is clearly not applicable to this case, where the tentative cost comparison decision was to keep the activity "in-house."

[4] Mr. Innamorato proposes that the "flawed Management Analysis, the flawed PWS, the Contractor bid based on a flawed PWS, and the flawed MEO with Team Lead conflict of interest should all be vacated. The study teams responsible for this should be replaced by independent and properly-trained teams and the A-76 Study should be reinitiated, if necessary . . ." Appeal at 4. Mr. Innamorato contends that if this were done the "graphics staff MEO would not only win, it would win without compromising current federal grade levels, responsibilities, work processes, products

he believes the Visual Information Services A-76 study process was flawed. But he does not demonstrate that a correction of the alleged deficiencies would result in a different outcome in the present case. For example, if the errors he alleges in the PWS were corrected (issue (5)), the contractor's bid and the MEO cost presumably would change, but the cost difference between the two likely would not. Similarly, while the appellant questions two of the estimated in-house costs, he does not allege (nor is it conceivably the case) that a more accurate estimation of those two costs ("materials and supplies" and "maintenance") would be more than $716,156, enough in the aggregate to make the in-house cost higher than the contract cost, and thereby alter the outcome of the cost comparison.

For the reasons set forth above, the appellant's submission is not eligible for review under the A-76 Administrative Appeals process. We will therefore deny the present appeal.

It Is Therefore Ordered That:

(1) The A-76 Administrative Appeal filed by Daniel Innamorato, Case Number TEA-0003, is hereby denied.

(2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 16, 2003

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or services provided." *Id*. at 3.

August 16, 2005

DECISION AND ORDER
DEPARTMENT OF ENERGY

Implementation of Special Refund Procedures

Names of Firms: BPM Ltd.
Honeymon Drilling Co.
Intercontinental Oil
Knox Oil
Pescar Trading
Shepherd Oil, Inc.
Sierra Petroleum Co.
Thriftway Co.
Western Refining Co. (Robert J. Martin)

Date of Filing: June 21, 2005

Case Numbers: TEF-0001
TEF-0002
TEF-0003
TEF-0004
TEF-0005
TEF-0007
TEF-0008
TEF-0010
TEF-0011

I. Background

The Office of General Counsel (OGC) of the Department of Energy (DOE) filed a Petition requesting that the Office of Hearings and Appeals (OHA) formulate and implement Subpart V special refund proceedings. Under the procedural regulations of the DOE, special refund proceedings may be implemented to refund monies to persons injured by violations of the DOE petroleum price regulations, provided DOE is unable to readily identify such persons or to ascertain the amount of any refund. 10 CFR § 205.280. We have considered OGC's request to formulate refund procedures for the disbursement of monies remitted by the following firms pursuant to administrative or judicial decisions or in settlement of the DOE allegations that the firms had violated the DOE petroleum price control and allocation regulations:

BPM Ltd.
Honeymon Drilling Co.
Intercontinental Oil
Knox Oil
Pescar Trading
Shepherd Oil, Inc.
Sierra Petroleum Co.
Thriftway Co.
Western Refining Co. (Robert J. Martin)

In its Petition, OGC states that is has been unable to reasonably identify persons harmed as a result of these firms' alleged violations, or to reasonably ascertain the amount of the refund to any person that might have been harmed. We therefore have determined that the refund procedures requested by OGC are appropriate.

A total of $1,585,576.76 has been remitted to DOE by these firms to remedy violations that occurred during the relevant audit periods. These funds are being held in an escrow account established with the United States Treasury pending a determination of their proper distribution. This Decision sets forth OHA's plan to distribute those funds.

II. Jurisdiction and Authority

The general guidelines that govern OHA's ability to formulate and implement a plan to distribute refunds are set forth at 10 CFR Part 205, Subpart V. These procedures apply in situations where the DOE cannot readily identify the persons who were injured as a result of actual or alleged violations of the regulations or ascertain the amount of the refund each person should receive. For a more detailed discussion of Subpart V and the authority of the OHA to fashion procedures to distribute refunds, *see Office of Enforcement*, 9 DOE ¶ 82,508 (1981) and *Office of Enforcement*, 8 DOE ¶ 82,597 (1981).

On June 28, 2005, the OHA issued a Proposed Decision and Order (PD&O) establishing tentative procedures to distribute the funds remitted. That PD&O was published in the *Federal Register*, and a 30-day period was provided for the submission of comments regarding our proposed refund plan. *See* 70 FR 38901 (July 6, 2005). More than 30 days have elapsed and OHA has received no comments concerning these proposed refund procedures. Consequently, the procedures will be adopted as proposed.

III. Refund Procedures

A. Allocation of Remitted Funds

The alleged violations by the above-named firms all concerned the sale of crude oil. Under these circumstances, all of the funds remitted will be allocated for restitution for parties injured by the

firms' alleged violations of the crude oil regulations.

B. Refund Procedures for Crude Oil Violations

The funds will be distributed in accordance with the DOE's Modified Statement of Restitutionary Policy in Crude Oil Cases, (MSRP), *see* 51 FR 27899 (August 4, 1986). Pursuant to the MSRP, OHA may reserve up to 20 percent of those funds for direct refunds to applicants who claim that they were injured by the crude oil violations. The remaining funds are distributed to the states and federal government for indirect restitution. We will distribute the funds remitted in accordance with the MSRP, which was issued as a result of the Settlement Agreement approved by the court in *The Department of Energy Stripper Well Exemption Litigation*, 653 F. Supp. 108 (D. Kan. 1986). Shortly after the issuance of the MSRP, the OHA issued an Order that announced that this policy would be applied in all Subpart V proceedings involving alleged crude oil violations. *See* Order Implementing the MSRP, 51 FR 29,689 (August 20, 1986) (the August 1986 Order).

Under the MSRP, 40 percent of crude oil overcharge funds will be disbursed to the federal government, another 40 percent to the states, and up to 20 percent may initially be reserved for the payment of claims to injured parties. The MSRP also specified that any funds remaining after all valid claims by injured purchasers are paid will be disbursed to the federal government and the states in equal amounts.

In April 1987, the OHA issued a Notice analyzing the numerous comments received in response to the August 1986 Order. 52 FR 11,737 (April 10, 1987) (April 10 Notice). This Notice provided guidance to claimants that anticipated filing refund applications for crude oil monies under the Subpart V regulations. In general, we stated that all claimants would be required to (1) document their purchase volumes of petroleum products during the August 19, 1973 through January 27, 1981 crude oil price control period, and (2) prove that they were injured by the alleged crude oil overcharges. Applicants who were end-users or ultimate consumers of petroleum products, whose businesses are unrelated to the petroleum industry, and who were not subject to the DOE price regulations would be presumed to have been injured by any alleged crude oil overcharges. In order to receive a refund, end-users would not need to submit any further evidence of injury beyond the volume of petroleum products purchased during the period of price controls. *See City of Columbus Georgia,* 16 DOE ¶ 85,550 (1987).

1. Individual Refund Claims

The amount of money obtained from the listed firms intended for restitution of crude oil violations is $1,585,576.76 plus accrued interest. In accordance with the MSRP, we shall initially reserve 20 percent of those funds ($317,115.36 plus accrued interest) for direct refunds to applicants who claim that they were injured by crude oil overcharges. We shall base refunds on a volumetric amount which has been calculated in accordance with the methodology described in the April 10 Notice. That volumetric refund amount is currently $0.0016 per gallon. *See* 57 FR 15562 (March 24, 1995). On May 13, 2004, we announced final procedures for the distribution of the remaining crude oil

overcharge funds held by DOE, and estimated that all remaining funds would result in an additional volumetric refund amount of $0.00072 per gallon. *See* 69 FR 29300 (May 21, 2004).

The filing deadline for refund applications in the crude oil refund proceeding was June 30, 1994. This was subsequently changed to June 30, 1995. See Filing Deadline Notice, 60 FR 19914 (April 20, 1995); *see also* DMLP PDO, 60 FR 32004, 32007 (June 19, 1995). Because the June 30, 1995, deadline for crude oil refund applications has passed, no new applications for restitution from purchasers of refined petroleum products based on the alleged (or established) crude oil pricing violations will be accepted for these funds. Instead, these funds will be added to the general crude oil overcharge pool used for direct restitution.

2. Payments to the States and Federal Government

Under the terms of the MSRP, the remaining 80 percent of the crude oil violation amounts subject to this Decision, or $1,268,461.40 plus accrued interest, should be disbursed in equal shares to the states and federal government, for indirect restitution. Refunds to the states will be in proportion to the consumption of petroleum products in each state during the period of price controls. The share or ratio of the funds which each state will receive is contained in Exhibit H of the Stripper Well Settlement Agreement. When disbursed, these funds will be subject to the same limitations and reporting requirements as all other crude oil monies received by the states under the Stripper Well Agreement.

Accordingly, we will direct the DOE's Office of the Controller to transfer one-half of that amount, or $634,230.70 plus interest, into an interest bearing subaccount for the states, and one-half or $634,230.70 plus interest, into an interest bearing subaccount for the federal government.

It Is Therefore Ordered That:

(1) The Director of Special Accounts and Payroll, Office of Departmental Accounting and Financial Systems Development, Controller's Office, Department of Energy, shall take all steps necessary to transfer the funds remitted by the 9 firms listed in the Appendix to this determination, plus accrued interest, pursuant to Paragraphs (2), (3), and (4) below.

(2) The Director of Special Accounts and Payroll shall transfer $634,230.70, plus 40 percent of all accrued interest on the funds referenced in Paragraph (1) above, into the subaccount denominated "Crude Tracking-States," Account No. 999DOE003W.

(3) The Director of Special Accounts and Payroll shall transfer $634,230.70, plus 40 percent of all accrued interest on the funds referenced in Paragraph (1) above, into the subaccount denominated "Crude Tracking-Federal," Account No. 999DOE002W.

(4) The Director of Special Accounts and Payroll shall transfer $317,115.36, plus 20 percent of all accrued interest on the funds referenced in Paragraph (1) above, into the subaccount denominated "Crude Tracking-Claimants 4," Account No. 999DOE010Z.

George B. Breznay
Director
Office of Hearings and Appeals

Date: August 16, 2005

APPENDIX

NAME OF FIRM	OHA C ASE NO.	CONSENT ORDER TRACKING SYSTEM (COTS) NO.	PRINCIPAL
BPM, Ltd.	TEF-0001	6C0X00230W	$621,220.04
Honeymon Drilling Co., Ltd.	TEF-0002	BWBBBBBBBB	$359.00
Intercontinental Oil Co., Inc.	TEF-0003	650X00282W	$48,750.28
Knox Oil	TEF-0004	BLBBBBBBBB	$2,989.00
Pescar International Trading Corp.	TEF-0005	650X000345W	$28,044.49
Shephard Oil, Inc.	TEF-0007	640X00439W	$150,000.00
Sierra Petroleum Co.	TEF-0008	740C01128Z	$21,939.89
Thriftway Company	TEF-0010	BCBBBBBBBB	$97,380.14
Western Refining Co.	TEF-0011	N00S90458W	$614,893.92
		TOTAL	$1,585,576.76

June 27, 2007

DECISION AND ORDER
DEPARTMENT OF ENERGY

Implementation of Special Refund Procedures

Names of Firms:	Powerine Oil Company Storey Oil Company, Inc.
Dates of Filing:	June 23, 2005 June 23, 2005
Case Numbers:	TEF-0006 TEF-0009

The Office of General Counsel (OGC) of the Department of Energy (DOE) filed a Petition requesting that the Office of Hearings and Appeals (OHA) formulate and implement Subpart V special refund proceedings. Under the procedural regulations of the DOE, special refund proceedings may be implemented to refund monies to persons injured by violations of the DOE petroleum price regulations, provided DOE is unable to readily identify such persons or to ascertain the amount of any refund. 10 C.F.R. § 205.280. We have considered OGC's request to formulate refund procedures for the disbursement of monies remitted by Powerine Oil Company (Powerine) and Storey Oil Company (Storey) pursuant to Remedial Orders DOE has issued regarding them and have determined that such procedures are appropriate.

Under the terms of the Remedial Orders, Powerine's bankruptcy trustee has remitted a total of $1,546,302 to the DOE to remedy motor gasoline retailer-reseller pricing violations which occurred during the relevant audit period. Storey has remitted a total of $46,599 to remedy similar violations. These funds are being held in an escrow account established with the United States Treasury pending a determination of their proper distribution. This Decision sets forth OHA's plan to distribute those funds. The specific application requirements are detailed in Section III of this Decision.

I. Background

Powerine was a privately held corporation which operated a refinery located in Santa Fe Springs, California during the period of price controls, August 13, 1973 through January 27, 1981. During this period, Storey, operating in Colorado, was a reseller of refined petroleum products. Economic Regulatory Administration audits of Powerine and Storey revealed possible violations of the Mandatory Petroleum Price Regulations (MPPR) in their sales of motor gasoline. Subsequently, OHA issued Remedial Orders in each case directing Powerine and Storey to remit to the DOE

$7,956934 and $64,639 in restitution with respect to overcharges each firm in regard to sales to their customers during the period of price controls. 1/

II. Jurisdiction and Authority

The general guidelines that govern OHA's ability to formulate and implement a plan to distribute refunds are set forth at 10 C.F.R. Part 205, Subpart V. These procedures apply in situations where the DOE cannot readily identify the persons who were injured as a result of actual or alleged violations of the regulations or ascertain the amount of the refund each person should receive. For a more detailed discussion of Subpart V and the authority of the OHA to fashion procedures to distribute refunds, *see Office of Enforcement*, 9 DOE ¶ 82,508 (1981) and *Office of Enforcement*, 8 DOE ¶ 82,597 (1981).

On May 8, 2007, the OHA issued a Proposed Decision and Order (PD&O) establishing tentative procedures to distribute the Consent Order funds. That PD&O was published in the *Federal Register*, and a 30-day period was provided for the submission of comments regarding our proposed refund plan. *See* 72 Fed. Reg. 26083 (May 8, 2007). More than 30 days have elapsed and OHA has received no comments concerning these proposed refund procedures. Consequently, the procedures will be adopted as proposed.

III. Refund Procedures

A. Allocation of Consent Order Funds

Both firms violations of the MPPR involved sales of a refined petroleum product - motor gasoline. Consequently, all of the funds that have been remitted by Powerine and Storey will be allocated for restitution for those parties injured by the firms' alleged violations of the pricing regulations for motor gasoline.

B. Refined Petroleum Product Refund Procedures

1. Application Requirements

In cases where the ERA is unable to identify parties injured by the alleged overcharges or the specific amounts to which they may be entitled, we normally implement a two-stage refund procedure. In the first stage, those who bought refined petroleum products from the consenting firms may apply for refunds, which are typically calculated on a pro-rata or volumetric basis. In

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1/ *See Powerine Oil Company*, 21 DOE ¶ 83,008 (1991); *Storey Oil Company, Inc.*, 16 DOE ¶ 83,007 (1987).

order to calculate the volumetric refund amount, the OHA divides the amount of money available for direct restitution by the number of gallons sold by the firm during the price control period covered by the remedial order.

In the present case, however, we lack much of the information that we normally use to provide direct restitution to injured customers of the consenting firms. In particular, we have been unable to obtain any information on the volumes of motor gasoline products sold by the firms during the price control period. Nor do we have any information concerning the customers of these firms. Based on the present state of the record in these cases, it would be difficult to implement a volumetric refund process. Nevertheless, we will accept any refund claims submitted by persons who purchased motor gasoline from Powerine or Storey during the settlement periods discussed above. We will work with those claimants to develop additional information that would enable us to determine who should receive refunds and in what amounts. 2/

To apply for a refund from the Powerine or Storey Remedial Order funds, a claimant should submit an Application for Refund containing the following information:

> (1) Identifying information including the claimant's name, current business address, business address during the refund period, social security number or taxpayer identification number, a statement indicating whether the claimant is an individual, corporation, partnership, sole proprietorship, or other business entity, the name, title, and telephone number of a person to contact for additional information, and the name and address of the person who should receive any refund check. 3/
>
> (2) A monthly motor gasoline gallonage purchase schedule covering the price control order period. The applicant should specify the source of this gallonage information. In calculating its purchase volumes, an applicant should use actual records from the refund period, if available. If these records are not available, the applicant may

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2/ Applications for Refund from will be accepted only for motor gasoline pricing violations. With regard to crude oil pricing violations the deadline for filing applications for refund has passed. *See infra*.

3/ An applicant must submit the social security number or employer identification number of the person or legal entity that is seeking the refund. This information will be used in processing refund applications, and is requested pursuant to our authority under the Petroleum Overcharge Distribution and Restitution Act of 1986 and the regulations codified at 10 C.F.R. Part 205, Subpart V. The information may be shared with other Federal agencies for statistical, auditing or archiving purposes, and with law enforcement agencies when they are investigating a potential violation of civil or criminal law.

submit estimates of its refined petroleum product purchases, but the estimation method must be reasonable and must be explained;

(3) A statement whether the applicant or a related firm has filed, or has authorized any individual to file on its behalf, any other application in that refund proceeding. If so, an explanation of the circumstances of the other filing or authorization must be submitted;

(4) If the applicant is or was in any way affiliated with Powerine or Storey, it must explain this affiliation, including the time period in which it was affiliated; 4/

(5) The statement listed below signed by the individual applicant or a responsible official of the firm filing the refund application:

> I swear (or affirm) that the information contained in this application and its attachments is true to the best of my knowledge and belief. I understand that anyone who is convicted of providing false information to the federal government may be subject to a fine, a jail sentence, or both, pursuant to 18 U.S.C. § 1001. I understand that the information contained in this application is subject to public disclosure. I have enclosed a duplicate of this entire application which will made available at OHA.

All applications should be either typed or printed and clearly labeled with the name and case number of the relevant firm (Powerine Oil Company, Case No. TEF-0006 or Storey Oil Company, Inc., Case No. TEF-0009). Each applicant must submit an original and one copy of the application. If the applicant believes that any of the information in its application is confidential and does not wish for that information to be publicly disclosed, it must submit an original application, clearly designated "confidential," containing the confidential information, and two copies of the application with the confidential information deleted. All refund applications should be postmarked on or before December 28, 2007:

4/ As in other refund proceedings involving alleged refined product violations, the DOE will presume that affiliates of a remedial order firm were not injured by the firm's overcharges. *See, e.g., Marathon Petroleum Co./EMRO Propane Co.*, 15 DOE ¶ 85,288 (1987). This is because the remedial order firm presumably would not have sold petroleum products to an affiliate if such a sale would have placed the purchaser at a competitive disadvantage. *See Marathon Petroleum Co./Pilot Oil Corp.*, 16 DOE ¶ 85,611 (1987), *amended claim denied*, 17 DOE ¶ 85,291 (1988), *reconsideration denied*, 20 DOE ¶ 85,236 (1990). Furthermore, if an affiliate of the remedial order firm were granted a refund, the remedial order firm would be indirectly compensated from a Remedial Order fund remitted to settle its own alleged violations.

Office of Hearings and Appeals
Department of Energy
1000 Independence Ave., S.W.
Washington, D.C. 20585-1615

We will adopt the standard OHA procedures relating to refund applications filed on behalf of applicants by "representatives," including refund filing services, consulting firms, accountants, and attorneys. *See, e.g.*, *Starks Shell Service*, 23 DOE ¶ 85,017 (1993); *Texaco Inc.*, 20 DOE ¶ 85,147 (1990) (*Texaco*); *Shell Oil Co.*, 18 DOE ¶ 85,492 (1989). We will also require strict compliance with the filing requirements as specified in 10 C.F.R. § 205.283, particularly the requirement that applications and the accompanying certification statement be signed by the applicant. The OHA reiterates its policy to scrutinize applications filed by filing services closely. Applications submitted by a filing service should contain all of the information indicated above.

Finally, the OHA reserves the authority to require additional information from an applicant before granting any refund in these proceedings.

2. Allocation Claims

We may receive claims based upon Powerine's or Storey's failure to furnish motor gasoline that they were obliged to supply under the DOE allocation regulations that became effective in January 1974. *See* 10 C.F.R. Part 211. Any such application will be evaluated with reference to the standards set forth in *Texaco* (and cases cited therein). *See Texaco*, 20 DOE at 88,321.

3. Impact of the Petroleum Overcharge Distribution and Restitution Act of 1986 (PODRA) Amendments on Powerine and Storey Refined Product Refund Claims

The Interior and Related Agencies Appropriations Act for FY 1999 amended certain provisions of the Petroleum Overcharge and Distribution and Restitution Act of 1986 (PODRA). These amendments extinguished rights that refund applicants had under PODRA to refunds for overcharges on the purchases of refined petroleum products. They also identified and appropriated a substantial portion of the funds being held by the DOE to pay refund claims (including the funds paid by Powerine and Storey). Congress specified that these funds were to be used to fund other DOE programs. As a result, the petroleum overcharge escrow accounts in the refined product area contain substantially less money than before. In fact they may not contain sufficient funds to pay in full all pending and future refund claims (including those in litigation) if they should all be found to be meritorious. *See Enron Corp./Shelia S. Brown*, 27 DOE ¶ 85,036 at 88,244 (2000) (*Brown*). Congress directed OHA to "assure the amount remaining in escrow to satisfy refined petroleum product claims for direct restitution is allocated equitably among all claimants."*Omnibus Consolidated and Emergency Supplemental Appropriation Act, 1999*, Pub. L. No. 105-277 § 337, 112 Stat 2681, 2681-295 (1998) (language added to PODRA); *Brown*, 27 DOE at 88,244. In view of this Congressional directive and the limited amount of funds available, it may become necessary

to prorate the funds available for the meritorious claimants in the Powerine and Storey refund proceedings.

It Is Therefore Ordered That:

The payments remitted to the Department of Energy by Powerine Oil Company and Storey Oil Company, Inc., pursuant to remedial orders signed on August 30, 1991 and June 24, 1987 respectively, will be distributed in accordance with the forgoing Decision.

Fred L. Brown
Acting Director
Office of Hearings and Appeals

Date: June 27, 2007

December 4, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Motion for Stay

Name of Case: Chevron USA Inc.

Date of Filing: December 4, 2007

Case Number: TES-0010

Pending before this Office – the Office of Hearings and Appeals (OHA) - is a Chevron USA Inc. (Chevron) notice of appeal and simultaneous motion to stay or continue the appeal pending a concurrent federal court proceeding in which Chevron alleges DOE breach of contract. As set forth below, Chevron's motion to stay or continue is denied. The parties are instructed to file a proposed briefing schedule on or before January 7, 2008.

I. Background

The underlying appeal concerns the Elk Hills oil field (formerly Naval Petroleum Reserve No. 1). Chevron and DOE produced the field pursuant to a unit operating agreement, and the parties shared revenues based on estimates of the volume of hydrocarbons underlying their respective lands. In conjunction with the federal government's sale of its interest in the field, the parties agreed to a process to determine their final equity interests (the Equity Process Agreement).

Pursuant to that agreement, the DOE Assistant Secretary for Fossil Energy (AFSE) issued a determination for the Stevens Zone, the largest producing zone in the field. Chevron appealed; OHA granted the appeal in part and remanded the matter for a revised determination. *Chevron USA Inc.*, 29 DOE ¶ 80,203 (2005). The ASFE issued a revised determination, and Chevron filed the instant appeal.

In support of its request to stay or continue the proceeding, Chevron refers to a pending federal court proceeding in which Chevron alleges DOE breach of the Equity Process Agreement. Chevron maintains that the court proceeding will produce documents relevant to whether the ASFE complied with the Equity Process

Agreement in reaching the first and second Stevens Zone determinations. Chevron also maintains that the court proceeding may affect OHA's jurisdiction. Accordingly, Chevron argues, it would be "unfair, inappropriate, and wasteful" to require Chevron to proceed with briefing at this time. Reply at 1.

II. The Applicable Standard

The parties agree that the DOE procedural regulations apply, but they disagree on which provision applies. Chevron argues that the extension-of-time provision applies. *See* 10 C.F.R. § 1003.6. DOE, on the other hand, argues that the stay provisions apply. *See* 10 C.F.R. § 1003.45(b).

The original DOE procedural regulations provided for stays. *See* 10 C.F.R. Part 205, Subpart I, 44 Fed. Reg. 36935 (June 25, 1979). In 1995, DOE promulgated new procedural regulations that also provided for stays. 10 C.F.R. Part 1003, Subpart D, 60 Fed. Reg. 15,006, 15,007 (March 21, 1995).

The stay provisions apply to requests for relief from specific agency requirements. Although the provisions do not define the term "stay," one provision refers to stays from "DOE rules, regulations, and generally applicable requirements." 10 C.F.R. § 1003.40. Under the current regulations, stays have been rare; the most recent request involved an Energy Information Administration reporting requirement. *See Southern Co.*, 28 DOE ¶ 82,505 (2002) (stay denied). Thus, the language of the stay provisions and precedent indicate that the stay provisions apply where a party requests relief from a specific agency requirement.

Given the foregoing, Chevron's request is not a request for stay. Chevron does not request relief from a specific regulatory requirement. Instead, Chevron requests a continuance of the appeal proceeding for an unspecified duration.

The DOE procedural regulations do not have a specific provision governing continuances. That makes sense because a continuance is a type of extension request. Accordingly, we agree with Chevron that its request is for an extension of time and, therefore, subject to the "good cause" standard of that provision. *See* 10 C.F.R. § 1003.6. What constitutes "good cause" is decided on a case-by-case basis after consideration of the particular circumstances presented. Thus, claims of hardship, inequity, and inefficiency may, depending on the particular circumstances of a case, provide a basis for a continuance.

III. Whether "Good Cause" Exists to Continue the Proceeding

Chevron acknowledges that, in 2004, it requested a continuance of the first Stevens Zone appeal proceeding and that we denied that request. Chevron argues that the instant request is different. Chevron states that it has received additional information supporting its claim of breach. Chevron also states that it expects to receive more information and a court decision in the near future, and the latter may affect OHA's jurisdiction. Finally, Chevron maintains, the equity finalization process is at a standstill and, therefore, a continuance will not delay the completion of that process.

Chevron's arguments do not support a continuance. As we stated in 2004, allegations of DOE breach of the Equity Process Agreement are beyond our purview. Moreover, we are not persuaded that Chevron needs additional information to pursue the instant appeal. Chevron's asserted need for documents depends, in part, on the scope of the appeal, an issue on which the parties differ. The parties should address the scope of the appeal in their briefs.

As the foregoing indicates, we see no basis for a continuance. Accordingly, the parties are instructed to submit a proposed briefing schedule on or before January 7, 2008. We anticipate a schedule in which oral argument is held no later than June 2008.

IT IS THEREFORE ORDERED THAT:

(1) Chevron's request to continue the proceeding in Chevron USA, Inc., Case No. TEA-0010, be and hereby is denied.

(2) The parties shall file a proposed briefing schedule on or before January 7, 2008.

Thomas L. Wieker
Deputy Director
Office of Hearings and Appeals

Date: December 4, 2007

July 15, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Interlocutory Order

Name of Case: Chevron USA Inc.

Date of Filing: July 10, 2008

Case Number: TEZ-0010

Chevron USA Inc. (Chevron) filed an appeal with this Office – the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE). The appeal concerns a 2007 Assistant Secretary for Fossil Energy (the ASFE) determination of equity interests in the Elk Hills oil field, also referred to as Naval Petroleum Reserve No. 1 (the Reserve). DOE filed a Motion to Dismiss, in which it requested dismissal of certain issues; during the briefing process, DOE withdrew its objection to some issues. As set forth below, we have determined that DOE's Motion, as amended, should be granted.

I. Background

A detailed history of the Reserve is set forth in *United States v. Standard Oil of Cal.*, 545 F.2d 624 (9th Cir. 1976). Discussions are are also set forth in our decisions in *Chevron USA, Inc.*, 29 DOE ¶ 80,203 (2005) and *Chevron USA Production Co.*, 28 DOE ¶ 80,101 (2000). For purposes of this decision, a brief discussion will suffice.

Congress established the Reserve in 1912 to conserve oil for the national defense. The Reserve was comprised of parcels of land – some owned by the federal government and others owned by Standard Oil of California (Standard), now Chevron USA Inc. Initially, the Department of the Navy (Navy) had jurisdiction over the federal government's interest in the Reserve. In 1977, Congress transferred that jurisdiction to the newly-established DOE.

In 1942, Standard and Navy (also referred to as "the parties") entered into a unit plan contract for limited production of the Reserve. In 1944, after concerns were raised about the legality of the contract, the parties terminated it. That same year, the parties entered into a congressionally-approved Unitized Plan Contract (the UPC) covering a portion of the Reserve (the Unit). Under the UPC, the parties' "participating percentages" in

production, also referred to as "equity interests," were based on estimates of the volume of hydrocarbons underlying their respective lands. The UPC established initial percentages and provided for subsequent redeterminations, retroactive to 1942, as the parties learned about the geological structure of the field.

In 1995, Congress enacted legislation directing that the government sell its interest in the Reserve. National Defense Authorization Act for Fiscal Year 1996, §§ 3412-16, 10 U.S.C. §7420 note. In conjunction with the sale, the parties agreed to a process to determine their final equity interests. The parties' agreement is entitled "Agreement Regarding Equity Redetermination Process" and is also referred to as the "Equity Process Agreement." DOE Mot., Ex. 1.

Under the Equity Process Agreement, the ASFE makes final equity determinations on a zone-by-zone basis. The parties make presentations to an Independent Petroleum Engineer (IPE), who then makes a preliminary recommendation. After the parties comment on the preliminary recommendation, the IPE makes a final recommendation. If the ASFE accepts the IPE recommendation, the matter is final and not appealable. If the ASFE rejects the IPE recommendation on a given issue, Chevron may appeal that issue to OHA. Similarly, if an Independent Legal Advisor (ILA) and the ASFE reject Chevron's position on a legal issue, Chevron may appeal that issue to OHA.

In 2002, the Principal Deputy ASFE (the PDASFE or, for simplicity, the ASFE) issued a decision on the Stevens Zone - the Unit's largest producing zone. DOE Mot., Ex. 3. Chevron appealed, challenging the ASFE's "conversion" methodology, *i.e.*, the methodology for converting the parties' respective volumes of gas into barrel-of-oil equivalents (BOEs), the measure of the "hydrocarbons" underlying the parties' respective lands. The ASFE averaged two conversion factors: one based on relative 1996-1998 prices ("current prices") and one based on relative thermal value.

In 2003, Chevron appealed the 2002 ASFE decision to OHA. In its appeal, Chevron challenged both conversion factors used by the ASFE, arguing that the ASFE should have used a conversion factor based on 1942 prices.

In 2005, we granted the appeal in part. *Chevron*, 29 DOE ¶ 80,203. We noted that, under the UPC, a party's share in a given producing zone was equal to the volume of hydrocarbons in that zone underlying the party's property on November 20, 1942, divided by the total volume underlying the Unit on that date. *Id.* at 80,689. We also noted that the UPC required that each party receive, over the life of the Unit, its volume of hydrocarbons. As the decision indicates, the only conversion methodology that gives that result

is based on prices over the life of the Unit. *Id.* Accordingly, we remanded the matter to the ASFE for a revised determination.

To assist in the order's implementation, we required the ASFE to prepare a schedule showing a calculation of a conversion factor. We stated:

> As part of the remand, the PDASFE should prepare a schedule with the following information:
>
> (a) the Unit's revenues in each month;
> (b) the Unit's revenues in each month as a percentage of total revenues,
> (c) the per barrel price of oil in each month,
> (d) the per thousand cubic feet price of gas in each month,
> (e) the ratio of the price of gas to oil in each month,
> (f) the result of multiplying (b) times (e), and
> (g) the sum of the entries in column (f).
>
> Item (g) is the conversion factor based on the weight-averaged monthly relative price of oil and gas. If the PDASFE determines that for technical reasons Item (g) is not the most accurate weight-averaged conversion factor, the PDASFE should explain why.

C*hevron,* 29 DOE at 80,692. We further stated that Chevron could appeal the resulting determination to this Office. *Id.*

In 2006, the ASFE issued a preliminary decision. DOE Mot., Ex. 12. Chevron challenged several aspects of the preliminary decision. With respect to the formula, Chevron argued that, to be consistent with industry practice, Item (e) of the schedule should be expressed as the ratio of oil over gas, rather than the reverse. DOE Mot., Ex. 13 at 4. In 2007, the ASFE issued a final decision, adopting Chevron's proposal concerning Item (e). *Id.* at 4-5.

After the issuance of the ASFE final decision, Chevron noticed the instant appeal, identifying seven issues. Some of those issues concern Chevron's allegation that DOE breached the Equity Process Agreement, an allegation that Chevron is pursuing in a concurrent federal court proceeding. *See Chevron v. United States,* No. 04-1365C (Ct. Cl. filed Aug. 20, 2004). In conjunction with its notice of appeal, Chevron sought a continuance of the appeal, stating that it needed discovery in the federal court proceeding in order to brief its appeal before OHA. DOE opposed a continuance on

the ground that Chevron's allegation of breach of contract was beyond the scope of the instant appeal.

In late 2007, we denied Chevron's request for a continuance. *Chevron USA Inc.*, 29 DOE ¶ 82,503 (2007). We stated that Chevron's allegation of breach of contract was outside our purview. *Id.* at 84,005. We noted the parties' disagreement over the scope of the appeal, and we stated that the parties should address that disagreement in their briefs. *Id.* Finally, we instructed the parties to file a proposed briefing schedule.

In early 2008, each party filed a "preferred" briefing schedule. Chevron proposed a standard briefing schedule; DOE proposed an initial round of briefing limited to jurisdictional issues. After considering the matter, we provided for an initial round of briefing on jurisdictional issues. *See* Letter from Janet N. Freimuth (OHA) to Donald B. Ayer (counsel for Chevron) and Ada L. Mitrani (counsel for DOE) (January 29, 2008) at 2.

The initial round of briefing began when DOE filed a "Motion to Dismiss Issues Outside OHA's Jurisdiction." In that Motion, DOE did not seek dismissal of two issues identified in Chevron's appeal notice, *i.e.*, Issues 2 and 3. DOE did, however, seek dismissal of the five other issues, *i.e.*, Issue 1 and Issues 4 through 7. Chevron filed a Response, and DOE filed a Reply that limited its Motion in certain respects. Chevron filed a Sur-Reply, and DOE filed a Response to the Sur-Reply.

II. Applicable Standard

The parties agree that the Equity Process Agreement governs this proceeding. They further agree that Paragraph B.8 of the agreement governs the permissible scope of the appeal. They differ, however, on the proper interpretation of Paragraph B.8. We discuss below Paragraph B.8 in the context of the specific issues raised herein.

III. Analysis

A. Issue 1

In its Notice of Appeal, Chevron identified Issue 1 as follows:

> Whether there are technical reasons that the conversion factor established by the formula in OHA's 2005 decision is not the most accurate weight-averaged conversion factor.

Notice of Appeal at 3. In its Response, Chevron redefined Issue 1, stating that OHA's formula was accurate and that the ASFE departed from the formula in two respects: first, by excluding 400 months

involving $2.5 billion in revenues; second, by using, for Item (d) of the formula, a "composite gas value" that included all natural gas liquids (NGLs). Chevron Response at 17. In its Reply, DOE withdrew its jurisdictional objection to having Issue 1 considered on appeal by OHA, as redefined.

In its Response, Chevron also made an alternative argument. Chevron argued that, if the ASFE's exclusion of certain months and use of a composite gas value did not depart from OHA's formula, then OHA's formula did not accurately implement the rationale of OHA's decision. *Id.* at 19. It is not clear to us from the pleadings whether DOE withdrew its Motion with respect to this argument and, therefore, we address it below.

Chevron is free to make the alternative argument noted above. In the 2005 OHA decision, we recognized that there may be technical reasons why the decision's formula may not produce the most accurate weight-averaged conversion factor. If Chevron does argue that there is a more accurate formula, Chevron should include a discussion of the alternative formula proposed by the DOE in proceedings before the ASFE.

B. Issue 4

In its Notice of Appeal, Chevron identified Issue 4 as follows:

> Whether the Unit Plan Contract allows subsurface gas as of November 20, 1942 to be converted to BOEs as if all natural gas liquids ("NGLs") produced from the field originated in that gas when, in fact, produced NGLs originated largely in subsurface oil.

Notice of Appeal at 3. In its request for relief, Chevron asked that NGLs be excluded from the conversion formula altogether or, in the alternative, that NGLs be attributed to subsurface oil, rather than gas. *Id.* at 5.

In its Motion to Dismiss, DOE argued that the inclusion of NGLs was a settled matter and unrelated to the conversion methodology. Chevron responded that the 2007 ASFE decision, for the first time, included "cycled" NGLs, *i.e.*, NGLs produced from re-injected gas, and that re-injected gas contains hydrocarbons absorbed from subsurface oil. Chevron Response at 23. In its Reply, DOE agreed that "cycled" NGLs had not previously been included in the conversion formula, and DOE withdrew its jurisdictional objection with respect to those NGLs. Accordingly, we now turn to DOE's jurisdictional objection to the issue of the ASFE's inclusion of "non-cycled" NGLs.

It is undisputed that the inclusion of NGLs was addressed in the proceedings leading to the 2002 ASFE decision. The IPE recommendation included non-cycled NGLs in the conversion formula, and the ASFE accepted the IPE recommendation. *See* DOE Mot., Ex. 12 at 6.

Under the Equity Process Agreement, the ASFE's acceptance of an IPE recommendation on an issue is final and non-appealable. Paragraph B.7 provides in relevant part:

> If an ASFE decision adopts the [IPE] recommendation for a particular zone, that ASFE decision shall be final and not subject to challenge by Chevron. If an ASFE final decision rejects, in whole or in part, [the IPE's] participation percentage recommendations, Chevron may challenge the ASFE decision and such challenge shall be referred to [OHA] for a decision. In this event, OHA shall review only the points on which the ASFE rejected [the IPE's] recommendations that have been challenged by Chevron, and in all other respects the ASFE's decision shall be final.

DOE Mot., Ex. 1 at 4. Nonetheless, Chevron argues, it can now challenge the inclusion of non-cycled NGLs.

1. Chevron's argument that the 2005 OHA decision "wiped out" the 2002 ASFE decision

Chevron argues that the 2005 OHA decision "wiped out" the 2002 ASFE decision, allowing Chevron to raise previously settled issues, including the inclusion of NGLs in the conversion formula. *See, e.g.,* Chevron Sur-Reply at 4. We disagree.

Chevron's argument is inconsistent with the plain language of Paragraph B.8 of the Equity Process Agreement, which provides in full:

> If OHA denies the Chevron challenge to the ASFE's decision on an issue, the ASFE's decision on such issue shall be final and binding on the parties. If OHA upholds the Chevron challenge on an issue, then the [IPE] recommendations at issue shall be adopted as final. If OHA determines to uphold the ASFE in part, then OHA, in its discretion, may either (i) direct that the [IPE] recommendation on the issue be adopted by the ASFE, (*ii) remand the specific issue back to the ASFE for further determinations in accordance with OHA's instructions,* or (iii) render a decision on such issue based on the record before it. If OHA *remands an issue* to the ASFE, Chevron shall have the right to challenge

> any *further* determination of the ASFE *on such remand* under the process set forth in paragraph B.7 above.

DOE Mot., Ex. 1 at 5 (emphasis added). As the quotation indicates, Chevron's appeal right concerns OHA's remand of a "specific issue" for "further determinations in accordance with OHA's instructions," and the ASFE's "further" determination "on such remand." The fact that the appeal is "under the process set forth in paragraph B.7" does not enlarge the scope of the appeal. Accordingly, the plain language of Paragraph B.8 limits any further appeal to the ASFE's implementation of OHA's instructions.

Efficiency, finality, and common sense support this result. Under Chevron's theory, if, in the future, we order a second remand, our second remand decision would "wipe out" the 2007 ASFE decision and allow Chevron to challenge any aspect of any future ASFE equity determination, including previously settled issues. To adopt such an approach would likely result in endless litigation.

2. Chevron's alternative arguments

Chevron argues that, even if the 2005 OHA decision did not "wipe out" the 2002 ASFE decision, Chevron is still entitled to challenge the inclusion of NGLs. In support, Chevron advances three arguments.

First, Chevron argues, the earlier IPE recommendation to include NGLs was made in the context of the "current price" formula, as opposed to the "contemporaneous price" formula required by OHA's 2005 decision. In our January 29, 2008, letter setting the briefing schedule, we stated that any argument based on differences in the conversion formulas should be specific:

> If Chevron argues that it would have raised an issue before had it known of the applicability of the 2005 remand conversion formula, Chevron should provide a specific and detailed explanation of that argument, including an explanation of relevant differences between the remand formula and the formula under consideration during the prior equity finalization process.

Letter from Janet N. Freimuth, OHA, to Donald B. Ayer (counsel for Chevron) and Ada L. Mitrani (counsel for the ASFE) (January 29, 2008) at 2. Despite that admonition, Chevron has not explained why, if the 2002 ASFE decision had used a conversion factor based on prices over the life of the Unit, Chevron would have appealed the inclusion of NGLs.

Second, Chevron argues that OHA's 2005 decision excludes NGLs from the conversion formula. We disagree. The OHA 2005 decision

addressed the issue of which prices – 1942, current, or contemporaneous over the life of the Unit – should be used to convert gas volumes to BOEs. The issue of what hydrocarbons were included in gas volumes was not presented to OHA in that appeal. Thus, the 2005 OHA decision did not alter prior determinations on the inclusion of NGLs in gas volumes.

Finally, Chevron argues that the ASFE departed from the IPE's methodology for including non-cycled NGLs. Chevron identified those arguments under Issue 1, *supra*, and they will be considered in this proceeding.

C. Issues 5, 6, and 7

In its Notice of Appeal, Chevron identified Issues 5, 6, and 7 as follows:

> 5. Whether the IPE's calculation of equity participation percentages based on "abandonment pressures" of 500 psi in the 26R and NWS A-1 to A-3 reservoirs, later reversed by the ASFE, was arbitrary and capricious or inconsistent with sound oilfield engineering principles.
>
> 6. Whether equity participation percentages should be established without regard to publicly available data that is obtained by the IPE and that affects the IPE's estimates of one party's share of recoverable oil by approximately eight million barrels.
>
> 7. Whether, in establishing equity participation percentages, the results of a simulation model which has not been found to be biased in any way may be diluted by using an average recovery based upon the combination of parcels owned by each party, where the simulation model and other independent methodologies are capable of resolving migration calculations directly and solely for each parcel as required by the five-step process directed by the Settlement Agreement of January 6, 1997 . . . .

Notice of Appeal at 4. Chevron recognizes that its "prior appeal did not address those aspects of the 2002 decision," but argues that it can raise them now. *Id.* at 2. In its Motion to Dismiss, DOE argues that Chevron's failure to raise those issues in its prior appeal rendered them final and not subject to further appeal. Chevron disagrees.

As discussed above, Chevron argues that the 2005 OHA decision "wiped out" the 2002 ASFE decision and, therefore, any finality

associated therewith. *See, e.g.,* Chevron Sur-Reply at 4. As indicated in Part III.B. above, we have rejected that argument.

Chevron also argues that it would have raised Issues 5, 6, and 7 if it had seen a December 2000 IPE report to the ASFE, *see* Chevron Resp., Ex. 13. Chevron argues that the December 2000 report was, in effect, an "IPE recommendation." As the parties recognize, this argument is part of Chevron's federal district court claim that DOE breached the Equity Process Agreement. As we have stated before, Chevron's allegations of breach of contract are outside our purview. *See, e.g., Chevron,* 29 DOE ¶ 82,503. Accordingly, these issues are beyond the scope of the appeal.

IV. Conclusion

In its Motion to Dismiss, DOE did not object to Issues 2 and 3 being heard on appeal, but moved to dismiss Issue 1 and Issues 4 through 7. As the result of the briefing process, DOE excluded, from its Motion, Issue 1 and the portion of Issue 4 related to "cycled NGLs." Accordingly, these issues will be considered by OHA in the context of this appeal. Regarding the remaining issues raised by Chevron *i.e.,* (i) the portion of Issue 4 challenging the inclusion of non-cycled NGLs in the gas component of the conversion formula, and (ii) Issues 5 through 7, we hold that they are outside of the scope of the appeal. Accordingly, we have determined that DOE's motion to dismiss these issues should be granted.

IT IS THEREFORE ORDERED THAT:

(1) The Motion to Dismiss filed by the Department of Energy on February 11, 2008, be, and hereby is, granted as set forth in Paragraph 2 below.

(2) The following issues identified in the Notice of Appeal filed by Chevron USA Inc., on August 24, 2007, are dismissed: (i) the portion of Issue 4 challenging the inclusion of non-cycled NGLs in the gas component of the conversion formula, and (ii) Issues 5 through 7.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 15, 2008

September 2, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Interlocutory Order

Name of Case: Chevron USA Inc.

Date of Filing: August 27, 2009

Case Number: TEZ-0011

This decision concerns an appeal filed by Chevron USA Inc. (Chevron) with the Office of Hearings and Appeals. The appeal concerns equity interests in the production from the Elk Hills oil field, also referred to as Naval Petroleum Reserve No. 1 (the Reserve). In 2002, the Assistant Secretary for Fossil Energy (AFSE) issued a determination concerning the Stevens Zone, the largest producing zone in the Unit. Chevron filed an appeal, challenging the ASFE methodology for converting gas volumes to barrel-of-oil equivalents (BOEs), the unit by which the parties measure their equity interests. In a 2005 decision, we granted the appeal in part and remanded the matter to the ASFE. *Chevron USA Inc.,* Case No. TEA-0001 (2005).[1] In 2007, the ASFE issued a revised determination, and Chevron filed the instant appeal. In this interlocutory order, we address issues raised in the appeal, and we provide for further briefing related to the appropriate conversion methodology.

I. Background

A detailed history of the Reserve is set forth in *United States v. Standard Oil of Cal.,* 545 F.2d 624 (9th Cir. 1976). Discussions are also set forth in our decisions in *Chevron USA, Inc.,* Case No. TEA-0001 (2005), and *Chevron USA Production Co.,* Case No. VEA-0010 (2000). For purposes of this decision, a brief discussion will suffice.

[1] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine at http://www.oha.doe.gov/search.htm.

Congress established the Reserve in 1912 to conserve oil for the national defense. The Reserve was comprised of parcels of land – some owned by the federal government and others owned by Standard Oil of California (Standard), now Chevron. Initially, the Department of the Navy (Navy) had jurisdiction over the federal government's interest in the Reserve. In 1977, Congress transferred that jurisdiction to the newly-established DOE.

In 1942, Standard and Navy (also referred to as "the parties") entered into a unit plan contract for limited production of the Reserve. In 1944, after concerns were raised about the legality of the contract, the parties terminated it. That same year, the parties entered into a congressionally-approved Unit Plan Contract (the UPC) covering a portion of the Reserve (the Unit). Under the UPC, the parties' "participating percentages" in production, also referred to as "equity interests," were based on estimates of the volume of hydrocarbons underlying their respective lands. The UPC established initial participating percentages and provided for subsequent redeterminations, retroactive to 1942, as the parties learned about the geological structure of the field.

In 1995, Congress enacted legislation directing that the government sell its interest in the Reserve. National Defense Authorization Act for Fiscal Year 1996, §§ 3412-16, 10 U.S.C. § 7420 note. In conjunction with the sale, the parties entered into an agreement to determine their final equity interests. The parties' agreement is entitled "Agreement Regarding Equity Redetermination Process," Chevron Ex. 5, and is also referred to as the "Equity Process Agreement" or the "EPA."

Under the Equity Process Agreement, the ASFE makes final equity determinations for each geological zone. Chevron Ex. 5, at 3-7. The parties first make presentations to an Independent Petroleum Engineer (IPE), who then makes a preliminary recommendation. *Id.* at 3 (EPA ¶ B.1). After the parties comment on the preliminary recommendation, the IPE makes a final recommendation, and the parties have an opportunity to comment. *Id.* (EPA ¶ B.2). The ASFE issues a preliminary determination, the parties have an opportunity to comment, and the ASFE issues a final determination. *Id.* (EPA ¶¶ 3-6). If the ASFE accepts the IPE recommendation, the matter is final and not appealable. *Id.* (EPA ¶ 7). If

the ASFE rejects the IPE recommendation on a given issue, Chevron may appeal that issue to OHA. *Id.* Similarly, if an Independent Legal Advisor (ILA) and the ASFE reject Chevron's position on a legal issue, Chevron may appeal that issue to OHA. *Id.* (EPA ¶ 11.)

In 2002, after receiving the IPE recommendation and the parties' comments, the Principal Deputy ASFE (hereinafter also referred to as the ASFE) issued a determination on the Stevens Zone – the Unit's largest producing zone. Chevron Ex. 13 (2002 ASFE determination). Chevron appealed, challenging the ASFE's "conversion" methodology, *i.e.,* the methodology for converting the parties' respective volumes of gas (in million cubic feet or "mcf") to barrel-of-oil equivalents (BOEs), the measure of "hydrocarbons" underlying the parties' respective lands. The ASFE used the average of two conversion factors: one based on relative 1996-1998 prices ("current prices"), and one based on relative thermal value (expressed in British Thermal Units or BTUs). 2002 ASFE Determination at 15-22. Chevron appealed the determination to OHA, arguing that the conversion factor should be based on relative 1942 prices.

In 2005, we granted the Chevron appeal in part. *Chevron*, Case No. TEA-0001 (2005) (the 2005 OHA Decision). We rejected the ASFE and Chevron methodologies. We reasoned that the methodology for calculating participating percentages must be consistent with the UPC's provision for each party's eventual receipt of its 1942 volume of hydrocarbons. *Id.* at 5. We further reasoned that, to accomplish that result, the conversion factor must be based on the prices received for the Unit's production." *Id.* at 6. We provided an example showing that if the conversion factor were not based on weight-averaged prices over the life of the Unit, the parties would not receive revenues consistent with their 1942 share of hydrocarbons. *Id.* at 6-7.

Based on the foregoing, the 2005 OHA Decision remanded the matter to the ASFE for a revised determination. *Id.* at 11. The 2005 OHA Decision stated:

> As part of the remand, the [ASFE] should prepare a schedule with the following information:
>
> (a) the Unit's revenues in each month,
> (b) the Unit's revenues in each month as

> a percentage of total revenues,
> (c) the per barrel price of oil in each month,
> (d) the per thousand cubic feet price of gas in each month,
> (e) the ratio of the price of gas to oil in each month,
> (f) the result of multiplying (b) by (e), and
> (g) the sum of the entries in column (f).
>
> Item (g) is a conversion factor based on the weight-averaged monthly relative price of gas and oil. If the [ASFE] determines that for technical reasons Item (g) is not the most accurate weight-averaged conversion factor, the [ASFE] should explain why. In any event, [Chevron] may appeal to this Office any determination reached by the [AFSE].

Id. at 11-12. As the foregoing indicates, the 2005 OHA Decision required that the ASFE prepare a schedule showing the calculation of a conversion factor based on revenue-weighted monthly price ratios (hereinafter the 2005 formula) and explain the basis for any ASFE objection to the use of the resulting conversion factor. Finally, the 2005 OHA Decision provided that "[i]n any event," Chevron could appeal the resulting ASFE determination. *Id.* at 12.

In 2006, the ASFE issued a preliminary determination concerning the OHA remand (the 2006 ASFE Preliminary Determination). Chevron Ex. 17. The ASFE discussed the process leading to that preliminary determination. After the issuance of the 2005 OHA Decision, the parties engaged in a process to consider how the ASFE should implement the 2005 decision. *Id.* at 2-4. Each party had an "equity team" that provided its views to an ASFE "headquarters equity advisory team" (the ASFE advisory team). *Id.* The matter was not referred to the IPE, who had resigned his position in 2005. *See* Chevron Mot. for Stay, Case No. TES-0010, at 7.

In 2006, the ASFE advisory team prepared a report, setting forth its technical analysis (the 2006 ASFE Advisory Team Report). Chevron Ex. 19. The ASFE advisory team stated that the 2005 formula was "imprecise" for various technical reasons related to the formula's use of revenue-weighted monthly price ratios. 2006 ASFE Advisory Team Report at 2.

The ASFE advisory team cited as "a more accurate approach" the formula proposed by the DOE equity team, using weighted average prices. *Id.* at 3. Nonetheless, the ASFE advisory team recommended the 2005 formula, viewing it as a "requirement" of the 2005 OHA Decision. *Id.* at 16.

The ASFE advisory team then discussed its view of the technical issues associated with using the 2005 formula, two of which are relevant to the instant appeal. First, for months in which a hydrocarbon was not sold, the ASFE advisory team declined to impute a sale price, which precluded a price ratio and resulted in the exclusion of the month from the calculation (the excluded months issue). 2006 ASFE Advisory Team Report at 4. Second, for the determination of gas prices, the ASFE advisory team calculated a composite "wet" gas price, *i.e.,* a price that consisted of two components – a dry gas price and a value for natural gas liquids (NGLs) (the NGL issue).

Shortly after the ASFE advisory team issued its report, the ASFE issued the 2006 Preliminary Determination. The ASFE stated that the 2005 OHA decision required the use of revenue-weighted monthly price ratios. 2006 Preliminary Determination at 2. The ASFE addressed various technical issues concerning the implementation of that approach. The ASFE agreed with the ASFE advisory team on the excluded months issue, stating that he did not "see a technically defensible methodology for creating a monthly price ratio" where sales of both oil and gas did not occur. *Id.* at 7-8. The ASFE also agreed with the ASFE advisory team on the NGL issue, stating that the inclusion of NGLs in gas prices was a settled issue. *Id.* at 6, 8.

Both parties filed comments and, in 2007, the ASFE issued his final determination. Chevron Ex. 18 (the ASFE 2007 Final Determination). The ASFE reiterated his view that the 2005 OHA Decision required a calculation based on revenue-weighted monthly sale price ratios. *Id.* at 2. He then addressed various technical issues, adopting his preliminary determination on the excluded months and NGL issues. *Id.* at 2-5. The result was to raise Chevron's equity interest from 19.4575 percent to 19.6460 percent. *Compare* 2002 Determination at 31, *with* 2007 Determination at 5.

Following the 2007 ASFE Determination, Chevron filed a Notice of Appeal, which included the following issue:

> Whether there are technical reasons that the conversion factor established by the formula in OHA's 2005 decision is not the most accurate weight-averaged conversion factor.

Notice of Appeal at 3. After DOE filed a Partial Motion to Dismiss, Chevron redefined that issue. Chevron argued that the 2005 formula was accurate and that the ASFE erred in implementing the formula with respect to the excluded months and NGL issues. Chevron Resp. (Mot. to Dismiss) at 17. In the alternative, Chevron argued that if the ASFE accurately implemented the 2005 formula, then the formula was not consistent with the logic of the 2005 OHA decision. *Id.* at 19.

In a 2008 interlocutory decision, we noted that Chevron was free to challenge the 2005 formula. We stated:

> In the 2005 OHA decision, we recognized that there may be technical reasons why the decision's formula may not produce the most accurate weight-averaged conversion factor. If Chevron does argue that there is a more accurate formula, Chevron should include a discussion of the alternative formula proposed by the DOE in proceedings before the ASFE.

Chevron USA Inc., Case No. TEZ-0010, at 5 (2008). As explained below, Chevron argues that consideration of any alternative formula is foreclosed by the 2005 OHA Decision and the 2007 ASFE Determination.

In its opening brief, Chevron argued that the ASFE erred in his implementation of the 2005 formula with respect to the excluded months and NGL issues. In response, DOE argued that there is a more accurate formula – based on weighted average prices - that would not give rise to those issues, and DOE requests that we adopt that formula. In the alternative, DOE argued that the ASFE determination represents a reasonable, technical judgment of how to implement the 2005 formula that should be upheld. In reply, Chevron argued that the 2005 formula is a settled issue and, therefore, the issues properly considered in this appeal are Chevron's challenges to the ASFE's implementation of the formula with respect to the excluded months and NGL issues. Oral argument on these issues was held on March 5, 2009.

II. The Applicable Standard

The parties agree that the Equity Process Agreement governs Chevron's appeal of the 2007 ASFE Determination. Paragraph B.8 of the Agreement provides that if OHA remands "a specific issue back to the ASFE for further determinations in accordance with OHA's instructions," Chevron "shall have the right to challenge any further determination of the ASFE on such remand" pursuant to Paragraph 7 of the Agreement. *See* Chevron Ex. 5 at 5 (Equity Process Agreement ¶ B.8). Paragraph 7 refers to appeals from ASFE determinations in the first instance and provides that the standard of review is that set forth in the Administrative Procedures Act, 5 U.S.C. §706, and the Wunderlich Act, 41 U.S.C. §§ 321, 322. Chevron Ex. 5 at 4.

III. Analysis

In this interlocutory decision, we discuss the issues raised by the parties. In light of that discussion, we require additional briefing.

A. The 2005 Formula

As mentioned above, the 2005 formula is based on revenue-weighted monthly sale price ratios. Chevron's objections, discussed below, illustrate that the 2005 formula is not fully aligned with the analysis in the 2005 OHA Decision and the IPE's treatment of NGLs.

As noted above, Chevron objects to the ASFE's refusal to impute sale prices in months in which sales did not occur. One of Chevron's objections is that this is "illogical," given the 2005 formula's inclusion of months in which only small sales occurred. Chevron Br. at 22. This argument illustrates a fundamental characteristic of the 2005 formula, i.e., that it weights the monthly price ratios based on revenues, regardless of the relative contribution of oil and gas to those revenues. Thus, two months with the same price ratios and the same revenues will have the same revenue-weighted monthly sale price ratios, even if one month's revenues are attributable mostly to gas and the other month's revenues are attributable mostly to oil. In this respect, the 2005 formula is not completely aligned with the 2005 OHA decision's discussion of the use of weighted average prices. 2005 OHA Decision at 6-7.

Similarly, Chevron's challenge to the ASFE's inclusion of NGLs in the gas prices illustrates that the formula is not completely aligned with the IPE treatment of NGLs. It is undisputed that in the proceedings leading to the 2002 ASFE Determination, the IPE recommended the inclusion of certain NGLs (associated with gas cap and solution gas) in gas prices. It is also undisputed that the ASFE accepted that recommendation. *See, e.g.,* Chevron Br. at 13, DOE Resp. Br. at 2. Finally, it is undisputed that the 2005 formula does not permit the IPE's treatment of NGLs, instead requiring an all-or-nothing treatment, i.e., that the gas price includes a value reflecting all NGLs or the gas price does not include a value for NGLs. *See, e.g.,* Chevron Br. at 13; DOE Resp. Br. at 2.

Given the foregoing, we question whether the 2005 formula produces the most accurate conversion factor. DOE argues for a formula based on weighted average prices. Chevron previously asked for such a formula as an alternative form of relief.[2] As explained above, however, Chevron now argues that, for a variety of reasons, consideration of an alternative conversion formula is foreclosed and we are limited to upholding the ASFE implementation of the formula on the excluded months and NGL issues.

B. Whether Consideration of an Alternative Formula is Foreclosed

Chevron argues that the 2005 OHA Decision requires use of the 2005 formula. In support of that argument, Chevron cites the ordering paragraph stating that gas reserves shall be converted based on revenue-weighted monthly price ratios.

This argument ignores the decision's context and language. In the prior appeal proceeding, the parties did not brief the issue of whether the conversion factor should be based on prices over the life of the Unit, let alone the implementing formula. Chevron, Case No. TEA-0001, at 6. Although the 2005 OHA Decision required that the ASFE prepare a schedule utilizing a particular formula, the

[2] In its appeal of the 2002 ASFE Determination, Chevron stated that if OHA rejected its position on 1942 prices, OHA "should order that there be no conversion, or it should apply a conversion factor based on the actual historical values of gas and oil, weighted according the quantities produced over the life of the contract." Chevron Reply Br. at 29, Case No. TEA-0001.

decision specifically stated that if the ASFE determined that the resulting conversion factor was not the most accurate conversion factor, he should explain why. The decision allowed that "in any event" Chevron could appeal the resulting determination to OHA. *Id.* at 12. It would be illogical to require the ASFE to utilize the 2005 formula yet give Chevron the right to appeal the formula.

Chevron next argues that, even if the 2005 OHA decision did not require the use of the 2005 formula, the 2007 ASFE determination reflects his independent assessment that the 2005 formula produces the most accurate conversion factor. This argument lacks merit. As an initial matter, we note that the ASFE advisory team advised the ASFE that, in its view, the 2005 formula was not the most accurate conversion formula. Chevron Ex. 19 at 2-3. More importantly, the ASFE stated, in both the preliminary and final decisions, that he viewed, as a "central holding" of the 2005 OHA decision, a requirement that he use the formula's methodology of revenue-weighted price sale ratios. Chevron Ex. 17 at 2; Chevron Ex. 18 at 2. There is nothing in the determination to indicate that the ASFE made an independent assessment that the 2005 formula produced the most accurate conversion factor.

Finally, Chevron argues that, regardless of the ASFE's view of the formula, the formula is a settled issue under the Equity Process Agreement. Chevron states that issues not appealed are final and that Chevron did not appeal the formula. This argument too lacks merit. As an initial matter, we note that Chevron's Notice of the Appeal raised the issue whether the formula produced the most accurate conversion factor. Notice of Appeal at 3.[3] Chevron later argued that if the ASFE correctly implemented the formula then the formula did not implement the logic of the decision. *See, e.g.,* Chevron Resp. to DOE Motion to

[3] Chevron identified the following issue:

> Whether there are technical reasons that the conversion factor established by the formula in OHA's 2005 decision is not the most accurate weight-averaged conversion factor.

Notice of Appeal at 3, *quoted in Chevron,* Case No. TEZ-0010, at 4.

Dismiss, *cited in Chevron,* Case No. TEZ-0010, at 4-5. More importantly, Chevron's objections to the ASFE's implementation of the formula illustrate that the formula is not fully aligned with the logic of our decision and prior proceedings, and the ASFE's use of the formula resulted from his misunderstanding of the 2005 OHA Decision and resulting failure to render a determination "in accordance with OHA's remand instructions." Chevron Ex. 5 at 5 (EPA ¶ B.8). Given these circumstances, the Equity Process Agreement does not preclude our consideration of whether the 2005 formula produces the most accurate conversion factor.

C. Further Briefing

The parties have not fully briefed issues on the proper methodology for calculating the conversion factor. Chevron has not done so, because it took the position that the consideration of an alternative formula was foreclosed. DOE, while arguing for the use of weighted average prices based on production, has not fully briefed why the use of production volumes, rather than sales volumes, produces the more accurate conversion factor. Accordingly, Chevron should file a brief setting forth its views on the merits of the respective approaches to using prices over the life of the Unit: (i) weighted monthly price ratios and (ii) weighted average prices. DOE will have a chance to respond, and Chevron to reply. Both parties should include a discussion of (i) whether the Unit's termination prior to the production of all recoverable hydrocarbons affects the operation of the formulas and (ii) which formula is best aligned with the UPC and the logic of the 2005 OHA Decision.

The parties should also brief the impact of the absence of the IPE from the remand proceeding. With respect to the treatment of NGLs, the parties strenuously dispute the percentage of NGL revenues attributable to gas versus oil, citing various IPE analyses leading to the 2002 ASFE Determination. Despite the obvious relevance of the IPE's views on this issue, we have no IPE recommendation concerning how to treat NGLs under the 2005 formula or whether the 2005 formula produces the most accurate conversion factor. It appears to us that the Equity Process Agreement does not contemplate OHA consideration of technical issues, except in the instances where the ASFE has rejected an IPE recommendation. *See* Chevron Ex. 5 at 4 (EPA ¶ 7). The parties should brief whether the choice of the most accurate formula is a technical determination that

requires IPE participation and, if so, the appropriate action from this office concerning the appeal.

IT IS THEREFORE ORDERED THAT:

(1) The parties shall brief the issues identified in Part III.C. of this Interlocutory Order.

(2) The parties shall file a proposed briefing schedule within 21 days of this Interlocutory Order.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: September 2, 2009

Department of Energy
Washington, DC 20585

JUL 23 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Cumberland County, Maine

Date of Filing: July 10, 2009

Case Number: TGA-0001

This decision considers an Appeal filed by Cumberland County, Maine (Cumberland County) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Cumberland County seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, Cumberland County would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible

unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, Cumberland County states that it believes it was denied eligibility to apply for EECBG Program funding based on a determination that it is incapable of carrying out activities prescribed by the EISA. Cumberland County asserts in its Appeal, however, that this finding is incorrect and that "[o]ur county does, in fact, have the jurisdiction and functional capabilities to implement the broad range of programs identified by EISA." Appeal at 1. Cumberland County further contends that it otherwise meets the requirements for EECBG eligibility, specifically that the county (1) is a unit of local government identified in 2007 GID, (2) meets the required EISA population threshold based upon 2007 U.S. Census estimates, and (3) has a governance structure consisting of elected officials and a governing body.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Cumberland County and have determined that its Appeal should be granted. For the reasons discussed below, we find that Cumberland County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Cumberland County is one of 16 county governments in the State of Maine listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Cumberland County therefore meets this criterion.

(2) Population

As noted in its Appeal, Cumberland County is the most populous county in the State of Maine, with a population of 275,374 according to 2007 U.S. Census county population data. Under the State and Local Grant Allocations listing published by DOE on April 15, 2009, there are four cities within Cumberland County that have been determined eligible to receive EECBG funding. See Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A. These are the cities of Town of Brunswick (2007 Census population 21,806), Portland (2007 Census population 62,825), Town of Scarborough (2007 Census population 18,983), and South Portland (2007 Census population 23,748). Cumberland County notes correctly in its Appeal, however, that "[e]ven subtracting the populations of our four municipalities receiving EECBG funds we are the 2nd most populous county in the state of Maine." Appeal at 1.[2] We, therefore, find that Cumberland County satisfies the population requirement of the EISA.

(3) Governance Structure

Cumberland County states in its Appeal that it has a "Commission-Manager" governance structure. More specifically, Cumberland County states that it has three County Commissioners, elected by popular vote to four-year staggered terms in each of three single member districts. According to Cumberland County, the Commission is "the policy-making body of the county." Appeal at 1. In addition, Cumberland County has a County Manager who manages the activities of more than 400

[2] Excluding the populations of its four eligible cities, Cumberland County would have a 2007 balance population of 148,012 second only to York County which has s 2007 Census population of 158,495 after excluding the populations of two cities situated in York County (Biddeford and Town of Sanford) which have been determined eligible for the EECBG program.

county employees. *Id.*[3] Based upon this information, we find that Cumberland County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

In its Appeal, Cumberland County argues that the county was initially denied EECBG eligibility based upon DOE's supposition that it does not have the functional capability to administer one or more of the broad range of activities specified in the EISA. As stated in the implementing DOE Federal Register Notice: "As defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 Fed. Reg. at 17462. However, we find that Cumberland County has presented sufficient supporting information and evidence in its Appeal to rebut that presumption.

Cumberland County has an annual budget of $38 million. According to its Appeal, the county's jurisdiction and responsibilities include a 500-bed jail, two of the largest Registries of Probate and Deeds in New England, the District Attorney's Office, a county- and federally-funded Domestic Violence Program, and a 6,500 seat County Civic Center. Appeal at 2. In addition, Cumberland County provides law enforcement for 14 of its 28 municipalities and emergency management services for the entire county. Cumberland County is also responsible for the management of over 300,000 square feet of public facilities including the regional court. *Id.*[4]

Perhaps most significant, however, is that Cumberland County already receives and administers federal block grant funds from the U.S. Department of Housing and Urban Development (HUD). Cumberland County states in its Appeal that it is the only New England county that has been designated an Urban Entitlement County. Cumberland County states that, in this capacity, the county receives over $2 million annually in Community Development Block Grant (CDBG) and HOME funds from HUD. Appeal at 3. Cumberland County asserts that "[t]hrough this program, the County has funded dozens of municipal projects, as well as created region-wide programs for weatherization, housing and homelessness . . . [and] also provides grants totaling several hundred thousands of dollars annually to social service agencies." *Id.* Cumberland County further states that, during the past five years, it has created a regional Public Health Council and a regional board to oversee distribution of CDBG and HOME funds. *Id.*

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[3] Cumberland County also notes that it has six other officials who are elected county-wide: District Attorney, Sheriff, Judge of Probate, Registrar of Probate, Registrar of Deeds and Treasurer. Appeal at 2.

[4] On July 17, 2009, Cumberland County supplemented its submission with a copy of its 2009 County Budget which corroborates the financial data summarized in its Appeal.

Based upon the foregoing, we are satisfied that Cumberland County has the functional capability to carry out one or more of the broad activities outlined in the EISA.[5]

It Is Therefore Ordered That:

(1) The Appeal filed by Cumberland County, Maine, on July 10, 2009, is hereby granted.

(2) Cumberland County will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals
Date: JUL 23 2009

[5] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. 17154.

Department of Energy
Washington, DC 20585
AUG 19 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Broward County, Florida

Date of Filing: July 14, 2009

Case Number: TGA-0002

This decision considers an Appeal filed by Broward County, Florida (Broward County) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Broward County seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, Broward County would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible

unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, Broward County contends that DOE inappropriately failed to identify the county as eligible to apply for funding under the EECBG Program. According to Broward County, it was denied eligibility because 18 cities[2] out of 31 incorporated cities situated within the county were

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[2] In its initial filing, Broward County inadvertently failed to list the city of Hallandale Beach, and stated that there were only 17 cities within the county that had qualified to receive EECBG Program funding. However, in an Addendum filed on July 23, 2009, Broward County corrected its appeal and revised its figures to indicate that there are indeed 18 cities within the county that have been designated by DOE to receive funding under the EECBG Program.

determined eligible to receive EISA funding. Appeal at 1; *see* Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A. Notwithstanding, Broward County argues that it should be allowed to apply for funding under the EECBG Program. Broward County points out that it is the 17th most populous county in the nation. Appeal at 2. In addition, Broward County asserts that as the regional government, it is the governmental entity charged with developing and implementing environmental programs on a countywide basis. *Id.* Broward County further states that as a county government with 31 incorporated cities, it has responsibility for managing for an international seaport, airport, an extensive library system, parks, transit, street lights, infrastructure and various public works projects. According to Broward County, "[a]ll of these areas of responsibility include initiatives designed to improve energy efficiency, reduce greenhouse gases, and improve sustainability." *Id.*

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Broward County and have determined that its Appeal must be denied. Broward County is a unit of local government identified in 2007 GID, and clearly has the governance structure and functional capability to carry out the broad range of activities specified in the EISA. However, as explained below, Broward County fails to meet the EISA population requirement based upon 2007 U.S. Census estimates, as implemented by DOE.

As explained in the April 15, 2009, Federal Register notice, DOE used the "county balance population" to determine eligibility for the EECBG Program:

> In evaluating county populations for eligibility for direct formula grants, DOE will not include the populations of cities located within county boundaries that are eligible for direct formula grants from DOE. For the purpose of this program, this population is referred to as the "county balance population." In determining the formulas for funding distribution, DOE has determined that the EECBG Program achieves the most equitable funding allocations if done on a per capita basis. By removing the population of an eligible city from a county population, DOE has reduced the instances of double-counting persons who live in both an eligible city, which is located in an eligible county. DOE's implementation approach is consistent with the approach developed by the Community Development Block Grant Program (CDBG) administered by the Department of Housing and Urban Development (HUD).

74 Fed. Reg. at 17462.

According to the 2007 Census estimates data utilized by DOE, Broward County had a 2007 population of 1,759,591, while the respective 2007 populations of the 18 cities within the county that have been determined to be eligible for EECBG Program funding are as follows:

City	Population
Coconut Creek	50,321
Coral Springs	126,875
Davie, Town of	90,329
Deerfield Beach	74,573
Fort Lauderdale	183,606
Hallandale Beach	38,634
Hollywood	142,473
Lauderhill	67,565
Margate	54,602
Miramar	108,240
North Lauderdale	41,832
Oakland Park	42,151
Pembroke Pines	146,828
Plantation	84,370
Pompano Beach	102,745
Sunrise	89,787
Tamarac	59,668
Weston	64,157
Total	1,568,756

Deducting this amount from Broward County's 2007 population leaves a county balance population of 190,835 (1,759,591 - 1,568,756 = 190,835).[3] Thus, Broward County is below the 200,000 population threshold for county eligibility specified in the EISA. *See* 42 U.S.C. 17151. In addition, Broward County fails to satisfy the alternative means for meeting county eligibility under the EISA, i.e. one of the ten highest populated counties in the State, since its county balance population drops the county from being the second most populous county (behind Miami-Dade County), to the 19th most populous county in Florida.[4]

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[3] In its appeal, Broward County calculates a county balance of 189,379. *See* Appeal Addendum. Apparently, Broward County incorrectly utilized 2007 population estimates as adjusted by the U.S. Census Bureau in 2008. However, this discrepancy does not affect the outcome of this decision. Using either county balance figure, Broward County is below the 200,000 threshold and not within the top ten county balance populations in the State, as required and specified in the EISA.

[4] Broward County becomes the 19th most populous county based upon county balance populations after deducting the 2007 populations of 69 Florida cities determined to be eligible to apply of EECBG Program funding, from the populations of the respective counties in which they are situated.

The June 24, 2009, Federal Register notice that established the present appeal process provides specifically that issues regarding DOE's methodology for determining city or county population are not appealable, noting "[f]or example, the decision by DOE to exclude the population of an eligible city from the population of the county in which the city is located is not reviewable on appeal." 74 Fed. Reg. at 30063-64. We do not question Broward County's claims that it carries a high level of responsibility in managing and overseeing various programs and facilities on behalf of its citizenry. However, these equitable arguments are insufficient to overcome the population requirements clearly established by the EISA. Accordingly, Broward County's appeal must be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Broward County, Florida, on July 14, 2009, is hereby denied.

(2) This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: AUG 19 2009

Department of Energy
Washington, DC 20585

AUG 13 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Aroostook County, Maine

Date of Filing: July 16, 2009

Case Number: TGA-0003

This decision considers an Appeal filed by Aroostook County, Maine (Aroostook County) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Aroostook County seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, Aroostook County would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible

unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, Aroostook County states that it believes it was denied eligibility to apply for EECBG Program funding based on a determination that it is incapable of carrying out activities prescribed by the EISA. Aroostook County asserts in its Appeal, however, that this finding is incorrect and that "[o]ur county does have the jurisdiction and functional capabilities to implement the broad range of programs identified by EISA." Appeal at 1. Aroostook County further contends that it otherwise meets the requirements for EECBG eligibility, specifically that the county (1) is a unit of local government identified in 2007 GID, (2) meets the required EISA population threshold based upon 2007 U.S. Census estimates, and (3) has a governance structure consisting of elected officials and a governing body.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Aroostook County and have determined that its Appeal should be granted. For the reasons discussed below, we find that Aroostook County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Aroostook County is one of 16 county governments in the State of Maine listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Aroostook County therefore meets this criterion.

(2) Population

As noted in its Appeal, Aroostook County has a population of over 73,000 people. According to 2007 U.S. Census county population data, the population of Aroostook County in 2007 was 72,047. Under the State and Local Grant Allocations listing published by DOE on April 15, 2009, no cities or towns located within Aroostook County were determined to be eligible to receive EECBG funding. *See* Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A. When compared to other Maine counties whose populations are adjusted by subtracting the population of municipal recipients of EECBG funds, Aroostook County is the fifth most populous county in the state of Maine. We, therefore, find that Aroostook County satisfies the population requirement of the EISA as one of the ten most populous counties in the State.

(3) Governance Structure

Aroostook County states in its Appeal that it has a "Commissioner/Manager" governance structure. More specifically, Aroostook County states that it has three County Commissioners, elected by popular vote from three single member-electoral districts. According to Aroostook County, the Board of Commissioner is "the policy-making body of the county." Appeal at 1-3. In addition, Aroostook County has a County Administrator who manages the activities of more than 180 county employees. *Id.*[2] Based upon this information, we find that Aroostook County has the requisite governance structure to receive EECBG funds.

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[2] Aroostook County also notes that there are six other officials who are elected county-wide: District Attorney, Sheriff, Judge of Probate, Registrar of Probate, Registrar of Deeds and Treasurer. Appeal at 3.

(4) Functional Capability

In its Appeal, Aroostook County argues that the county was initially denied EECBG eligibility based upon DOE's supposition that it does not have the functional capability to administer one or more of the broad range of activities specified in the EISA. As stated in the implementing DOE Federal Register Notice: "As defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 Fed. Reg. at 17462. However, we find that Aroostook County has presented sufficient supporting information and evidence in its Appeal to rebut that presumption.

Aroostook County has an annual county budget of more than $7.3 million and an "unorganized territory" budget of an additional $1.2 million. According to its Appeal, the County's jurisdiction and responsibilities include a 66-bed jail, Registries of Probate and Deeds, the District Attorney's Office, and the Sheriff's Office, which provides law enforcement to 47 municipalities and unorganized territories. The County also has a Workforce Investment Office, the Office of County Commissioners, and an Emergency Management Agency which provides emergency management for the entire county. Appeal at 3.[3] Aroostook County is also responsible for the management of over 76,000 square feet of public facilities, including the county courthouse, the superior court building, the registry of deeds building, the emergency management building, the sheriff's office building, the county jail, and the county maintenance garage.

Perhaps most significant, however, is that since 2001, Aroostook County has administered a federally funded program under the Workforce Investment Act (WIA) for both Aroostook County and neighboring Washington County. The annual WIA funding allotments have fluctuated between $1.1 and $1.6 million, and, recently, the County's WIA program received an additional $800,000 in Federal Recovery Act funding. The administration of this program is effectuated through an executive director position, a county administrator (who provides supervision), and a county commissioner (who functions as the chief local elected official). Local policy is directed through a 33 member board. The County of Aroostook provides rental space for the program and receives administrative fees for its role in providing supervision, payroll, human resources, and accounting functions to the program. Over the past several years, Aroostook County also has received Community Development Block Grant funding, Victim Witness Advocate program funding administered through the County's District Attorney's Office, and federal "Edward Byrne Memorial Justice Assistance Grants" and other federal law enforcement funding administered through the Sheriff's Office. The Aroostook County Administrator asserts that the County's experience in administering federal and state funding amounting to millions of dollars indicates that the County

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[3] On August 3, 2009, Aroostook County supplemented its submission with a copy of its 2009 Budget Summary which corroborates annual revenues and projected county expenditures of $7.34 million, and an additional $1.23 million in total projected expenditures for the county's unorganized territories.

will be adept at using energy efficiency funds in a conscientious and prudent manner. *See* July 31, 2009 e-mail from Aroostook County's County Administrator to Kent S. Woods, OHA attorney.

Based upon the foregoing, we are satisfied that Aroostook County has the functional capability to carry out one or more of the broad activities outlined in the EISA.[4]

It Is Therefore Ordered That:

(1) The Appeal filed by Aroostook County, Maine, on July 16, 2009, is hereby granted.

(2) Aroostook County will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application

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[4] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. 17154.

requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals
Date:

AUG 13 2009

Department of Energy
Washington, DC 20585

AUG 14 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Kennebec County, Maine

Date of Filing: July 21, 2009

Case Number: TGA-0004

This decision considers an Appeal filed by Kennebec County, Maine (Kennebec County) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Kennebec County seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, Kennebec County would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible

unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, Kennebec County states that it believes it was denied eligibility to apply for EECBG Program funding based on a determination that it is incapable of carrying out activities prescribed by the EISA. Kennebec County asserts in its Appeal, however, that this finding is incorrect and that "[o]ur county does have the jurisdiction and functional capabilities to implement the broad range of programs identified by [the EISA]." Appeal at 1. Kennebec County further contends that it otherwise meets the requirements for EECBG eligibility, specifically that the county (1) is a unit of local government identified in 2007 GID, (2) meets the required EISA population threshold based upon 2007 U.S. Census estimates, and (3) has a governance structure consisting of elected officials and a governing body.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Kennebec County and have determined that its Appeal should be granted. For the reasons discussed below, we find that Kennebec County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Kennebec County is one of 16 county governments in the State of Maine listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Kennebec County therefore meets this criterion.

(2) Population

As noted in its Appeal, Kennebec County has a year round population of over 117,000 people. According to 2007 U.S. Census county population data, the population of Kennebec County is 120,839. Under the State and Local Grant Allocations listing published by DOE on April 15, 2009, the city of Augusta (population 18,367), located within Kennebec County, has been determined eligible to receive EECBG funding. *See* Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A. After subtracting the population of this municipal recipient of EECBG funds, Kennebec County's balance population is 102,472. When compared to other Maine counties whose populations are adjusted in a similar manner, Kennebec County is the fourth most populous county in the state of Maine. We, therefore, find that Kennebec County satisfies the population requirement of the EISA.

(3) Governance Structure

Kennebec County states in its Appeal that it has a "Commissioner/Administrator" governance structure. More specifically, Kennebec County states that it has three County Commissioners, elected by popular vote from three single member-electoral districts. According to Kennebec County, the Board of Commissioner is "the policy-making body of the county." Appeal at 2. In addition, Kennebec County has a County Administrator who manages the activities of more than 180 county employees. *Id.*[2] Based upon this information, we find that Kennebec County has the requisite governance structure to receive EECBG funds.

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[2] Kennebec County also notes that it has six other officials who are elected county-wide: District Attorney, Sheriff, Judge of Probate, Registrar of Probate, Registrar of Deeds and Treasurer. Appeal at 2.

(4) Functional Capability

In its Appeal, Kennebec County argues that the county was initially denied EECBG eligibility based upon DOE's supposition that it does not have the functional capability to administer one or more of the broad range of activities specified in the EISA. As stated in the implementing DOE Federal Register Notice: "As defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 Fed. Reg. at 17462. However, we find that Kennebec County has presented sufficient supporting information and evidence in its Appeal to rebut that presumption.

Kennebec County has an annual budget of more than $10 million. According to its Appeal, the county's jurisdiction and responsibilities include a 180-bed jail, Registries of Probate and Deeds, the District Attorney's Office, and the Sheriff's Office, which provides law enforcement for 24 of the county's 29 municipalities and emergency management for the entire county. Appeal at 3.[3] Kennebec County is also responsible for the management of over 98,000 square feet of public facilities, including the county courthouse, the administration building, and the county jail.

Perhaps most significant, however, is that over the past six years, Kennebec County has received and administered federally funded grants in amounts totaling several hundred thousand dollars. During the years 2008 through 2010, Kennebec County received a total of $250,000 in grants from the U.S. Department of Justice (USDOJ) to fund justice-related crisis and counseling programs. The USDOJ also provides Kennebec County with annual grants of $25,000 to $50,000 to help fund its drug enforcement activities, to improve its criminal justice system (Byrne Justice Assistance Grant), and to fund the investigation of elder abuse (Program CFDA 16.588). From 2004 through 2007, Kennebec County managed and administered about $400,000 in Homeland Security funds granted to the State of Maine and passed through to the county. These Homeland Security funds were distributed to local agencies after the county held public hearings and conducted goal setting sessions with local officials. Kennebec County's administrator asserts that the county's "experience administering and implementing [grant] funded programs positions us to successfully plan and execute energy efficiency projects." *See* Kennebec County's August 5, 2009, submission.

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[3] On August 5, 2009, Kennebec County supplemented its submission with a copy of expenditure summaries for its 2007, 2008 and 2009 Budgets which corroborate the $10 million annual budget figure cited in its Appeal.

Based upon the foregoing, we are satisfied that Kennebec County has the functional capability to carry out one or more of the broad activities outlined in the EISA.[4]

It Is Therefore Ordered That:

(1) The Appeal filed by Kennebec County, Maine, on July 21, 2009, is hereby granted.

(2) Kennebec County will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals
Date: AUG 14 2009

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[4] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. 17154.

Department of Energy
Washington, DC 20585

AUG 14 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Androscoggin County, Maine

Date of Filing: July 21, 2009

Case Number: TGA-0005

This decision considers an Appeal filed by Androscoggin County, Maine (Androscoggin County) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Androscoggin County seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, Androscoggin County would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

as an "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible

unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, Androscoggin County states that it believes it was denied eligibility to apply for EECBG Program funding based on a determination that it is incapable of carrying out activities prescribed by the EISA. Androscoggin County asserts in its Appeal, however, that this finding is incorrect and that "[o]ur county does, in fact, have the jurisdiction and functional capabilities to implement the broad range of programs identified by EISA." Appeal at 1. Androscoggin County further contends that it otherwise meets the requirements for EECBG eligibility, specifically that it is (1) is a unit of local government identified in 2007 GID, (2) meets the required EISA population threshold based upon 2007 U.S. Census estimates, and (3) has a governance structure consisting of elected officials and a governing body.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Androscoggin County and have determined that its Appeal should be granted. For the reasons discussed below, we find that Androscoggin County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Androscoggin County is one of 16 county governments in the State of Maine listed in the 2007 Governments Integrated Directory. See http://harvester.census.gov/gid/gid_07/options.html. Androscoggin County therefore meets this criterion.

(2) Population

Androscoggin County is the fifth most populous county in the State of Maine, with a population of 106,815, according to 2007 U.S. Census county population data. Under the State and Local Grant Allocations listing published by DOE on April 15, 2009, there are two cities within Androscoggin County that have been determined eligible to receive EECBG funding. See Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A. These are the cities of Auburn (2007 Census population 23,203), and Lewiston (2007 Census population 35,234). After subtracting the populations of these two cities, Androscoggin County is the 9th most populous county in the state of Maine, with a population balance of 48,378. We, therefore, find that Androscoggin County satisfies the population requirement of the EISA.

(3) Governance Structure

Androscoggin County states in its Appeal that it has a "Commissioner" governance structure. More specifically, Androscoggin County states that it has three County Commissioners, elected by voters from three [single-member] districts. The Commissioners are the policy making body of the Androscoggin and manage 100 employees. Based upon this information, we find that Androscoggin County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

In its Appeal, Androscoggin County argues that it was initially denied EECBG eligibility based upon DOE's supposition that it does not have the functional capability to administer one or more of the broad range of activities specified in the EISA. As stated in the implementing DOE Federal Register Notice: "As defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 Fed. Reg. at 17462. However, we find that Androscoggin County has presented sufficient supporting information and evidence in its Appeal to rebut that presumption.

Androscoggin County has an annual budget of $9,800,000.[2] According to its Appeal, Androscoggin County's jurisdiction and responsibilities include a 160-bed jail, Registry of Probate and Registry of Deeds, the District Attorney's Office, and a county- and federally-funded domestic violence coordinator. The Androscoggin County provides law enforcement for 8 of its 14 municipalities, as well as 911 services for 12 municipalities, fire and rescue dispatch services for 6 municipalities, law enforcement dispatch services for 10 municipalities and emergency management for the entire County. Appeal at 1. Androscoggin County further states in its August 4, 2009, submission that it is responsible for management of approximately 140,000 square feet of public facilities, including the Androscoggin County courthouse and the jail.

Androscoggin County also lists other programs it has administered with funds derived from state and/or federal grants. This includes $111,000 in federal reimbursement funds for the Emergency Management Agency Program. Further, Androscoggin County assists, develops and coordinates all reporting for all its municipalities of mandates for federal disaster reimbursement. The Androscoggin County staff has managed Comprehensive Employment Act funding through financial reporting, development and strategic planning. *Id.*

Androscoggin County has also undertaken energy efficiency projects, including retrofitting all courthouse T12 lights to T8 lights, with an estimated savings of over $7,000 a year, and changing approximately 200 night lights in the jail from 7 watts to 5 watts. It is also in the process of developing an energy savings program that includes installation of new controls for all boilers for the courthouse and jail, installation of light motion sensors, and replacement of approximately 100 windows that are over 100 years old. *Id.*

Based upon the foregoing, we are satisfied that Androscoggin County has the functional capability to carry out one or more of the broad activities outlined in the EISA.[3]

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[2]On August 4, 2009, Androscoggin County supplemented its submission with an abbreviated version of its 2009 and 2008 budgets which corroborates the assertions in its appeal. This submission also provided additional information, including description of some of the projects it has undertaken, as described in the text above.

[3] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled

It Is Therefore Ordered That:

(1) The Appeal filed by Androscoggin County, Maine, on July 21, 2009, is hereby granted.

(2) Androscoggin County will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals
Date:
AUG 14 2009

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content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. 17154.

Department of Energy
Washington, DC 20585

AUG 13 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Strafford County, New Hampshire

Date of Filing: July 21, 2009

Case Number: TGA-0006

This decision considers an Appeal filed by Strafford County, New Hampshire (Strafford County) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Strafford County seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, Strafford County would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. §§ 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. § 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5 (Recovery Act).

as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible

unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, Strafford County states that it believes it was denied eligibility to apply for EECBG Program funding based on a determination that it is incapable of carrying out activities prescribed by the EISA. Appeal at 4. Strafford County asserts in its Appeal, however, that this finding is incorrect and that it "clearly has a governance structure with the type of responsibilities and jurisdiction capable of implementing the programs contemplated by" the EECBG Program. *Id.* at 5.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Strafford County and have determined that its Appeal should be granted. For the reasons discussed below, we find that Strafford County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Strafford County is one of ten county governments in the State of New Hampshire listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Strafford County therefore meets this criterion.

(2) Population

As noted above, the EISA definition of "eligible unit of local government" includes a county with a population which causes the county to be one of the ten highest populated counties of the State. Because there are only ten counties in the State of New Hampshire, Strafford County is one of the ten highest populated counties of the State. We, therefore, find that Strafford County satisfies the population requirement of the EISA.

(3) Governance Structure

Strafford County states in its Appeal that it "is governed by 3 elected County Commissioners." Appeal at 2. The 2007 Census of Governments describes boards of county commissioners as the "governing body" of counties in the State of New Hampshire. *See* http://www.census.gov/govs/www/cog2007.html. Based upon this information, we find that Strafford County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

In its April 15, 2009, Federal Register Notice, the DOE found that, as "defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 Fed. Reg. at 17462. However, as discussed below, we find that Strafford County has presented sufficient supporting information and evidence in its Appeal and supplementary material to rebut that presumption.

As of 2009, Strafford County has an annual budget of over $51 million. E-Mail from Diane A. Legere, Finance Director, Strafford County, to Steven Goering, OHA Staff Attorney (July 31, 2009) (attaching budget documents). According to its Appeal, the county's jurisdiction and responsibilities include a correctional facility housing 480 inmates at any one time, a 215-bed nursing home, a federally-funded Domestic Violence Prosecution Unit, the County Attorney's Office, County Treasurer's Office, County Register of Deeds Office, and the Strafford County Sheriff's Department. Appeal at 2. The county, with 650 employees, has a large complex made up of three government buildings, consisting of 380,000 square feet of space. *Id.* at 5.

In its Appeal, Strafford County states that is has previously implemented energy efficiency programs, including upgrades in the lighting and heating and air conditioning units used by its nursing home. *Id.* It also cites "strategies and plans in place" for future energy efficiency and conservation programs, including replacing aging boiler heat pumps and controls at its nursing home, upgrading to more energy efficient doors at the nursing home and county court house, and installing more energy efficient parking lot lighting at its court house. *Id.* The county has also done a feasibility and engineering study on a wood biomass woodchip heating plant for its nursing home and county jail. *Id.*

Regarding Strafford County's ability to administer federal grant funding, the county provided examples of where it has used such grants "to fund personnel and their benefits, training of staff, daily operations of these departments as well as for the purchase of equipment." E-Mail from Diane A. Legere, Finance Director, Strafford County, to Steven Goering, OHA Staff Attorney (July 31, 2009). For the past ten years, the county has used grant money from the U.S. Department of Justice to fund its Domestic Violence Prosecution Unit, and currently is using a grant in the amount of $731,067 to fund this program. *Id.* The county also received "a three year grant in the amount of $796,370 for the period of 7/1/05 through 6/30/08 from the Department of Justice, Bureau of Justice Assistance under the Drug Court Enhancement Program." *Id.* This grant has been used to fund the county's Drug Court department. Other grants from the Justice Department have been used to purchase equipment for municipal Police Departments and the county's Sheriff's Department, Domestic Violence Unit, and Child Advocacy Center. *Id.* An additional $356,863 recently awarded through the Recovery Act of 2009 "will be used to purchase equipment for local police departments and the Counties House of Corrections." *Id.*

Based upon the foregoing, we are satisfied that Strafford County has the functional capability to carry out one or more of the broad activities outlined in the EISA.[2]

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[2] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;

It Is Therefore Ordered That:

(1) The Appeal filed by Strafford County, New Hampshire, on July 21, 2009, is hereby granted.

(2) Strafford County will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: AUG 13 2009

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5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. § 17154.

Department of Energy
Washington, DC 20585

AUG 14 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Belknap County, New Hampshire

Date of Filing: July 21, 2009

Case Number: TGA-0007

This decision considers an Appeal filed by Belknap County, New Hampshire (Belknap County) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Belknap County seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, Belknap County would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. §§ 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. § 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5 (Recovery Act).

as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible

unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, Belknap County states that it believes it was denied eligibility to apply for EECBG Program funding based on a "misunderstanding of the statutory role of county government in New Hampshire." Appeal at 3. Belknap County asserts in its Appeal that it "clearly has a governance structure with the type of responsibilities and jurisdiction capable of implementing the programs contemplated by" the EECBG Program. *Id.*

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Belknap County and have determined that its Appeal should be granted. For the reasons discussed below, we find that Belknap County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Belknap County is one of ten county governments in the State of New Hampshire listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Belknap County therefore meets this criterion.

(2) Population

As noted above, the EISA definition of "eligible unit of local government" includes a county with a population which causes the county to be one of the ten highest populated counties of the State. Because there are only ten counties in the State of New Hampshire, Belknap County is one of the ten highest populated counties of the State. We, therefore, find that Belknap County satisfies the population requirement of the EISA.

(3) Governance Structure

Belknap County states in its Appeal that it "is governed by 3 elected County Commissioners." Appeal at 1. The 2007 Census of Governments describes boards of county commissioners as the "governing body" of counties in the State of New Hampshire. *See* http://www.census.gov/govs/www/cog2007.html. Based upon this information, we find that Belknap County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

In its April 15, 2009, Federal Register Notice, the DOE found that, as "defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 Fed. Reg. at 17462. However, as discussed below, we find that Belknap County has presented sufficient supporting information and evidence in its Appeal and supplementary material to rebut that presumption.

As of 2009, Belknap County has an annual budget of over $28 million. E-Mail from Debra Shackett, County Administrator, Belknap County, to Steven Goering, OHA Staff Attorney (August 5, 2009) (attaching budget document). According to its Appeal, the county's jurisdiction and responsibilities include a correctional facility housing 110 inmates at any one time, a 94-bed nursing home, the County Attorney's Office, County Register of Deeds Office, and the Belknap County Sheriff's Department. Appeal at 2. The county, with 260 employees, has a large complex made up of two government buildings, consisting of 142,000 square feet of space. *Id.* at 3.

In its Appeal, Belknap County states that is has previously implemented energy efficiency programs, citing as an example a "[l]ighting retrofit by Public Service of New Hampshire." *Id.* It also cites "strategies and plans in place for energy efficiency and conservation programs." *Id.* With its appeal, Belknap County provided a copy of a document prepared by Johnson Controls, Inc., which states that the company is assisting Belknap County "to reduce energy costs by implementing an energy performance contract." Attachment to Appeal at 1. The document details the results of an energy audit, and projects the energy savings that could be achieved through various measures, including a lighting retrofit, weatherization, a web-enabled building management system, and upgrading of water fixtures. Attachment to Appeal at 2.

Regarding Belknap County's ability to administer federal grant funding, the county provided documentation of recent grants it has received and administered, from both federal and state sources. For example, in 2008 and 2009, the county received grants from the New Hampshire Department of Justice, including federal grant money and state matching funds, to fund a domestic violence prosecutor and a substance abuse treatment program. In June 2009, the U.S. Department of Justice notified Belknap County that it had approved the county's application for funding in the amount of $217,578 under the FY 09 Recovery Act Edward Byrne Memorial Justice Assistance Grant Program. The county also provided a copy of a September 11, 2008, Community Development Block Grant (CDBG) Certificate of Completion from the New Hampshire Community Development Finance Authority (CDFA) for activities it carried out using funds from the U.S. Department of Housing and Urban Development awarded to Belknap County by the CDFA.

Based upon the foregoing, we are satisfied that Belknap County has the functional capability to carry out one or more of the broad activities outlined in the EISA.[2]

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[2] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;

It Is Therefore Ordered That:

(1) The Appeal filed by Belknap County, New Hampshire, on July 21, 2009, is hereby granted.

(2) Belknap County will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: AUG 14 2009

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7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. § 17154.

Department of Energy
Washington, DC 20585

AUG 14 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Cheshire County, New Hampshire

Date of Filing: July 21, 2009

Case Number: TGA-0008

This decision considers an Appeal filed by Cheshire County, New Hampshire (Cheshire County) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Cheshire County seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, Cheshire County would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. §§ 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. § 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5 (Recovery Act).

as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible

unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, Cheshire County states that it believes it was denied eligibility to apply for EECBG Program funding based on a determination that it is incapable of carrying out activities prescribed by the EISA. Appeal at 3. Cheshire County asserts in its Appeal that it "clearly has a governance structure with the type of responsibilities and jurisdiction capable of implementing the programs contemplated by" the EECBG Program. *Id.* at 4.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Cheshire County and have determined that its Appeal should be granted. For the reasons discussed below, we find that Cheshire County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Cheshire County is one of ten county governments in the State of New Hampshire listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Cheshire County therefore meets this criterion.

(2) Population

As noted above, the EISA definition of "eligible unit of local government" includes a county with a population which causes the county to be one of the ten highest populated counties of the State. Because there are only ten counties in the State of New Hampshire, Cheshire County is one of the ten highest populated counties of the State. We, therefore, find that Cheshire County satisfies the population requirement of the EISA.

(3) Governance Structure

Cheshire County states in its Appeal that it is governed by three elected county commissioners. Appeal at 2. The 2007 Census of Governments describes boards of county commissioners as the "governing body" of counties in the State of New Hampshire. *See* http://www.census.gov/govs/www/cog2007.html. Based upon this information, we find that Cheshire County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

In its April 15, 2009, Federal Register Notice, the DOE found that, as "defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 Fed. Reg. at 17462. However, as discussed below, we find that Cheshire County has presented sufficient supporting information and evidence in its Appeal and supplementary material to rebut that presumption.

As of 2009, Cheshire County has an annual budget of over $37 million. E-Mail from Jack Wozmak, Cheshire County Administrator, to Steven Goering, OHA Staff Attorney (July 31, 2009) (attaching budget document). According to its Appeal, the county's jurisdiction and responsibilities include a correctional facility housing 124 inmates at any one time, a 150-bed nursing home, the County Attorney's Office, County Register of Deeds Office, and the Cheshire County Sheriff's Department. Appeal at 2-3. Among the buildings and facilities of Cheshire County government are the county nursing home, an assisted living facility, the municipal water treatment facility, the municipal wastewater treatment facility, the county correctional facility and county farm, the superior court building, and the county administration building. *Id.* at 3. In addition, the county will be opening a new jail in the first quarter of 2010. *Id.*

In its Appeal, Cheshire County states that is has previously implemented energy efficiency programs, including upgrades to "state-of-the-art" lighting equipment, replacement of electric motors with more efficient equipment, and installation of a new, more energy-efficient commercial laundry operation. *Id.* at 4. The county further states that it is "in the process of installing what will be the State's first geothermal heating/cooling system in a correctional facility . . . ." *Id.* The county has plans for further lighting upgrades, utilizing LED lighting for street and converting a building to LED lighting as a community pilot project. *Id.* Other plans being considered include using solar panels for one of its large county buildings, and installation of wind turbines on county land. *Id. at* 5.

Regarding Cheshire County's ability to administer federal grant funding, the county provided a summary of grant activity over the last eight years, and states that in that period it " has administered $6.4 million in federal grant funds and an additional $227,000 in state grant funds." E-Mail from Jack Wozmak, Cheshire County Administrator, to Steven Goering, OHA Staff Attorney (August 5, 2009). These funds were used for a wide variety of projects, including building rehabilitation projects, a community energy partnership program, the funding of a domestic violence prosecutor, a Head Start program, emergency management, and programs to combat underage drinking. *Id.*

Based upon the foregoing, we are satisfied that Cheshire County has the functional capability to carry out one or more of the broad activities outlined in the EISA.[2]

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[2] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;

It Is Therefore Ordered That:

(1) The Appeal filed by Cheshire County, New Hampshire, on July 21, 2009, is hereby granted.

(2) Cheshire County will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: AUG 14 2009

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8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. § 17154.

Department of Energy
Washington, DC 20585

AUG 14 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Oxford County, Maine

Date of Filing: July 21, 2009

Case Number: TGA-0009

This decision considers an Appeal filed by Oxford County, Maine (Oxford County) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Oxford County seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, Oxford County would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible

unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, Oxford County states that it believes it was denied eligibility to apply for EECBG Program funding based on a determination that it is incapable of carrying out activities prescribed by the EISA. Oxford County asserts in its Appeal, however, that this finding is incorrect and that "Oxford County does, in fact, have the jurisdiction and functional capabilities to implement the broad range of programs identified by EISA." Appeal at 1. Oxford County further contends that it otherwise meets the requirements for EECBG eligibility, specifically that the county (1) is a unit of local government identified in 2007 GID, (2) meets the required EISA population threshold based upon 2007 U.S. Census estimates, and (3) has a governance structure consisting of elected officials and a governing body.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Oxford County and have determined that its Appeal should be granted. For the reasons discussed below, we find that Oxford County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Oxford County is one of 16 county governments in the State of Maine listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Oxford County therefore meets this criterion.

(2) Population

As noted in its Appeal, according to 2007 U.S. Census county population data, the population of Oxford County in 2007 was 56,734. Under the State and Local Grant Allocations listing published by DOE on April 15, 2009, no cities or towns located within Oxford County were determined to be eligible to receive EECBG funding. *See* Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A. When compared to other Maine counties whose populations are adjusted by subtracting the population of municipal recipients of EECBG funds, Oxford County is the sixth most populous county in the state of Maine. We, therefore, find that Oxford County satisfies the population requirement of the EISA as one of the ten most populous counties in the State.

(3) Governance Structure

Oxford County states in its Appeal that it has a "Commission-Administrator" governance structure. More specifically, Oxford County states that it has three County Commissioners, elected by popular vote from three single-member electoral districts. According to Oxford County, all County governmental activities are coordinated through the Board of Commissioners, the County Administrator's Office, and the County Treasurer's Office. In addition, the County government has 85 payroll employees. *Id.*[2] Based upon this information, we find that Oxford County has the requisite governance structure to receive EECBG funds.

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[2] Oxford County also notes that there are six other officials who are elected county-wide: Sheriff, Judge of Probate, Registrar of Probate, two Registers of Deeds and Treasurer. Appeal at 2.

(4) Functional Capability

In its Appeal, Oxford County argues that the county was initially denied EECBG eligibility based upon DOE's supposition that it does not have the functional capability to administer one or more of the broad range of activities specified in the EISA. As stated in the implementing DOE Federal Register Notice: "As defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 Fed. Reg. at 17462. However, we find that Oxford County has presented sufficient supporting information and evidence in its Appeal to rebut that presumption.

According to its Appeal, Oxford County has an annual county budget of more than $5.1 million, and the County's jurisdiction and responsibilities include two Registers of Deeds Offices, the County District Court, the County Superior Court, the District Attorney's Office, the Probate Court, the County Emergency Management Agency, the County Jail, and the County Sheriff's Office, which provides law enforcement for 28 of the County's 36 municipalities and the Unorganized Territories. In addition, Oxford County owns and operates a Regional Airport and a Regional Communications Center (providing emergency 911 services, law enforcement and fire dispatch services), both of which depend to a great extent upon receiving and administering federal and state grants. Appeal at 2.[3] According to an August 4, 2009, submission, Oxford County is also responsible for the management of over 97,000 square feet of public facilities, including the Superior Courthouse, the District Court building, the registry of deeds building, the Jail, the Regional Communications Center, and the airport.

Perhaps most significant, Oxford County has extensive experience in administering federal grants in connection with the its airport, its emergency management agency, its sheriff's office, and its regional communications center. Oxford County received grants of $1.4 million in 2008 and $201,362 in 2009 from the Federal Aviation Administration (FAA) to improve the runways at its airport. Since 2005, Oxford County has received over $1 million in federal grants for its Emergency Management Agency. In addition, the U.S. Department of Homeland Security has provided the Oxford County Sheriff's Office with $385,000 for border security programs and has provided the County's Regional Communications Center with $305,000 for infrastructure upgrades. Since 2007, the State of Maine also has provided Oxford County with more than $500,000 in funding grants for the County's emergency management and law enforcement activities. *See* Appeal at 3, August 6, 2009 submission of recent FAA grants to Oxford County.

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[3] On August 4, 2009, Oxford County supplemented its submission with a copy of its 2009 Budget Summary which corroborates projected annual revenues and county expenditures of more than $5.15 million.

Based upon the foregoing, we are satisfied that Oxford County has the functional capability to carry out one or more of the broad activities outlined in the EISA.[4]

It Is Therefore Ordered That:

(1) The Appeal filed by Oxford County, Maine, on July 21, 2009, is hereby granted.

(2) Oxford County will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals
Date: AUG 14 2009

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[4] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. 17154.

Department of Energy
Washington, DC 20585

AUG 19 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Coös County, New Hampshire

Date of Filing: July 22, 2009

Case Number: TGA-0010

This decision considers an Appeal filed by Coös County, New Hampshire (Coös County) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Coös County seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, Coös County would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. §§ 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. § 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5 (Recovery Act).

as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible

unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, Coös County states that it believes it was denied eligibility to apply for EECBG Program funding based on a determination that it is incapable of carrying out activities prescribed by the EISA. Appeal at 3. Coös County asserts in its Appeal that it "clearly has a governance structure with the type of responsibilities and jurisdiction capable of implementing the programs contemplated by" the EECBG Program. *Id.* at 4.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Coös County and have determined that its Appeal should be granted. For the reasons discussed below, we find that Coös County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Coös County is one of ten county governments in the State of New Hampshire listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Coös County therefore meets this criterion.

(2) Population

As noted above, the EISA definition of "eligible unit of local government" includes a county with a population which causes the county to be one of the ten highest populated counties of the State. Because there are only ten counties in the State of New Hampshire, Coös County is one of the ten highest populated counties of the State. We, therefore, find that Coös County satisfies the population requirement of the EISA.

(3) Governance Structure

Coös County states in its Appeal that it is governed by three elected county commissioners. Appeal at 1. The 2007 Census of Governments describes boards of county commissioners as the "governing body" of counties in the State of New Hampshire. *See* http://www.census.gov/govs/www/cog2007.html. Based upon this information, we find that Coös County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

In its April 15, 2009, Federal Register Notice, the DOE found that, as "defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 Fed. Reg. at 17462. However, as discussed below, we find that Coös County has presented sufficient supporting information and evidence in its Appeal and supplementary material to rebut that presumption.

As of 2009, Coös County has an annual budget of over $28 million. E-Mail from Suzanne Collins, County Administrator, Coös County, to Steven Goering, OHA Staff Attorney (August 3, 2009) (attaching budget document). According to its Appeal, the county's jurisdiction and responsibilities include a correctional facility housing 60 inmates at any one time, two nursing homes with a total of 197 beds, the County Attorney's Office, County Register of Deeds Office, County Commissioner's Office, a County Farm, and the Coös County Sheriff's Department. Appeal at 2-3. The county, with approximately 260 employees, has a large complex made up of eight government buildings and smaller support buildings. *Id.* at 4.

In its Appeal, Coös County states that is has previously implemented energy efficiency programs, including lighting upgrade projects in its two nursing homes, the Department of Corrections, and the County Farm, installation of high efficiency boilers and hot water tanks in it nursing hospital, and installation of a new, more energy-efficient commercial laundry operation in both of its nursing homes. *Id.* The county also cites "strategies and plans in place" for future energy efficiency and conservation programs, including plans to replace windows and doors in one of its nursing homes, and a study of the need for central air conditioning in its other nursing home, which currently uses less efficient window units. *Id.* at 4-5.

Regarding Coös County's ability to administer federal grant funding, the county states that it "regularly administers various state and federal grants." E-Mail from Suzanne Collins, County Administrator, Coös County, to Steven Goering, OHA Staff Attorney (August 3, 2009). As recent examples, the county cites its successful administration in 2006 and 2007 of a $245,000 Community Development Block Grant for the installation of a turbine at a furniture manufacturer, and a $104,592 Homeland Security Grant for the Coös County Sheriff's Department. *Id.* In 2008, the county "successfully administered a $500,000 Community Development Block Grant for the installation of a wood fired boiler at a paper manufacturer." *Id.* The county also recently administered grants for a domestic violence prosecutor and a victim witness advocate in the County Attorney's office. *Id.*

Based upon the foregoing, we are satisfied that Coös County has the functional capability to carry out one or more of the broad activities outlined in the EISA.[2]

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[2] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled

It Is Therefore Ordered That:

(1) The Appeal filed by Coös County, New Hampshire, on July 22, 2009, is hereby granted.

(2) Coös County will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: AUG 19 2009

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content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. § 17154.

Department of Energy
Washington, DC 20585

AUG 17 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Penobscot County, Maine

Date of Filing: July 22, 2009

Case Number: TGA-0011

This decision considers an Appeal filed by Penobscot County, Maine (Penobscot County) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Penobscot County seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, Penobscot County would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies as an "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published

by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, Penobscot County states that it believes it was denied eligibility to apply for EECBG Program funding based on a determination that it is incapable of carrying out activities prescribed by the EISA. Penobscot County asserts in its Appeal, however, that this finding is incorrect and that "[o]ur county does, in fact, have the jurisdiction and functional capabilities to implement the broad range of programs identified by EISA." Appeal at 1. Penobscot County further contends that it otherwise meets the requirements for EECBG eligibility, specifically that the county (1) is a unit of local government identified in 2007 GID, (2) meets the required EISA population threshold based upon 2007 U.S. Census estimates, and (3) has a governance structure consisting of elected officials and a governing body.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Penobscot County and have determined that its Appeal should be granted. For the reasons discussed below, we find that Penobscot County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Penobscot County is one of 16 county governments in the State of Maine listed in the 2007 Governments Integrated Directory. See http://harvester.census.gov/gid/gid_07/options.html. Penobscot County therefore meets this criterion.

(2) Population

As noted in its Appeal, Penobscot County is the third most populous county in the State of Maine, with a population of 148,784, according to 2007 U.S. Census county population data. Under the State and Local Grant Allocations listing published by DOE on April 15, 2009, there is one city, Bangor (2007 Census population 31,853), that has been determined eligible to receive EECBG funding. See Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A. Thus, we find that even after subtracting the population of Bangor from Penobscot County's population, it is still the third most populous county in Maine, with a balance population of 116,931. Appeal at 1. We, therefore, find that Penobscot County satisfies the population requirement of the EISA.

(3) Governance Structure

Penobscot County states in its Appeal that it has a "Commissioner" governance structure. More specifically, Penobscot County states that it has three County Commissioners, elected by voters, from three [single-member] districts. It also has a professional county administrator who manages more than 230 employees. The County also states that it has six officials elected county-wide: District

Attorney; Sheriff; Judge of Probate; Registrar of Probate; Registrar of Deeds and Treasurer. Based upon this information, we find that Penobscot County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

In its Appeal, Penobscot County argues that the county was initially denied EECBG eligibility based upon DOE's supposition that it does not have the functional capability to administer one or more of the broad range of activities specified in the EISA. As stated in the implementing DOE Federal Register Notice: "As defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 Fed. Reg. at 17462. However, we find that Penobscot County has presented sufficient supporting information and evidence in its Appeal to rebut that presumption.

According to its Appeal, Penobscot County has an annual budget of $14,413,584.[2] In addition, it manages a budget of $1,415,800 for the Unorganized Territory in the County. According to its Appeal, the County's jurisdiction and responsibilities include a 182-bed jail, Registry of Probate and a Registry of Deeds, and the District Attorney's Office, which also services neighboring Piscataquis County. Penobscot County provides law enforcement for 54 of 67 municipalities and Unorganized Territories in the County. It provides 911 services for 59 of 60 organized municipalities (exclusive of the City of Bangor), and for a bordering county. Penobscot County indicates that it provides emergency management. Appeal at 3. Penobscot County further states in its August 4, 2009, submission that it is responsible for managing a complex that covers 132,183 square feet and is spread over three acres. That complex is made up of the Superior Court Building (41,784 square feet); the District Court Building (22,950 square feet); the Penobscot County Jail (61,561 square feet); and the annex building, housing the Registry of Probate and the District Attorney's Office (6,888 square feet).

In its Appeal, Penobscot County lists other programs for which it is responsible or with which it is associated, including homeland security, community corrections, victim witness protection programs, municipal safety grants, Maine drug enforcement, Bureau of Highway Safety grants, justice assistance grants, underage drinking grants, hazard mitigation grants and public safety interoperability grants. Appeal at 3.

In its August 4 submission, Penobscot County has provided additional information regarding some of the programs in which it has been involved. For example, Penobscot County has described a program of its Emergency Management Agency that managed an "all Hazards Mitigation grant."

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[2]On August 4, 2009, Penobscot County supplemented its submission with an abbreviated version of its 2009 budget, which corroborates the assertions in its appeal. This submission also provided additional information, including description of some of the projects it has undertaken, as discussed in the text above.

In this program, Penobscot County purchased a residential property that was subject to continuous flooding, destroyed the structure located on it via a fire training exercise, and returned the land to its original, natural state. In its August 4 submission, Penobscot County included photos of the project.

Penobscot County also indicates in its August 4 submission that in 2008, its sheriff's department received a Homeland Security grant of approximately $280,000, plus an additional $12,500 for training, as lead agency for 14 law enforcement agencies, as well as the Maine State police in the County, to install mobile data in all patrol vehicles. Penobscot County further states that it was also awarded Homeland Security funds in 2003 ($422,548) and 2004 ($868,000).

Based upon the foregoing, we are satisfied that Penobscot County has the functional capability to carry out one or more of the broad activities outlined in the EISA.[3]

It Is Therefore Ordered That:

(1) The Appeal filed by Penobscot County, Maine, on July 21, 2009, is hereby granted.

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[3] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. 17154.

(2) Penobscot County will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals
Date:

AUG 17 2009

Department of Energy
Washington, DC 20585

AUG 17 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: York County, Maine

Date of Filing: July 22, 2009

Case Number: TGA-0012

This decision considers an Appeal filed by York County, Maine (York County) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, York County seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, York County would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible

unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, York County states that it believes it was denied eligibility to apply for EECBG Program funding based on a determination that it is incapable of carrying out activities prescribed by the EISA. York County asserts in its Appeal, however, that this finding is incorrect and that "[o]ur county does, in fact, have the jurisdiction and functional capabilities to implement the broad range of programs identified by EISA." Appeal at 1. York County further contends that it otherwise meets the requirements for EECBG eligibility, specifically that the county (1) is a unit of local government identified in 2007 GID, (2) meets the required EISA population threshold based upon 2007 U.S. Census estimates, and (3) has a governance structure consisting of elected officials and a governing body.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by York County and have determined that its Appeal should be granted. For the reasons discussed below, we find that York County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

York County is one of 16 county governments in the State of Maine listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. York County therefore meets this criterion.

(2) Population

As noted in its Appeal, York County has a population of over 186,000 people. According to 2007 U.S. Census county population data, the population of York County is 201,341. Under the State and Local Grant Allocations listing published by DOE on April 15, 2009, there are two cities within York County that have been determined eligible to receive EECBG funding. See Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A. These are the City of Biddeford, and the Town of Sanford. After subtracting the populations of these two municipalities receiving EECBG funds, York County's balance population is 158,495. When compared to other Maine counties whose populations are adjusted in a similar manner, York County is the most populous county in the state of Maine. We, therefore, find that York County satisfies the population requirement of the EISA as one of the ten most populous counties in the State.

(3) Governance Structure

York County states in its Appeal that it has a "Commission-Manager" governance structure. More specifically, York County states that it has five County Commissioners, elected by popular vote in each of five single member districts. According to York County, the Commission is "the policy-making body of the county." Appeal at 1. In addition, York County has a County Manager who manages the activities of more than 200 county employees. *Id.*[2] Based upon this information, we find that York County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

In its Appeal, York County argues that the county was initially denied EECBG eligibility based upon DOE's supposition that it does not have the functional capability to administer one or more of the

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[2] York County also notes that it has six other officials who are elected county-wide: District Attorney, Sheriff, Judge of Probate, Registrar of Probate, Registrar of Deeds and Treasurer. Appeal at 2.

broad range of activities specified in the EISA. As stated in the implementing DOE Federal Register Notice: "As defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 Fed. Reg. at 17462. However, we find that York County has presented sufficient supporting information and evidence in its Appeal to rebut that presumption.

York County has an annual budget of $19.5 million. According to its Appeal, the county's jurisdiction and responsibilities include a 250-bed jail, two of the largest Registries of Probate and Deeds in New England, the District Attorney's Office, and a county- and federally-funded Domestic Violence Program. Appeal at 2. In addition, York County provides law enforcement for 15 of its 29 municipalities and emergency management services for the entire county. In addition, York County administers funding for a Regional Hazardous Materials Response Team which addresses hazardous material spills and potential terrorist activities for all 29 towns/cities with the York County. *Id.*[3] York County is also responsible for the management of over 168,000 square feet of public facilities including the county courthouse and the county jail.

Perhaps most significant, however, is that over the past six years, York County has received and administered federally funded grants in amounts totaling several hundred thousand dollars annually, as well as millions of dollars in disaster relief funding. During fiscal years 2003 through 2009, The York County Emergency Management Agency (YCEMA) has managed and administered more than $5 million in federal Emergency Management Performance monies and Homeland Security funds granted to the State of Maine, with York County and its towns as sub-grantees. In addition, the YCEMA has administered more than $29 million in disaster relief funds granted to York County and its towns between 2005 and 2008. Over the past six years, the York County Sheriff's Department also has administered more than $1.7 million in federal and state grants aimed at enhancing its law enforcement activities. *See* York County's July 31, 2009 submission.

York County states in its Appeal that it has partnered in the past with the Southern Maine Regional Planning Commission (SMRPC) on numerous projects, and it would partner with SMRPC to help set up and administer an EECBG Program funds. York County states that it would set up a Grant Fund for its communities and also set up a revolving loan fund for energy efficiency projects for its towns, non-profit organizations, and other governmental organizations within the county. Appeal at 2-3.

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[3] On July 31, 2009, York County supplemented its submission with a copy of its 2009 Budget Summary which corroborates the $19.5 million total budget figure cited in its Appeal.

Based upon the foregoing, we are satisfied that York County has the functional capability to carry out one or more of the broad activities outlined in the EISA.[4]

It Is Therefore Ordered That:

(1) The Appeal filed by York County, Maine, on July 22, 2009, is hereby granted.

(2) York County will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals
Date: AUG 17 2009

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[4] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. 17154.

Department of Energy
Washington, DC 20585

AUG 17 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Hancock County, Maine

Date of Filing: July 22, 2009

Case Number: TGA-0013

This decision considers an Appeal filed by Hancock County, Maine (Hancock County) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Hancock County seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, Hancock County would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

as an "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible

unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, Hancock County states that it believes it was denied eligibility to apply for EECBG Program funding based on a determination that it is incapable of carrying out activities prescribed by the EISA. Hancock County asserts in its Appeal, however, that this finding is incorrect and that "[o]ur county does, in fact, have the jurisdiction and functional capabilities to implement the broad range of programs identified by EISA." Appeal at 1. Hancock County further contends that it otherwise meets the requirements for EECBG eligibility, specifically that it (1) is a unit of local government identified in 2007 GID, (2) meets the required EISA population threshold based upon 2007 U.S. Census estimates, and (3) has a governance structure consisting of elected officials and a governing body.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Hancock County and have determined that its Appeal should be granted. For the reasons discussed below, we find that Hancock County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Hancock County is one of 16 county governments in the State of Maine listed in the 2007 Governments Integrated Directory. See http://harvester.census.gov/gid/gid_07/options.html. Hancock County therefore meets this criterion.

(2) Population

As noted in its Appeal, Hancock County is the eighth most populous county in the State of Maine, with a population of 53,278, according to 2007 U.S. Census county population data. According to the State and Local Grant Allocations listing published by DOE on April 15, 2009, no cities within Hancock County that have been determined eligible to receive EECBG funding. We have, for the purposes of these EECBG appeals, made adjustments to the population rankings of the counties of Maine to account for the cities that have been determined to be eligible for funding. Based on that ranking adjustment, Hancock County's population ranks seventh in overall population. We, therefore, find that Hancock County satisfies the population requirement of the EISA as one of the ten most populous counties in the State.

(3) Governance Structure

Hancock County states in its Appeal that it has a "Commissioner/Clerk" governance structure. More specifically, Hancock County states that it has three County Commissioners, elected by popular vote in each of three single-member districts. In addition, there are six positions elected county-wide: District Attorney, Sheriff, Judge of Probate, Register of Probate, Register of Deeds and Treasurer. The County Commissioners are the policy-making body of the County. They manage the County and are assisted by the county clerk. They oversee 142 full and part-time employees. Based upon this information, we find that Hancock County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

In its Appeal, Hancock County argues that the County was initially denied EECBG eligibility based upon DOE's supposition that it does not have the functional capability to administer one or more of the broad range of activities specified in the EISA. As stated in the implementing DOE Federal Register Notice: "As defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire and Vermont perform only limited functions, and thus all counties

in these States were determined to be ineligible for Program funds." 74 Fed. Reg. at 17462. However, we find that Hancock County has presented sufficient supporting information and evidence in its Appeal to rebut that presumption.

Hancock County has an annual budget of $8,657,633, including a budget of $206,590 for the Unorganized Territory in the County, a Hancock County-Bar Harbor Airport budget of $723,781 and a jail budget of $2,213,084. [2] According to its Appeal, the County's jurisdiction and responsibilities include a 53-bed jail, a Sheriff's Office, a Registry of Probate, a Registry of Deeds, a District Attorney's Office, an Emergency Management Agency, an airport, an Unorganized Township Office, a Regional Communications Center/Public Safety Answering Point, and Superior and District Courts. Hancock County states in its August 11, 2009, submission that it is responsible for managing a complex that covers 82,871 square feet of space that includes the jail, Hancock County courthouse, District Attorney's Office, Sheriff's Office, and airport buildings.

The County provides law enforcement to 43 municipalities/cities, and unorganized territories; 911 services for all 50 municipalities/cities and unorganized territories; dispatch services for 26 municipalities; 3 ambulance services for 14 unorganized territories; and emergency management services for the entire County. Hancock County houses and manages one of only three county airports with a full commercial service passenger airline. Appeal at 3.

Hancock also lists other local, state and federal grants that it has managed. These include: Byrne Memorial Justice Assistance Grant; COP Fast program; Airport Improvement Projects; Federal Aviation Administration Federal Grants. In this regard, Hancock County states that in the last two years it has been awarded of $3,024,573, of which $1,278,123 was "ARRA" [American Recovery and Reinvestment Act of 2009] funds. Hancock further mentions that it has received "Homeland Security Grants."

Hancock County has also undertaken many construction and renovation projects involving energy efficiency. As examples, it cites completion of construction of the Hancock County jail in 1999, which followed energy standards of the late 1990s. It also refers to upgrades and expansions to its courthouse, including vinyl window replacements that have been brought up to "energy star" requirements. Hancock County also states that new insulation and siding have been installed in the district attorney's office, and energy efficiency projects are being undertaken in the sheriff's wing of the courthouse. Finally, the County notes that its airport has undergone a new roof project, and there is a plan to update the airport's insulation, lights and windows.

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[2] On August 11, 2009, Hancock County supplemented its submission with a summary version of its 2009 budget which corroborates the assertions in its Appeal. This submission also provided additional information, including description of some of the projects it has undertaken, as described in the text above.

Based upon the foregoing, we are satisfied that Hancock County has the functional capability to carry out one or more of the broad activities outlined in the EISA.[3]

It Is Therefore Ordered That:

(1) The Appeal filed by Hancock County, Maine, on July 22, 2009, is hereby granted.

(2) Hancock County will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals
Date: AUG 17 2009

[3] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. 17154.

Department of Energy
Washington, DC 20585

AUG 27 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Rockingham County, New Hampshire

Date of Filing: July 23, 2009

Case Number: TGA-0014

This decision considers an Appeal filed by Rockingham County, New Hampshire (Rockingham County) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Rockingham County seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, Rockingham County would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. §§ 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. § 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5 (Recovery Act).

as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible

unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, Rockingham County states that it believes it was denied eligibility to apply for EECBG Program funding based on a determination that it is incapable of carrying out activities prescribed by the EISA. Appeal at 4. Rockingham County asserts in its Appeal that it "clearly has a governance structure with the type of responsibilities and jurisdiction capable of implementing the programs contemplated by" the EECBG Program. *Id.*

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Rockingham County and have determined that its Appeal should be granted. For the reasons discussed below, we find that Rockingham County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Rockingham County is one of ten county governments in the State of New Hampshire listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Rockingham County therefore meets this criterion.

(2) Population

As noted above, the EISA definition of "eligible unit of local government" includes a county with a population which causes the county to be one of the ten highest populated counties of the State. Because there are only ten counties in the State of New Hampshire, Rockingham County is one of the ten highest populated counties of the State. We, therefore, find that Rockingham County satisfies the population requirement of the EISA.

(3) Governance Structure

Rockingham County states in its Appeal that it is governed by three elected county commissioners. Appeal at 1. The 2007 Census of Governments describes boards of county commissioners as the "governing body" of counties in the State of New Hampshire. *See* http://www.census.gov/govs/www/cog2007.html. Based upon this information, we find that Rockingham County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

In its April 15, 2009, Federal Register Notice, the DOE found that, as "defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 Fed. Reg. at 17462. However, as discussed below, we find that Rockingham County has presented sufficient supporting information and evidence in its Appeal and supplementary material to rebut that presumption.

As of 2009, Rockingham County has an annual budget of over $73 million. E-Mail from Theresa Young, Finance Officer, Rockingham County, to Steven Goering, OHA Staff Attorney (July 31, 2009) (attaching budget document). According to its Appeal, the county's jurisdiction and responsibilities include a correctional facility housing in excess of 300 inmates at any one time, long term care services including a 226-bed nursing home, a 49-bed assisted living facility, and an adult medical day care facility, the County Attorney's Office, County Register of Deeds Office, and the Rockingham County Sheriff's Department. Appeal at 2-3. The county, with approximately 750 employees, has a large complex made up of three main government buildings and several support buildings in excess of 390,000 square feet and occupying 399 acres. *Id.* at 4.

In its Appeal, Rockingham County states that is has previously implemented energy efficiency programs, citing a $4 million energy management project that included lighting upgrades, new building sealing and insulation, installation of energy-efficient motors, and initiatives that save approximately 20,000 gallons of water per day. *Id.* at 4-5. The county also cites "strategies and plans in place" for future energy efficiency and conservation programs, including evaluation of projects using renewable energy sources, such as wood pellets or wood chips, and retrofitting of existing boilers. *Id.* at 5.

Regarding its ability to administer federal grant funding, the county states that it "has facilitated millions of dollars of grant monies for local communities and organizations through Community Development Block Grants and Justice Assistance Grants." *Id.* at 3. Most recently, the county was awarded a $500,000 Community Development Block Grant under the 2009 Recovery Act for work on affordable senior housing. E-Mail from Theresa Young, Finance Officer, Rockingham County, to Steven Goering, OHA Staff Attorney (July 31, 2009) (attaching grant documents). In addition, Rockingham County states that it has "administered a variety of federal grants over many years that fund personnel, their benefits, and other costs at the County Attorney's Office for Victim Witness Advocates and Domestic Violence Prosecutors, as well as at the Sheriff's Office for Drug Enforcement and Child Advocacy." E-Mail from Theresa Young, Finance Officer, Rockingham County, to Steven Goering, OHA Staff Attorney (August 17, 2009).

Based upon the foregoing, we are satisfied that Rockingham County has the functional capability to carry out one or more of the broad activities outlined in the EISA.[2]

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[2] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;

It Is Therefore Ordered That:

(1) The Appeal filed by Rockingham County, New Hampshire, on July 23, 2009, is hereby granted.

(2) Rockingham County will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: AUG 27 2009

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7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. § 17154.

Department of Energy
Washington, DC 20585

AUG 18 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Knox County, Maine

Date of Filing: July 23, 2009

Case Number: TGA-0015

This decision considers an Appeal filed by Knox County, Maine (Knox County) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Knox County seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, Knox County would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible

unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, Knox County states that it believes it was denied eligibility to apply for EECBG Program funding based on a determination that it is incapable of carrying out activities prescribed by the EISA. Knox County asserts in its Appeal, however, that this finding is incorrect and that "[o]ur county does, in fact, have the jurisdiction and functional capabilities to implement the broad range of programs identified by EISA." Appeal at 1. Knox County further contends that it otherwise meets the requirements for EECBG eligibility, specifically that the county (1) is a unit of local government identified in 2007 GID, (2) meets the required EISA population threshold based upon 2007 U.S. Census estimates, and (3) has a governance structure consisting of elected officials and a governing body.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Knox County and have determined that its Appeal should be granted. For the reasons discussed below, we find that Knox County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Knox County is one of 16 county governments in the State of Maine listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Knox County therefore meets this criterion.

(2) Population

According to 2007 U.S. Census county population data, the population of Knox County in 2007 was 40,781. Under the State and Local Grant Allocations listing published by DOE on April 15, 2009, no cities or towns located within Knox County were determined to be eligible to receive EECBG funding. *See* Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A. When compared to other Maine counties whose populations are adjusted by subtracting the population of municipal recipients of EECBG funds, Knox County is the tenth most populous county in the state of Maine. We, therefore, find that Knox County satisfies the population requirement of the EISA as one of the ten most populous counties in the State.

(3) Governance Structure

Knox County states in its Appeal that it has a "Commission-Administrator" governance structure. More specifically, Knox County states that it has three County Commissioners, elected by popular vote from three single-member electoral districts. According to Knox County, the three County Commissioners are the policy-making body of the County, and the County Administrator manages more than 110 County employees. *Id.*[2] Based upon this information, we find that Knox County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

In its Appeal, Knox County argues that the county was initially denied EECBG eligibility based upon DOE's supposition that it does not have the functional capability to administer one or more of the broad range of activities specified in the EISA. As stated in the implementing DOE Federal Register Notice: "As defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire and Vermont perform only limited functions, and thus all counties in these States

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[2] Knox County also notes that there are four officials who are elected county-wide: District Attorney, Sheriff, Judge of Probate, and Registrar of Probate. Appeal at 2.

were determined to be ineligible for Program funds." 74 Fed. Reg. at 17462. However, we find that Knox County has presented sufficient supporting information and evidence in its Appeal to rebut that presumption.

According to its Appeal, Knox County has an annual county budget of more than $7.4 million, and the County's jurisdiction and responsibilities include an 80-bed Jail, the Registries of Probate and Deeds, the District Attorney's Office, a County and federally-funded Domestic Violence Program, the Knox Regional Communications Center, and the Knox Regional Airport. Knox County provides law enforcement for 14 of its 18 municipalities, as well as emergency dispatch services for 19 municipalities (18 Knox municipalities and one Waldo County municipality), and emergency management for the entire County. Appeal at 2.[3] According to an August 6, 2009, submission, Knox County is also responsible for the management of over 210,000 square feet of public facilities, including the Knox County Jail, the County Courthouse, and the Knox Regional Airport.

Perhaps most significant, Knox County has extensive experience in administering federal grants in connection with the its airport, its emergency management agency, its sheriff's office, and its regional communications center. Knox Regional Airport receives between $1 million and $7 million each year in Airport Improvement Program funding from the Federal Aviation Administration (FAA). In the last two years, the Knox County Emergency Management Agency (EMA) has received substantial grants from the Department of Homeland Security (DHS) which it has distributed to various Knox County departments. In 2008, EMA received $766,303 in grants from the DHS for Public Safety Interoperable Communications. In 2009, as of July 23, EMA has received $921,363 in DHS grants. Between May 2008 and July 2009, EMA also received $960,000 in disaster relief funding from the Federal Emergency Management Agency. *See* Appeal at 2-3, August 6, 2009, submission discussing federal grants to Knox County.

Based upon the foregoing, we are satisfied that Knox County has the functional capability to carry out one or more of the broad activities outlined in the EISA.[4]

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[3] On August 6, 2009, Knox County supplemented its submission with a copy of its 2009 Budget Summary which corroborates projected annual expenditures of more than $7,436,309.

[4] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled

It Is Therefore Ordered That:

(1) The Appeal filed by Knox County, Maine, on July 23, 2009, is hereby granted.

(2) Knox County will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals
Date:

AUG 18 2009

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content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. 17154.

Department of Energy
Washington, DC 20585

AUG 19 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Grafton County, New Hampshire

Date of Filing: July 23, 2009

Case Number: TGA-0016

This decision considers an Appeal filed by Grafton County, New Hampshire (Grafton County) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Grafton County seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, Grafton County would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. §§ 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. § 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5 (Recovery Act).

as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible

unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, Grafton County states that it believes it was denied eligibility to apply for EECBG Program funding based on a determination that it is incapable of carrying out activities prescribed by the EISA. Appeal at 3. Grafton County asserts in its Appeal that it "clearly has a governance structure with the type of responsibilities and jurisdiction capable of implementing the programs contemplated by" the EECBG Program. *Id.* at 4.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Grafton County and have determined that its Appeal should be granted. For the reasons discussed below, we find that Grafton County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Grafton County is one of ten county governments in the State of New Hampshire listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Grafton County therefore meets this criterion.

(2) Population

As noted above, the EISA definition of "eligible unit of local government" includes a county with a population which causes the county to be one of the ten highest populated counties of the State. Because there are only ten counties in the State of New Hampshire, Grafton County is one of the ten highest populated counties of the State. We, therefore, find that Grafton County satisfies the population requirement of the EISA.

(3) Governance Structure

Grafton County states in its Appeal that it is governed by three elected county commissioners. Appeal at 2. The 2007 Census of Governments describes boards of county commissioners as the "governing body" of counties in the State of New Hampshire. *See* http://www.census.gov/govs/www/cog2007.html. Based upon this information, we find that Grafton County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

In its April 15, 2009, Federal Register Notice, the DOE found that, as "defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 Fed. Reg. at 17462. However, as discussed below, we find that Grafton County has presented sufficient supporting information and evidence in its Appeal and supplementary material to rebut that presumption.

As of 2009, Grafton County has an annual budget of over $32 million. E-Mail from Julie L. Clough, Executive Director, Grafton County Commissioners' Office, to Steven Goering, OHA Staff Attorney (August 3, 2009) (attaching budget documents). According to its Appeal, the county's jurisdiction and responsibilities include a correctional facility housing over 100 inmates at any one time, a 135-bed nursing home, the County Attorney's Office, County Treasurer's Office, County Register of Deeds Office, the Grafton County Sheriff's Department, a county dairy farm, and a Drug Court program. Appeal at 2-3. The county, with 400 employees, has a large complex made up of several government buildings, occupying a total of 190,700 square feet. *Id.* at 4.

In its Appeal, Grafton County states that is has previously implemented energy efficiency programs, including installation of new boilers, windows, and lighting to its nursing home and administrative building, lighting upgrades and boiler replacements in it jail, and installation of new insulation and lighting at its courthouse. Attachment to Appeal. Future plans include further lighting upgrades at many of its facilities, a more energy-efficient laundry system at its nursing home, a central biomass plant as a primary heating source for most of the buildings in its complex, and a geothermal heating and cooling system for its correctional facility. *Id.*

Regarding its ability to administer federal grant funding, Grafton County provided our office information on grants awarded for fiscal years 2008 through 2010. E-Mail from Julie L. Clough, Executive Director, Grafton County Commissioners' Office, to Steven Goering, OHA Staff Attorney (August 3, 2009) (attaching grant receipts data). These included funds provided to the Grafton County Sheriff's Department for underage drinking enforcement, sobriety checkpoints and seatbelt campaigns, grants for its County Attorney's Office under the Violence Against Women Act, substance abuse treatment funds used by its Department of Corrections, and over $5 million in Community Development Block Grants. For fiscal year 2010, the county has been awarded $177,195 for its Sheriff's Department under the Edward Byrne Memorial Justice Assistance Grant Program, $149,295 under the federal Recovery Act for its Drug Court program, and $900,000 for two Community Development Block Grants.

Based upon the foregoing, we are satisfied that Grafton County has the functional capability to carry out one or more of the broad activities outlined in the EISA.[2]

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[2] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled

It Is Therefore Ordered That:

(1) The Appeal filed by Grafton County, New Hampshire, on July 22, 2009, is hereby granted.

(2) Grafton County will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: AUG 19 2009

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content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. § 17154.

Department of Energy
Washington, DC 20585

SEP - 4 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Town of Groton, Connecticut

Filing Date: July 23, 2009

Case Number: TGA-0017

This decision considers an Appeal filed by the Town of Groton, Connecticut, relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) administered by the U.S. Department of Energy (DOE). The Town of Groton seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, the Town of Groton would have 30 days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. The Energy Efficiency and Conservation Block Grant Program

The EECBG Program was established by the Energy Independence and Security Act of 2007 (EISA).[1] The EECBG Program provides grants to implement EISA activities, which are designed to reduce fossil fuel emissions and total energy use and improve energy efficiency. 42 U.S.C. §§ 17152(b)(1)-(3). EISA activities include energy conservation planning; energy audits of buildings; code development; installation of energy efficient technologies; financial incentive and public education programs; transportation programs to conserve energy; recycling programs; management of greenhouse gases from waste-related sources; and production of energy from renewable sources. *Id.* at §§ 17154(1)-(14).

EECBG recipients include States, Indian Tribes, and eligible units of local government. *Id.* at 17152(1)(A)-(C). The EISA defines an "eligible unit of local government" as: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Pub. Law No. 111-5 (2009).

of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State. *Id.* at §§ 17151(3)(A)(i)-(ii).

In April 2009, DOE published formulas for the allocation of direct grants under the EECBG Program. 74 Fed. Reg. 17,461 (Apr. 15, 2009). DOE stated that for a city or county to be an eligible unit of local government, in addition to meeting the EISA's population thresholds, it must:

(1) Be listed in the U.S. Census Bureau's 2007 Governments Integrated Directory (GID) as an incorporated entity;

(2) Be listed in the U.S. Census of Governments as having a governance structure consisting of an elected official and governing body; and

(3) Be listed in the 2007 Census data as capable of carrying out activities that the EISA sets forth.

Id.; *see also* 74 Fed. Reg. 30,062 (June 24, 2009).

In May 2009, DOE published a list of entities eligible to apply for direct grants under the EECBG Program. *See* Attachment A, U.S. Department of Energy, National Energy Technology Laboratory, Recovery Act – Energy Efficiency and Conservation Block Grants – Formula Grants, Funding Opportunity Number: DE-FOA-0000013, Amendment 000003, *available at* http://www.eecbg.energy.gov/downloads/DE_FOA_0000013_Amendment_000003.pdf (last visited Aug. 20, 2009).

DOE treated towns, townships, and boroughs as cities if the U.S. Census Bureau listed them as "incorporated places" for purposes of the Department of Housing and Urban Development's Community Development Block Grant Program. 74 Fed. Reg. 30,062, 30,063 (June 24, 2009). (Because cities are potentially eligible units of local government, incorporated places are also potentially eligible units of local government.) If one incorporated place is "nested" within the boundaries of another incorporated place, DOE counted the two populations separately. By subtracting the population of a nested city from the town in which it lies, DOE wished to avoid "double-counting" populations in order to distribute the funds equitably, on a per-capita basis. Further, "DOE assumed" that if the 2007 GID listed an entity as incorporated, that entity "has a functional government with responsibilities and jurisdiction capable of implementing the broad range of programs identified by EISA." *Id.* at 30,062.

B. Appeal Procedures

On June 24, 2009, DOE published a notice establishing a process for units of local government to appeal DOE's EECBG eligibility determinations. *See id.* at 30,061. A unit of local government may appeal when it has been denied eligibility based:[2]

(1) Upon a determination that it is incapable of carrying out activities set forth in [the EISA];

(2) Upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in [the] EISA; or

(3) Upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Id. at 30,064. The notice set an appeal deadline of July 24, 2009.

DOE specified a test that a unit of local government must meet when it appeals its EECBG eligibility denial based "[u]pon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in [the] EISA." The June 24, 2009, Federal Register notice states that the appellant "would need to demonstrate that the 'nested city' lacks sufficient jurisdiction and government function to carry out the types of projects listed in EISA, and the 'nested city' relies on the appellant city for such services." *Id.* at 30,063. Noting that the information provided in the appeal "should be authoritative but need not be exhaustive," the notice states that in order to make the required demonstration, the appealing unit of government should show "that the larger city provides services to the 'nested city' of the type necessary to implement programs or projects that are consistent with those listed by EISA. A city (or city equivalent) may include previous examples where the applicant has carried out such activities." *Id.*

C. The Town of Groton's Appeal

The Town of Groton has 42,324 residents, including 9,338 residents in the "nested" City of Groton, which is located within the Town of Groton's "corporate boundaries." Appeal at 3.[3] DOE "adjusted" the population of the Town by subtracting the population of the City, based on the assumption that the City is capable of implementing activities set forth in the EISA. *See id.*

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[2] Certain eligibility determinations are not appealable, including denials based on the entity's "failure to meet required population thresholds." 74 Fed. Reg. 30,064 (June 24, 2009). Nor can an entity appeal a denial because the GID does not list it as an incorporated entity, or because the U.S. Census of Governments does not list it as having an elected official and governing body. *See id.*

[3] These population numbers are taken from the U.S. Census Bureau's Population Estimates data for the period April 1, 2000 to July 1, 2007 (released on July 10, 2008).

at 2. Because the Town of Groton's "adjusted" population fell below the EECBG population eligibility threshold of 35,000, DOE denied it eligibility to apply for EECBG funds. *Id.* at 4-5.

The Town of Groton argues that DOE improperly adjusted its population because (i) the City of Groton is not capable of implementing activities set forth in the EISA; and (ii) the City relies on the Town for such services. Therefore, the Town of Groton argues that the DOE improperly denied it eligibility to apply for EECBG funds. *Id.* at 12.

II. Analysis

We have reviewed the Town of Groton's Appeal and determined that it should be granted. The Town of Groton shows that the City of Groton lacks the jurisdiction and government function to implement EISA activities. It makes its showing by demonstrating that it provides many services to the City, and that the City relies on it to provide EISA-type activities in many of those services.

The services that the Town provides to the City include the public school system; a recycling program; a public works program; three municipal libraries; the public health services; the probate court; social services and assistance; animal control; the school nurses; the multi-purpose refuse transfer station; Meals on Wheels; grants to approximately 18 social service and cultural agencies; the Senior Center; the K-9 police; the ambulance services; and community redevelopment housing rehabilitation. *Id.* at 8, 9, 14.

In providing these services to the City, the Town has undertaken activities consistent with programs and projects that the EISA authorizes. For example, in January 2008, the Town opened a new high school that serves the City. Memorandum of Telephone Conversation Between Mark R. Oefinger, Town Manager, Town of Groton, and David M. Petrush, Attorney-Examiner, OHA, Sept. 1, 2009. Through a grant, the State Department of Education provided more than half of the building costs of $42 million. The school's energy efficient lights and HVAC system caused the electricity provider to award the school a $100,000 rebate. Additionally, the new high school is much larger than the old high school, but saves $100,000 a year in fuel oil. Second, the Town's recycling program provides the City bins, educational materials, and a processing facility. Third, the Town operates 20 passenger vehicles (excluding police cars) that also serve the City. The Town recently replaced 8 of the vehicles with energy-efficient hybrids, and has ordered 4 more. For three years, the Town has paid for part of the vehicles with grant money from the State Department of Transportation. *Id.* Lastly, the area's largest employers are located in the City, providing jobs for more than 13,000 commuters that congest the area. The Town sanctioned and financed a study to improve traffic flows and reduce carbon emissions within the City. *Id.*, *see also* Appeal at 16.

The Town of Groton has presented sufficient evidence that the City of Groton lacks the government function to implement EISA activities, and that by necessity the City relies on the

Town to implement those activities.[4] Therefore, the Town of Groton has established that the population of the City of Groton should be included with the Town of Groton's population for purposes of determining eligibility for apply for EECBG program funding. As indicated above, with this adjustment, the Town of Groton's 2007 Census population exceeds the 35,000 population threshold established by the EISA.

It Is Therefore Ordered That:

(1) The Appeal filed by the Town of Groton, Connecticut, on July 23, 2009, is hereby granted.

(2) The Town of Groton will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 000003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: SEP - 4 2009

[4] The Town of Groton also argues that DOE adjusted its population based on a misapplied application of the "double-counting" rule. Appeal at 9, 10. We agree. Since the City of Groton's low population made it ineligible to apply for EECBG funds (nor is the City one of the ten largest in the state), the City's population could not have been "double-counted."

Department of Energy
Washington, DC 20585

SEP - 2 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Carroll County, New Hampshire

Date of Filing: July 23, 2009

Case Number: TGA-0018

This decision considers an Appeal filed by Carroll County, New Hampshire (Carroll County) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Carroll County seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, Carroll County would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. §§ 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. § 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5 (Recovery Act).

as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible

unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, Carroll County states that it believes it was denied eligibility to apply for EECBG Program funding based on a determination that it is incapable of carrying out activities prescribed by the EISA. Appeal at 4. Carroll County asserts in its Appeal that it "clearly has a governance structure with the type of responsibilities and jurisdiction capable of implementing the programs contemplated by" the EECBG Program. *Id.*

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Carroll County and have determined that its Appeal should be granted. For the reasons discussed below, we find that Carroll County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Carroll County is one of ten county governments in the State of New Hampshire listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Carroll County therefore meets this criterion.

(2) Population

As noted above, the EISA definition of "eligible unit of local government" includes a county with a population which causes the county to be one of the ten highest populated counties of the State. Because there are only ten counties in the State of New Hampshire, Carroll County is one of the ten highest populated counties of the State. We, therefore, find that Carroll County satisfies the population requirement of the EISA.

(3) Governance Structure

Carroll County states in its Appeal that it is governed by three elected county commissioners. Appeal at 2. The 2007 Census of Governments describes boards of county commissioners as the "governing body" of counties in the State of New Hampshire. *See* http://www.census.gov/govs/www/cog2007.html. Based upon this information, we find that Carroll County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

In its April 15, 2009, Federal Register Notice, the DOE found that, as "defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 Fed. Reg. at 17462. However, as discussed below, we find that Carroll County has presented sufficient supporting information and evidence in its Appeal and supplementary material to rebut that presumption.

As of 2009, Carroll County has an annual budget of over $22 million. E-Mail from Kathleen Garry, Finance Director, Carroll County, to Steven Goering, OHA Staff Attorney (August 3, 2009) (attaching budget document). According to its Appeal, the county's jurisdiction and responsibilities include a correctional facility housing up to 131 inmates at any one time, a 103-bed nursing home, the County Attorney's Office, County Treasurer's Office, County Register of Deeds Office, County Commissioner's Office, the Carroll County Sheriff's Department, and a county farm. Appeal at 2-3. The county, with approximately 290 employees, has a large complex made up of five main government buildings and smaller support buildings. *Id.* at 4.

In its Appeal, Carroll County states that is has previously implemented energy efficiency programs, including the construction of a new, more energy-efficient jail, new air handlers for its county administration building, new boilers, hot water tank, and doors in its nursing home, and lighting upgrades and recycling initiatives at all county buildings. *Id.* at 5. The county also cites "strategies and plans in place" for future energy efficiency and conservation programs, including plans to replace use of liquified petroleum heat and hot water sources with biomass, an assessment of the viability of wind power, and installation of photovoltaic panels. *Id.*

Regarding its ability to administer federal grant funding, Carroll County receives federal Community Development Block Grant (CDBG) funds through New Hampshire's Community Development Finance Authority (CDFA), most recently receiving "$750,000 in CDBG funds to complete a water system upgrade and $200,000 for a capacity building project that partially supports the state's 10 Regional Economic Development Corporations." E-Mail from George Hunton, Portfolio Manager, CDFA, to Steven Goering, OHA Staff Attorney (August 4, 2009). The county has received from the State of New Hampshire annual Victim Witness Advocate Grants of $25,000 since 1995, as well as annual Juvenile Justice and Delinquency Prevention Grants of $100,000, and grants from the New Hampshire Department of Environmental Services. E-Mail from Kathleen Garry, Finance Director, Carroll County, to Steven Goering, OHA Staff Attorney (August 28, 2009). In addition, the county received Homeland Security Grants annually from 2002 through 2005. *Id.*

Based upon the foregoing, we are satisfied that Carroll County has the functional capability to carry out one or more of the broad activities outlined in the EISA.[2]

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[2] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled

It Is Therefore Ordered That:

(1) The Appeal filed by Carroll County, New Hampshire, on July 23, 2009, is hereby granted.

(2) Carroll County will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: SEP - 2 2009

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content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. § 17154.

Department of Energy
Washington, DC 20585

AUG 19 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Town of Buckeye, Arizona

Date of Filing: July 23, 2009

Case Number: TGA-0019

This decision considers an Appeal filed by the Town of Buckeye, Arizona (Town of Buckeye) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, the Town of Buckeye seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, the Town of Buckeye would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible

unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, the Town of Buckeye contends that DOE inappropriately failed to identify the town as a unit of local government eligible to apply for direct funding under the EECBG Program. According to the Town of Buckeye, it was denied eligibility based upon the 2007 Census population data relied upon by DOE, which indicates that the Town of Buckeye has less than the 35,000 population eligibility threshold established by the EISA. The Town of Buckeye argues, however, that use of this data by DOE was incorrect. In its Appeal, the Town of Buckeye has submitted 2006-2008 population data from the Population Statistics Unit, Arizona Department of Commerce, showing the Town of Buckeye as having a 2007 population of 40,467. Appeal at 1; Appeal Attachment 1. In addition, the Town of Buckeye has submitted revised 2007 Census population

estimates, released by the U.S. Census Bureau in 2009, which shows the Town of Buckeye as having a 2007 population of 37,576. *Id.*, Attachment 2. The Town of Buckeye therefore claims that it should be determined eligible to apply for direct funding under the EECBG Program.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by the Town of Buckeye and have determined that its Appeal must be denied. The Town of Buckeye is a unit of local government identified in 2007 GID, and clearly has the governance structure and functional capability to carry out the broad range of activities specified in the EISA. However, as explained below, the Town of Buckeye fails to meet the EISA population requirement based upon 2007 U.S. Census estimates data utilized by DOE for purposes of the EECBG Program.

The U.S. Census Bureau is the official government source for population data and related information. In determining the EECBG Program eligibility of cities and counties, DOE relied on the Census 2007 Population Estimates data (April 1, 2000 to July 1, 2007) released by the U.S. Census Bureau on July 10, 2008. As stated by DOE in the April 15, 2009, Federal Register notice, this was "the most recent and accurate population data from the U.S. Census" at the time the EECBG Program was implemented. 74 Fed. Reg. 17462. The 2007 Census data relied upon by DOE shows the Town of Buckeye as having a 2007 population of 29,966,[2] below the 35,000 population threshold established by the EISA and does not qualify the Town of Buckeye as one of the ten most populous cities in the State of Arizona. Thus, we find that the Town of Buckeye was properly omitted by DOE from the listing of cities and counties determined by DOE to be ineligible to apply for direct funding under the EECBG Program.

We are unable to accept the more recently released 2007 population estimates presented by the Town of Buckeye. The revised 2007 Census population estimates (April 1, 2000 to July 1, 2008), showing the Town of Buckeye with a 2007 population of 37,576, were released by the U.S. Census Bureau on July 1, 2009. This was nearly three months after DOE's issuance of the April 15, 2009, Federal Register notice implementing the EECBG Program, when DOE published the funding opportunity announcement that identified "eligible units of local government" based on the initial 2007 population data published on July 10, 2008. *See* Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A. We find that DOE decision to use uniformly the best available Census data at the time the EECBG Program was established to be a prudent exercise of

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[2] The U.S. Census Bureau provided an opportunity for local governments to request corrections to the initially released 2007 population data. The time in which file a population challenge closed on January 5, 2009. DOE indicated in the April 15, 2009, Federal Register notice that it would update the 2007 population data it utilized to reflect challenges that were submitted and accepted by the U.S. Census Bureau. A listing of the successful challenges can be found at: http://www.census.gov/popest/archives/2000s/vintage_2007/07s_challenges.html. According to that listing, the Town of Buckeye is not among the local governments that filed a successful challenge to 2007 Census estimates.

agency discretion. It would be impracticable to implement the EECBG Program in a cohesive and timely manner if individual units of local government were permitted to present alternative or subsequently released population data to determine EECBG Program eligibility. For that reason, the June 24, 2009, Federal Register notice that established the present appeal process provides that issues regarding DOE's methodology for determining the population of a city or county are not appealable, specifically stating:

> [T]he determination of DOE to rely on the 2007 Census data is not reviewable on appeal. DOE recognizes that more recent data have been made available by the U.S. Census Bureau. However, in order to provide certainty as to the funding levels of entities determined to be "eligible units of local government," DOE relied on the most recent data available at the time the formula allocations were announced. The availability of updated (as opposed to corrected 2007 data) is not reviewable on appeal.

74 Fed. Reg. at 30064 (emphasis supplied).[3] Accordingly, the Town of Buckeye's appeal must be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by the Town of Buckeye, Arizona, on July 23, 2009, is hereby denied.

(2) This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: AUG 19 2009

[3] For these same reasons, it is inappropriate to consider the 2007 population data that the Town of Buckeye obtained from the Arizona Department of Commerce and submitted with its present appeal.

Department of Energy
Washington, DC 20585
AUG 19 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: City of Bremerton, Washington

Date of Filing: July 23, 2009

Case Number: TGA-0020

This decision considers an Appeal filed by the City of Bremerton, Washington (City of Bremerton) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, the City of Bremerton seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, the City of Bremerton would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible

unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, the City of Bremerton contends that DOE inappropriately failed to identify the town as a unit of local government eligible to apply for direct funding under the EECBG Program. According to the City of Bremerton, it was denied eligibility based upon the 2007 Census population data relied upon by DOE, which indicates that the City of Bremerton has less than the 35,000 population eligibility threshold established by the EISA, more specifically that the city had a 2007 population of 34,075. However, the City of Bremerton contests the use of this data by DOE. According to the City of Bremerton, the U.S. Census Bureau subsequently released revised 2007 Census population estimates which show that the City of Bremerton had a 2007 population of 35,826. Appeal at 2. In addition, the City of Bremerton asserts that it has a daytime population of

52,725, and "hence represents a community with substantial daytime energy demands and infrastructure." *Id.* The City of Bremerton therefore claims that it should be determined eligible to apply for direct funding under the EECBG Program.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by the City of Bremerton and have determined that its Appeal must be denied. The City of Bremerton is a unit of local government identified in 2007 GID, and clearly has the governance structure and functional capability to carry out the broad range of activities specified in the EISA. However, as explained below, the City of Bremerton fails to meet the EISA population requirement based upon 2007 U.S. Census estimates data utilized by DOE for purposes of the EECBG Program.

The U.S. Census Bureau is the official government source for population data and related information. In determining the EECBG Program eligibility of cities and counties, DOE relied on the Census 2007 Population Estimates data (April 1, 2000 to July 1, 2007) released by the U.S. Census Bureau on July 10, 2008. As stated by DOE in the April 15, 2009, Federal Register notice, this was "the most recent and accurate population data from the U.S. Census" at the time the EECBG Program was implemented. 74 Fed. Reg. 17462. The 2007 Census data relied upon by DOE shows the City of Bremerton as having a 2007 population of 34,075,[2] below the 35,000 population threshold established by the EISA and does not qualify the City of Bremerton as one of the ten most populous cities in the State of Washington. Thus, we find that the City of Bremerton was properly omitted by DOE from the listing of cities determined by DOE to be eligible to apply for direct funding under the EECBG Program.

We are unable to accept the more recently released 2007 population estimates presented by the City of Bremerton. The revised 2007 Census population estimates (April 1, 2000 to July 1, 2008), showing the City of Bremerton with a 2007 population of 35,826, were released by the U.S. Census Bureau on July 1, 2009. This was nearly three months after DOE's issuance of the April 15, 2009, Federal Register notice implementing the EECBG Program, when DOE published the funding opportunity announcement that identified "eligible units of local government" based on the initial 2007 population data published on July 10, 2008. *See* Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A. We find DOE's decision to use uniformly the best

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[2] The U.S. Census Bureau provided an opportunity for local governments to request corrections to the initially released 2007 population data. The time in which file a population challenge closed on January 5, 2009. DOE indicated in the April 15, 2009, Federal Register notice that it would update the 2007 population data it utilized to reflect challenges that were submitted and accepted by the U.S. Census Bureau. A listing of the successful challenges can be found at: http://www.census.gov/popest/archives/2000s/vintage_2007/07s_challenges.html. In its appeal, the City of Bremerton concedes that it did not file challenge to the initial 2007 population estimates released by the U.S. Census Bureau asserting, however, that it would have done so if it had known of the impact upon its EECBG Program eligibility. Appeal at 2.

available Census data at the time the EECBG Program was established to be a prudent exercise of agency discretion. It would be impracticable to implement the EECBG Program in a cohesive and timely manner if individual units of local government were permitted to present alternative or subsequently released population data to determine EECBG Program eligibility. For that reason, the June 24, 2009, Federal Register notice that established the present appeal process provides that issues regarding DOE's methodology for determining the population of a city or county are not appealable, specifically stating:

> [T]he determination of DOE to rely on the 2007 Census data is not reviewable on appeal. DOE recognizes that more recent data have been made available by the U.S. Census Bureau. However, in order to provide certainty as to the funding levels of entities determined to be "eligible units of local government," DOE relied on the most recent data available at the time the formula allocations were announced. The availability of updated (as opposed to corrected 2007 data) is not reviewable on appeal.

74 Fed. Reg. at 30064 (emphasis supplied). Accordingly, the City of Bremerton's appeal must be denied.[3]

It Is Therefore Ordered That:

(1) The Appeal filed by the City of Bremerton, Washington, on July 23, 2009, is hereby denied.

(2) This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: AUG 19 2009

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[3] The City of Bremerton urges that we take into consideration its daytime population, which it estimates to be 52,725. However, daytime population is relevant only for purposes of calculating the allocation amount of a city or county, after EECBG Program eligibility has been established. *See* 74 Fed. Reg. at 17463.

Department of Energy
Washington, DC 20585

AUG 20 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Merrimack County, New Hampshire

Date of Filing: July 24, 2009

Case Number: TGA-0021

This decision considers an Appeal filed by Merrimack County, New Hampshire (Merrimack County) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Merrimack County seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, Merrimack County would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. §§ 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. § 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5 (Recovery Act).

as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible

unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, Merrimack County states that it believes it was denied eligibility to apply for EECBG Program funding based on a determination that it is incapable of carrying out activities prescribed by the EISA. Appeal at 2. Merrimack County asserts in its Appeal, however, that this finding is incorrect and that it "clearly has a governance structure with the type of responsibilities and jurisdiction capable of implementing the programs contemplated by" the EECBG Program. *Id.* at App. C.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Merrimack County and have determined that its Appeal should be granted. For the reasons discussed below, we find that Merrimack County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Merrimack County is one of ten county governments in the State of New Hampshire listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Merrimack County therefore meets this criterion.

(2) Population

As noted above, the EISA definition of "eligible unit of local government" includes a county with a population which causes the county to be one of the ten highest populated counties of the State. Because there are only ten counties in the State of New Hampshire, Merrimack County is one of the ten highest populated counties of the State. We, therefore, find that Merrimack County satisfies the population requirement of the EISA.

(3) Governance Structure

Merrimack County states in its Appeal that it "is governed by 3 elected County Commissioners." Appeal at 1. The 2007 Census of Governments describes boards of county commissioners as the "governing body" of counties in the State of New Hampshire. *See* http://www.census.gov/govs/www/cog2007.html. Based upon this information, we find that Merrimack County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

In its April 15, 2009, Federal Register Notice, the DOE found that, as "defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 Fed. Reg. at 17462. However, as discussed below, we find that Merrimack County has presented sufficient supporting information and evidence in its Appeal and supplementary material to rebut that presumption.

Merrimack County has an annual budget of over $72 million. Appeal at 2. The county's jurisdiction and responsibilities include a 235-inmate correctional facility, a 291-bed nursing home, and offices for a Treasurer, Attorney, Sheriff, Register of Deeds, and Administrator. *Id.* With 761 county employees, the county maintains 14 buildings totaling over 584,102 square feet. *Id.* at 4.

Merrimack County has previously implemented energy efficiency programs, including the construction of its 220,000 square foot nursing home, which features geothermal heating and cooling, efficient lights, and Energy Star-rated appliances. *Id.* at 4.

Regarding Merrimack County's ability to administer federal grants, the county "has administered a variety of grants – primarily for affordable housing, public facilities, infrastructure, education, corrections, economic development, and human services." E-Mail from Kathy Bateson, County Administrator, Merrimack County, to David M. Petrush, Attorney-Examiner, OHA, Aug. 12, 2009.

Since 1999, the county has administered approximately $7 million in grants acquired through competitive application processes. The grants are from various state agencies, the US Department of Justice, and private foundations. The dollar amounts of the grants range from $20,000 to $500,000, but most are between $250,000 and $400,000. The grant periods range between 12 and 24 months. *Id.*

Based upon the foregoing, we are satisfied that Merrimack County has the functional capability to carry out one or more of the broad activities outlined in the EISA.[2]

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[2] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. § 17154.

It Is Therefore Ordered That:

(1) The Appeal filed by Merrimack County, New Hampshire, on July 24, 2009, is hereby granted.

(2) Merrimack County will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: AUG 20 2009

Department of Energy
Washington, DC 20585

AUG 20 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Sullivan County, New Hampshire

Date of Filing: July 24, 2009

Case Number: TGA-0022

This decision considers an Appeal filed by Sullivan County, New Hampshire (Sullivan County) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Sullivan County seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, Sullivan County would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. §§ 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. § 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5 (Recovery Act).

as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible

unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, Sullivan County states that it believes it was denied eligibility to apply for EECBG Program funding based on a determination that it is incapable of carrying out activities prescribed by the EISA. Appeal at 2. Sullivan County asserts in its Appeal, however, that this finding is incorrect and that it "clearly has a governance structure with the type of responsibilities and jurisdiction capable of implementing the programs contemplated by" the EECBG Program. *Id.* at App. C.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Sullivan County and have determined that its Appeal should be granted. For the reasons discussed below, we find that Sullivan County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Sullivan County is one of ten county governments in the State of New Hampshire listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Sullivan County therefore meets this criterion.

(2) Population

As noted above, the EISA definition of "eligible unit of local government" includes a county with a population which causes the county to be one of the ten highest populated counties of the State. Because there are only ten counties in the State of New Hampshire, Sullivan County is one of the ten highest populated counties of the State. We, therefore, find that Sullivan County satisfies the population requirement of the EISA.

(3) Governance Structure

Sullivan County states in its Appeal that it is governed by 3 elected County Commissioners. Appeal at App A. The 2007 Census of Governments describes boards of county commissioners as the "governing body" of counties in the State of New Hampshire. *See* http://www.census.gov/govs/www/cog2007.html. Based upon this information, we find that Sullivan County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

In its April 15, 2009, Federal Register Notice, the DOE found that, as "defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 Fed. Reg. at 17462. However, as discussed below, we find that Sullivan County has presented sufficient supporting information and evidence in its Appeal and supplementary material to rebut that presumption.

Sullivan County has an annual budget of over $33 million. E-Mail from Sharon Johnson-Callum, Administrative Assistant, Sullivan County Commissioner's Office, to David M. Petrush, Attorney-Examiner, OHA, Aug. 7, 2009. The county's jurisdiction and responsibilities include a correctional facility, a 156-bed nursing home, and office for an Attorney, Registrar of Deeds, Victim Witness Protection, Sheriff, UNH Cooperative Extension, Conservation Soil District, Administrator, and Commissioners. Appeal at App. A. With 250 full-time employees, the county maintains numerous government buildings totaling over 300,000 square feet. *Id.* at App. C.

Sullivan County has previously implemented energy efficiency programs, including an April 2005 comprehensive energy audit of the county complex, including the nursing home and correctional facility. At the nursing home, the county installed 200 energy efficient lighting fixtures. At the county administration building, the county installed energy efficient lighting fixtures, windows, insulation, and a boiler. *Id.*

Regarding Sullivan County's ability to administer federal grants, the county provided examples of its administration of "numerous grants from a variety of sources." E-Mail from Sharon Johnson-Callum, Administrative Assistant, Sullivan County Commissioner's Office, to David M. Petrush, Attorney-Examiner, OHA, Aug. 7, 2009. In FY08 and FY09, the county commissioner's office has provided fiscal oversight to a grant from the NH State Department of Health & Human Services (HHS), Division of Public Health Services (DPS). In the amount of $75,000, the grant funds a Public Health Network Coordinator to provide state-approved health services. During the same time, the county commissioner's office has also overseen a grant from the DPS Section of Alcohol Tobacco & Other Drug Prevention. In the amount of $232,252, the grant allows the county to provide drug and alcohol prevention services. The county provided information about its administration of ten additional grants.

Based upon the foregoing, we are satisfied that Sullivan County has the functional capability to carry out one or more of the broad activities outlined in the EISA.[2]

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[2] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;

It Is Therefore Ordered That:

(1) The Appeal filed by Sullivan County, New Hampshire, on July 24, 2009, is hereby granted.

(2) Sullivan County will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: AUG 20 2009

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waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. § 17154.

Department of Energy
Washington, DC 20585
AUG 20 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Hillsborough County, New Hampshire

Date of Filing: July 24, 2009

Case Number: TGA-0023

This decision considers an Appeal filed by Hillsborough County, New Hampshire (Hillsborough County) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Hillsborough County seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, Hillsborough County would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. §§ 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. § 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5 (Recovery Act).

as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible

unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, Hillsborough County states that it believes it was denied eligibility to apply for EECBG Program funding based on a determination that it is incapable of carrying out activities prescribed by the EISA. Appeal at 2. Hillsborough County asserts in its Appeal, however, that this finding is incorrect and that it "clearly has a governance structure with the type of responsibilities and jurisdiction capable of implementing the programs contemplated by" the EECBG Program. *Id.* at App. C.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Hillsborough County and have determined that its Appeal should be granted. For the reasons discussed below, we find that Hillsborough County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Hillsborough County is one of ten county governments in the State of New Hampshire listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Hillsborough County therefore meets this criterion.

(2) Population

As noted above, the EISA definition of "eligible unit of local government" includes a county with a population which causes the county to be one of the ten highest populated counties of the State. Because there are only ten counties in the State of New Hampshire, Hillsborough County is one of the ten highest populated counties of the State. We, therefore, find that Hillsborough County satisfies the population requirement of the EISA.

(3) Governance Structure

Hillsborough County states in its Appeal that it is governed by 3 elected County Commissioners. Appeal at 2. The 2007 Census of Governments describes boards of county commissioners as the "governing body" of counties in the State of New Hampshire. *See* http://www.census.gov/govs/www/cog2007.html. Based upon this information, we find that Hillsborough County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

In its April 15, 2009, Federal Register Notice, the DOE found that, as "defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 Fed. Reg. at 17462. However, as discussed below, we find that Hillsborough County has presented sufficient supporting information and evidence in its Appeal and supplementary material to rebut that presumption.

Hillsborough County has approximately 800 employees and an annual budget of almost $85 million. Appeal Exh. 2 at 30; Memorandum of Telephone Conversation Between Gregory Wenger, County Administrator, Hillsborough County, and David M. Petrush, Attorney-Examiner, OHA, August 18, 2009. Elected officers include the County Attorney, Registrar of Deeds, Sheriff, Treasurer, Nursing Home Administrator, Superintendent of Corrections, Director of Health and Human Services, and the County Administrator. The county maintains 26 buildings of considerable size. The 125,400 square-foot nursing facility has 300 beds, and the 141,000 square-foot correctional facility has capacity for more than 700 inmates. Appeal at 2-4.

Hillsborough County has previously implemented energy efficiency programs, including the installation of energy efficient lights in its correctional facility and nursing home. Hillsborough County is also developing a master plan for its properties that includes scientific analysis of issues regarding long-term energy efficiency. Memorandum of Telephone Conversation Between Gregory Wenger, County Administrator, Hillsborough County, and David M. Petrush, Attorney-Examiner, OHA, August 18, 2009.

Regarding Hillsborough County's ability to administer federal grants, the county "has both received and distributed a number of grants over the years." E-mail from Gregory Wenger, County Administrator, Hillsborough County, to David M. Petrush, Attorney-Examiner, OHA, Aug. 6, 2009. Currently, the County Attorney is administering a $1,202,712 grant to re-integrate former inmates into their communities, and a $52,000 grant to hire a prosecutor to combat gang crime. The Human Services Department is administering a $151,000 grant for family intervention and diversion. The US Department of Justice funds the grants through the County Attorney, and the State of New Hampshire funds the grant through the Human Services Department. *Id.*; Memorandum of Telephone Conversation Between Gregory Wenger, County Administrator, Hillsborough County, and David M. Petrush, Attorney-Examiner, OHA, August 18, 2009.

Based upon the foregoing, we are satisfied that Hillsborough County has the functional capability to carry out one or more of the broad activities outlined in the EISA.[2]

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[2] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar

It Is Therefore Ordered That:

(1) The Appeal filed by Hillsborough County, New Hampshire, on July 24, 2009, is hereby granted.

(2) Hillsborough County will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: AUG 20 2009

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waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. § 17154.

Department of Energy
Washington, DC 20585

AUG 18 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Somerset County, Maine

Date of Filing: July 24, 2009

Case Number: TGA-0024

This decision considers an Appeal filed by Somerset County, Maine (Somerset County) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Somerset County seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, Somerset County would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible

unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, Somerset County states that it believes it was denied eligibility to apply for EECBG Program funding based on a determination that it is incapable of carrying out activities prescribed by the EISA. Somerset County asserts in its Appeal, however, that this finding is incorrect and that "[o]ur county does, in fact, have the jurisdiction and functional capabilities to implement the broad range of programs identified by EISA." Appeal at 1. Somerset County further contends that it otherwise meets the requirements for EECBG eligibility, specifically that the county (1) is a unit of local government identified in 2007 GID, (2) meets the required EISA population threshold based upon 2007 U.S. Census estimates, and (3) has a governance structure consisting of elected officials and a governing body.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Somerset County and have determined that its Appeal should be granted. For the reasons discussed below, we find that Somerset County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Somerset County is one of 16 county governments in the State of Maine listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Somerset County therefore meets this criterion.

(2) Population

According to 2007 U.S. Census county population data, the population of Somerset County in 2007 was 51,658. Under the State and Local Grant Allocations listing published by DOE on April 15, 2009, no cities or towns located within Somerset County were determined to be eligible to receive EECBG funding. *See* Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A. When compared to other Maine counties whose populations are adjusted by subtracting the population of municipal recipients of EECBG funds, Somerset County is the eighth most populous county in the state of Maine. We, therefore, find that Somerset County satisfies the population requirement of the EISA as one of the ten most populous counties in the State.

(3) Governance Structure

Somerset County states in its Appeal that it has a "Commission-Administrator" governance structure. More specifically, Somerset County states that it has three County Commissioners, elected by popular vote from three single-member electoral districts. According to Somerset County, the three County Commissioners are the policy-making body of the County, and the County Administrator manages more than 200 County employees. Appeal at 1-2.[2] Based upon this information, we find that Somerset County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

In its Appeal, Somerset County argues that the county was initially denied EECBG eligibility based upon DOE's supposition that it does not have the functional capability to administer one or more of the broad range of activities specified in the EISA. As stated in the implementing DOE Federal Register Notice: "As defined by the Census of Governments, county governments in Maine,

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[2] Somerset County also notes that there are six officials who are elected county-wide: District Attorney, Sheriff, Judge of Probate, Registrar of Probate, Registrar of Deeds, and Treasurer. Appeal at 2.

Massachusetts, New Hampshire and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 Fed. Reg. at 17462. However, we find that Somerset County has presented sufficient supporting information and evidence in its Appeal to rebut that presumption.

According to its Appeal, Somerset County has an annual county budget of more than $12 million, and the County's jurisdiction and responsibilities include an 273-bed Jail, the Registries of Probate and Deeds, the District Attorney's Office, and a Regional Communications and Emergency Management Center. Somerset County provides law enforcement for 29 of its 32 municipalities and all of its 82 unorganized townships, as well as emergency dispatch services for all of its municipalities and several municipalities in Kennebec County. Appeal at 2.[3] According to an August 4, 2009, submission, Somerset County is also responsible for the management of over 133,000 square feet of public facilities, including the Somerset County Correctional Facility, the Courthouse Building, the Communications Center, the Extension Building, the Rockwood Fire Station, and county storage barns. In addition, in 2008, the County implemented an extensive program aimed at procuring and distributing cords of firewood to County residents in need of heating assistance. *See* Appeal at 3.

Most significant, Somerset County has extensive experience in administering federal grants in connection with the its emergency management operations, its law enforcement activities, its regional communications, and police operations performed in county towns. Since 1997, Somerset County has received more than $1.4 million in federal grants for these operations from the Department of Homeland Security, the Federal Emergency Management Agency, and the Edward Byrne Memorial Justice Assistance Grant Program of the Department of Justice. *See* August 4, 2009, submission discussing federal grants to Somerset County.

Based upon the foregoing, we are satisfied that Somerset County has the functional capability to carry out one or more of the broad activities outlined in the EISA.[4]

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[3] On August 4, 2009, Somerset County supplemented its submission with link to budget information on its website and a discussion of additional expenditures which corroborates annual expenditures by the County of more than $12 million.

[4] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;

It Is Therefore Ordered That:

(1) The Appeal filed by Somerset County, Maine, on July 24, 2009, is hereby granted.

(2) Somerset County will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals
Date: AUG 18 2009

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7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. 17154.

Department of Energy
Washington, DC 20585

AUG 27 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Barnstable County, Massachusetts

Date of Filing: July 24, 2009

Case Number: TGA-0025

This decision considers an Appeal filed by Barnstable County, Massachusetts (Barnstable County) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Barnstable County seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, Barnstable County would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible

unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, Barnstable County states that it believes it was denied eligibility to apply for EECBG Program funding based on a determination that it is incapable of carrying out activities prescribed by the EISA. Appeal at 4. Barnstable County asserts in its Appeal, however, that "the denial of eligibility is erroneous." *Id.* According to Barnstable County, it meets all of the requirements to be found eligible to receive direct funding under the EECBG Program, including having the jurisdiction, authority and functional capability to administer the types of programs and activities identified in the EISA.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Barnstable County and have determined that its Appeal should be granted. For the reasons discussed below, we find that Barnstable County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Barnstable County is one of five county governments in the State of Massachusetts listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Barnstable County therefore meets this criterion.

(2) Population

As noted above, the EISA definition of "eligible unit of local government" includes a county with a population which causes the county to be one of the ten highest populated counties of the State. Because there are only five county governments in the State of Massachusetts, Barnstable County is one of the ten highest populated counties of the State. We, therefore, find that Barnstable County satisfies the population requirement of the EISA.

(3) Governance Structure

Barnstable County states in its Appeal that in accordance with its County Home Rule Charter, the executive powers of the county are exercised by a Board of Regional Commissioners consisting of three members. Appeal at 3; *see* Exhibit B at Article 3. These Regional Commissioners are elected by Barnstable County voters to four-year terms. *Id.* The Home Rule Charter vests the County's executive branch with powers to direct and supervise all county agencies. In addition, legislative powers of Barnstable County are exercised by an Assembly of Delegates consisting of fifteen members who are elected to two-year terms by the respective towns they represent within Barnstable County. *Id.*, at Article 2. Based upon this information, we find that Barnstable County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

In its Appeal, Barnstable County argues that the county was initially denied EECBG eligibility based upon DOE's supposition that it does not have the functional capability to administer one or more of the broad range of activities specified in the EISA. As stated in the implementing DOE Federal Register Notice: "As defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 Fed. Reg. at 17462. However, we find that Barnstable County has presented sufficient supporting information and evidence in its Appeal to rebut that presumption.

Barnstable County states in its Appeal that, during fiscal year 2009, the county has been awarded more than $3.5 million in federal grant money and approximately $5 million in state grant funds that the county administers to conduct various programs on behalf of its citizens. Appeal at 5. Barnstable County notes, for example, that during the current year the county has expended approximately $875,000 of federal grant money received from the U.S. Department of Housing and Urban Development through its HOME Investment Partnerships Program. *Id.*; *see* Exhibit E. The county was recently awarded $750,000 by the state as part of a regional network program to end homelessness. *Id.* According to Barnstable County, it administers federal and state grant monies it receives through several county agencies directed by the county's executive branch: 1) Barnstable County Department of Health and Environment, 2) Barnstable County Department of Human Services, 3) Cape Cod and Islands Child Advocacy Center, 4) Barnstable County Resource Development Office, 5) Cape Cod Cooperative Extension, 6) Barnstable County Sheriff's Office, and 7) the Cape Light Compact. *See* Appeal at 5-7.

The Cape Light Compact (Compact), managed by Barnstable County, serves as a regional municipal power load aggregator as well as a energy efficiency program administrator that offers a variety of programs to help consumers with their energy needs.[2] According to Barnstable County, the Compact offers a competitive electric power supply option on an opt-out basis to over 200,000 customers, across all customer classes, located with the Compact's service territory. Appeal at 8. In addition, the Compact administers an Energy Efficiency Plan, with a 2009 annual budget of $10 million. Some of the many energy efficiency and conservation initiatives being conducted under the 2009 Energy Efficiency Program include the: 1) Massachusetts New Homes with *ENERGY STAR* Program, 2) Residential Massachusetts Home Energy Services Program, 3) Residential High Efficiency Air Conditioning Program (*"COOL SMART" with ENERGY STAR*), 4) Low-Income Single Family Program, 5) Low-Income New Construction Program, and 6) Small Commercial and Industrial Retrofit Program. *Id.* at 8-9.

Based upon the foregoing, we are satisfied that Barnstable County has the functional capability to carry out one or more of the broad activities outlined in the EISA.[3]

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[2] Barnstable County states that the Cape Light Compact was organized under a formal Intergovernmental Agreement and represents a unique partnering between Barnstable County and the Cape Cod municipalities, including the 21 towns located in Barnstable County and neighboring Dukes County. Appeal at 7. Barnstable County states that under the Intergovernmental Agreement and ancillary services agreement, Barnstable County "provides fiscal management and administrative support to the Compact, overseeing all fiscal and contracting concerns for the Compact." *Id.* citing Exhibits F and G.

[3] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings

It Is Therefore Ordered That:

(1) The Appeal filed by Barnstable County, Massachusetts, on July 24, 2009, is hereby granted.

(2) Barnstable County will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: AUG 27 2009

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performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. 17154.

Department of Energy
Washington, DC 20585

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DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Northwest Regional Planning Commission

Date of Filing: July 24, 2009

Case Number: TGA-0026

This decision considers an Appeal filed by Northwest Regional Planning Commission (Northwest RPC) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Northwest RPC seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. Although we do not find that Northwest RPC qualifies as an eligible unit of local government, one of the counties within the area served by Northwest RPC, Franklin County, Vermont, does so qualify for the reasons set forth below, and will therefore have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not

considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In the April 15, 2009, Federal Register notice, DOE found that, "[a]s defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire, and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 FR at 17462. Northwest RPC's Executive Director, Catherine Dimitruk, filed the present appeal on behalf of all of Vermont's regional planning commissions (RPCs). She contends that RPCs are proper substitutes for counties as eligible units of local government under the EISA, "as they perform many of the same functions as fully-authorized counties do in other

states, and particularly that they are perfect candidates for [EECBG funds] because of their expertise, contacts, experience, and effectiveness." Appeal at 2. In essence, under Vermont state law, the RPCs perform many of the traditional governmental functions performed by counties. Vt. Stat. Ann. tit. 24, §§ 4341-4351. These RPCs, in turn, are comprised of one or more counties, all of which are recognized by the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Northwest RPC. We do not find that Northwest RPC is a "proper substitute" as an eligible unit of local government for the counties within its jurisdiction. However, one of the counties within the area served by Northwest RPC, Franklin County, Vermont, has authorized Northwest RPC to represent the county on its behalf in the current Appeal process, and to receive and administer on its behalf any grants it may be eligible to apply for under the EECBG program. Further, as we discuss below, Franklin County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.[2]

(1) Incorporated Unit of Local Government

Franklin County is one of 14 county governments in the State of Vermont listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Franklin County therefore meets this criterion.

(2) Population

As noted above, the EISA definition of "eligible unit of local government" includes a county with a population which causes the county to be one of the ten highest populated counties of the State. According to 2007 U.S. Census data, after subtracting the population of the ten Vermont cities eligible to receive EECBG funding from their respective counties, *see* Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A, Franklin County is the 3rd most populous county in the State of Vermont. We, therefore, find that Franklin County satisfies the population requirement of the EISA.

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[2] The other county within the jurisdiction of Northwest RPC, Grand Isle County, Vermont, has a population of 7,601, according to 2007 U.S. Census data, making it the 13th most populous county in the state of Vermont. As such, Grand Isle County does not meet the population thresholds required for it to be considered an "eligible unit of local government" under the EISA. However, as noted in the April 15, 2009, Federal Register notice, county governments that do not meet the eligibility requirements for direct formula grants from DOE are eligible for program funds through the State in which they are located. 74 FR at 17462. Thus, Grand Isle County will be eligible to apply for EECBG funds through the State of Vermont.

(3) Governance Structure

Northwest RPC states in its Appeal that Vermont counties "are run by Assistant Judges, elected every four years at the General Election." Appeal at 2. The 2007 Census of Governments describes these assistant or "side" judges as the "principal administrative officers" of counties in the State of Vermont. *See* http://www.census.gov/govs/www/cog2007.html. Based upon this information, we find that Franklin County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

As noted above, the 2007 Census of Governments states that county governments in Vermont perform "very limited" functions. *Id.* However, in providing for the current appeal process, DOE recognized that "the characterization of city and county governments in the 2007 Census data was not in the context of the EECBG Program" and that, therefore, "the characterization of the governing structure of a city or county may not have been sufficiently informative for the purpose of determining eligibility under the EECBG Program. " 74 FR at 30063. This is clearly the case with respect to the State of Vermont, where as noted in the present Appeal, "laws and government systems have developed in different ways, particularly in the allocation of power among political subdivisions." Appeal at 2.

Thus, even if Franklin County government lacks the functional capability to, on its own, carry out activities as outlined in the EISA, the county has authorized Northwest RPC to "receive and administer any grants for which it may be eligible to apply under the EECBG program." Letter from Honorable Teresa Manahan and Honorable Roberta Allard, Franklin County, to Steven Goering, Office of Hearings and Appeals (August 19, 2009). We note here that, under Vermont law, RPCs are required to "assist and advise . . . authorities within the region to facilitate economic development programs for the appropriate development, improvement, protection and preservation of the region's physical and human resources." Vt. Stat. Ann. tit. 24, § 4345a(1). Further, as explained below, we find that Northwest RPC clearly has the necessary functional capability to carry out EISA activities on behalf of Franklin County, and indeed already acts in that capacity in administering similar programs.

In the present Appeal, Ms. Dimitruk states that Vermont's RPCs "are authorized by statute to perform a variety of functions, including regional planning for a number of topics including energy, land use, transportation, housing, etc., promoting mutual cooperation among municipalities, advising them on public financing, and providing technical and legal support to the towns and cities of Vermont, among other duties." Appeal at 1-2 (citing Vt. Stat. Ann. tit. 24, § 4345a). She states that the RPCs have been involved in energy planning for many years and that "[e]nergy planning is one of the required elements of a regional plan under Vermont law." *Id.* at 2 (citing Vt. Stat. Ann. tit. 24, §§ 4347, 4348).[3]

[3] We also note that, under Vermont law, RPC members are appointed by, and "serve at the pleasure" of, the legislative bodies of the municipalities represented by the RPC. Vt. Stat. Ann. tit.

Regarding its ability to administer federal grant funding, Northwest RPC states that it "already receives substantial funding support from numerous federal agencies." Letter from Catherine Dimitruk, Executive Director, Northwest RPC, to Steven Goering, Office of Hearings and Appeals (August 19, 2009). Among its current activities is the administration of three Brownfields grants from the U.S. Environmental Protection Agency, totaling $600,000. *Id.* at 1-2. In fiscal years 2008 and 2009, Northwest RPC expended over $340,000 in planning funds from the Federal Highway Administration, received through the Vermont Agency of Transportation. *Id.* at 2. Northwest RPC states that it "also receives funding from a number of other federal agencies," including the Fish and Wildlife Service, Federal Emergency Management Agency, and Department of Homeland Security. *Id.* at 2 (attaching schedule of federal expenditures). Thus, Northwest RPC clearly has demonstrated experience in utilizing federal funding to conduct various programs on behalf of the citizens of Franklin County.

Based upon the foregoing, we are satisfied that Northwest RPC has the functional capability to carry out, on behalf of Franklin County, one or more of the broad activities outlined in the EISA.[4] We believe that granting EECBG Program eligibility to Franklin County achieves the objective of the EISA while fulfilling the DOE's added requirement that the county have the functional capability to administer the grant funds. It is clear from the statute that Congress' intent was to make direct funding available to all counties, such as Franklin County, that meet the population requirements,

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24, §§ 4343.

[4] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. 17154.

i.e., a population of greater than 200,000 or one of the ten most populous counties in the State. While we deem it a reasonable interpretation by the agency that the county also have the functional capability to carry out EISA activities, we find the jurisdiction and authority of the Northwest RPC to act on behalf of Franklin County to be fully consistent with that requirement. The Northwest RPC is a governmental body recognized by the State of Vermont, and authorized by Franklin County, and thus is the appropriate vehicle to receive and administer EECBG Program funds that Franklin County is entitled to receive under the EISA.

It Is Therefore Ordered That:

(1) To the extent that the Appeal filed by Northwest Regional Planning Commission on July 24, 2009, is filed on behalf of Franklin County, Vermont, the Appeal is hereby granted, as set forth in paragraph (2) below.

(2) Franklin County, Vermont, will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) To the extent that the Appeal filed by Northwest Regional Planning Commission on July 24, 2009, is filed on behalf of Grand Isle County, Vermont, or any unit of government other than Franklin County, Vermont, the Appeal is hereby denied.

(4) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: SEP - 4 2009

Department of Energy
Washington, DC 20585

SEP 10 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Lamoille County Planning Commission

Date of Filing: July 24, 2009

Case Number: TGA-0027

This decision considers an Appeal filed by Lamoille County Planning Commission (Lamoille County PC) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Lamoille County PC seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

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[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In the April 15, 2009, Federal Register notice, DOE found that, "[a]s defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire, and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 FR at 17462. Northwest RPC's Executive Director, Catherine Dimitruk, filed the present appeal on behalf of all of Vermont's regional planning commissions (RPCs). She contends that RPCs are proper substitutes for counties as eligible units of local government under the EISA, "as they perform many of the same functions as fully-authorized counties do in other states, and particularly that they are perfect candidates for [EECBG funds] because of their expertise, contacts, experience, and effectiveness." Appeal at 2.

II. Analysis

In the present Appeal, Ms. Dimitruk states that Vermont's RPCs "are authorized by statute to perform a variety of functions, including regional planning for a number of topics including energy, land use, transportation, housing, etc., promoting mutual cooperation among municipalities, advising them on public financing, and providing technical and legal support to the towns and cities of Vermont, among other duties." Appeal at 1-2 (citing Vt. Stat. Ann. tit. 24, § 4345a). She states that the RPCs have been involved in energy planning for many years and that "[e]nergy planning is one of the required elements of a regional plan under Vermont law." *Id.* at 2 (citing Vt. Stat. Ann. tit. 24, §§ 4347, 4348).[2]

As noted above, the 2007 Census of Governments states that county governments in Vermont perform "very limited" functions. *Id.* However, in providing for the current appeal process, DOE recognized that "the characterization of city and county governments in the 2007 Census data was not in the context of the EECBG Program" and that, therefore, "the characterization of the governing structure of a city or county may not have been sufficiently informative for the purpose of determining eligibility under the EECBG Program. " 74 FR at 30063. This is clearly the case with respect to the State of Vermont, where as noted in the present Appeal, "laws and government systems have developed in different ways, particularly in the allocation of power among political subdivisions." Appeal at 2.

Thus, even if Vermont county governments lack the functional capability to, on their own, carry out activities as outlined in the EISA, Vermont's RPCs generally do have the necessary functional capability to carry out EISA activities on behalf of the counties they serve, and indeed already act in that capacity in administering similar programs. We note here that, under Vermont law, RPCs are required to "assist and advise . . . authorities within the region to facilitate economic development programs for the appropriate development, improvement, protection and preservation of the region's physical and human resources." Vt. Stat. Ann. tit. 24, § 4345a(1).

Recognizing this unique allocation of power among Vermont's state and local governments, we have found that a regional planning commission, as a governmental body recognized by the State of Vermont, can be an appropriate vehicle to receive and administer EECBG Program funds that an eligible county is entitled to receive under the EISA. *Northwest Regional Planning Commission,* Case No. TGA-0026 (2009).[3] This achieves the objective of the EISA while fulfilling the DOE's added requirement that the county have the functional capability to administer the grant funds. It is

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[2] We also note that, under Vermont law, RPC members are appointed by, and "serve at the pleasure" of, the legislative bodies of the municipalities represented by the RPC. Vt. Stat. Ann. tit. 24, §§ 4343.

[3] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov . The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

clear from the statute that Congress' intent was to make direct funding available to all counties that meet the population requirements of the statute. While we deem it a reasonable interpretation by the agency that the county also have the functional capability to carry out EISA activities, we find the jurisdiction and authority of an RPC to act on behalf of a county government to be fully consistent with that requirement.

In the present case, however, Lamoille County, Vermont, the only county in the area served by Lamoille County PC, does not meet the population requirement specified by Congress in the EISA. As noted above, for a county to be considered an "eligible unit of local government" under the EISA, it must either have a population of at least 200,000, or be one of the ten highest populated counties of the State. According to 2007 U.S. Census data, the population of Lamoille County is 24,676. Annual Estimates of the Population for Counties of Vermont: April 1, 2000 to July 1, 2007 (http://www.census.gov/popest/counties/tables/CO-EST2007-01-50.xls), Population Division, U.S. Census Bureau (March 20, 2008). Further, after subtracting the population of the ten Vermont cities eligible to receive EECBG funding from their respective counties, *see* Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A, Lamoille County is the 11th most populous county in the State of Vermont.

Because Lamoille County does not satisfy the population requirement of the EISA, Lamoille County PC cannot receive and administer EECBG Program funds under the EISA on behalf of an eligible county, or otherwise be considered a proper substitute for an eligible unit of local government under the EISA. Therefore, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Lamoille County Planning Commission on behalf of Lamoille County, Vermont, on July 24, 2009, is hereby denied.

(2) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: SEP 10 2009

Department of Energy
Washington, DC 20585
SEP - 4 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Northeastern Vermont Development Association

Date of Filing: July 24, 2009

Case Number: TGA-0028

This decision considers an Appeal filed by Northeastern Vermont Development Association (NVDA) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, NVDA seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. Although we do not find that NVDA qualifies as an eligible unit of local government, two of the counties within the area served by NVDA, Orleans County, Vermont, and Caledonia County, Vermont, do so qualify for the reasons set forth below, and will therefore have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not

considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In the April 15, 2009, Federal Register notice, DOE found that, "[a]s defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire, and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 FR at 17462. The Executive Director of Northwest Regional Planning Commission, Vermont, Catherine Dimitruk, filed the present appeal on behalf of all of Vermont's regional planning commissions (RPCs), including NVDA. She contends that RPCs are proper substitutes for counties as eligible units of local government under the EISA, "as they perform many

of the same functions as fully-authorized counties do in other states, and particularly that they are perfect candidates for [EECBG funds] because of their expertise, contacts, experience, and effectiveness." Appeal at 2. In essence, under Vermont state law, the RPCs perform many of the traditional governmental functions performed by counties. Vt. Stat. Ann. tit. 24, §§ 4341-4351. These RPCs, in turn, are comprised of one or more counties, all of which are recognized by the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by NVDA. We do not find that NVDA is a "proper substitute" as an eligible unit of local government for the counties within its jurisdiction. However, two of the counties within the area served by NVDA, Orleans County, Vermont, and Caledonia County, Vermont, have each authorized NVDA to represent it in the current Appeal process, and to receive and administer on its behalf any grants it may be eligible to apply for under the EECBG program. Further, as we discuss below, both Orleans County and Caledonia County meet all of the criteria for eligibility to receive EISA funding under the EECBG Program.[2]

(1) Incorporated Unit of Local Government

Orleans County and Caledonia County are two of 14 county governments in the State of Vermont listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Both Orleans County and Caledonia County therefore meet this criterion.

(2) Population

As noted above, the EISA definition of "eligible unit of local government" includes a county with a population which causes the county to be one of the ten highest populated counties of the State. According to 2007 U.S. Census data, after subtracting the population of the ten Vermont cities eligible to receive EECBG funding from their respective counties, *see* Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A, Caledonia County is the 8th most populous

[2] The other county within the jurisdiction of NVDA, Essex County, Vermont, has a population of 6,495, according to 2007 U.S. Census data, making it the 14th most populous county in the state of Vermont. Annual Estimates of the Population for Counties of Vermont: April 1, 2000 to July 1, 2007 (http://www.census.gov/popest/counties/tables/CO-EST2007-01-50.xls), Population Division, U.S. Census Bureau (March 20, 2008). As such, Essex County does not meet the population thresholds required for it to be considered an "eligible unit of local government" under the EISA. However, as noted in the April 15, 2009, Federal Register notice, county governments that do not meet the eligibility requirements for direct formula grants from DOE are eligible for program funds through the State in which they are located. 74 FR at 17462. Thus, Essex County will be eligible to apply for EECBG funds through the State of Vermont.

county in the State of Vermont, and Caledonia County is the 10th most populous county in the state. We, therefore, find that Orleans County and Caledonia County satisfy the population requirement of the EISA.

(3) Governance Structure

The Appeal filed on behalf of NVDA states that Vermont counties "are run by Assistant Judges, elected every four years at the General Election." Appeal at 2. The 2007 Census of Governments describes these assistant or "side" judges as the "principal administrative officers" of counties in the State of Vermont. *See* http://www.census.gov/govs/www/cog2007.html. Based upon this information, we find that both Orleans County and Caledonia County have the requisite governance structure to receive EECBG funds.

(4) Functional Capability

As noted above, the 2007 Census of Governments states that county governments in Vermont perform "very limited" functions. *Id.* However, in providing for the current appeal process, DOE recognized that "the characterization of city and county governments in the 2007 Census data was not in the context of the EECBG Program" and that, therefore, "the characterization of the governing structure of a city or county may not have been sufficiently informative for the purpose of determining eligibility under the EECBG Program. " 74 FR at 30063. This is clearly the case with respect to the State of Vermont, where as noted in the present Appeal, "laws and government systems have developed in different ways, particularly in the allocation of power among political subdivisions." Appeal at 2.

Thus, even if the governments of Orleans County and Caledonia County lack the functional capability to, on their own, carry out activities as outlined in the EISA, each county has authorized NVDA to "receive and administer any grants for which it may be eligible to apply under the EECBG program." Letter from Honorable Robert Goodby and Honorable Benjamin M. Batchelder, Orleans County, to Steven Goering, OHA (August 26, 2009); Letter from Honorable Roy Vance and Honorable William, Caledonia County, to Steven Goering, OHA (undated, received by OHA September 1, 2009). We note here that, under Vermont law, RPCs are required to "assist and advise . . . authorities within the region to facilitate economic development programs for the appropriate development, improvement, protection and preservation of the region's physical and human resources." Vt. Stat. Ann. tit. 24, § 4345a(1). Further, as explained below, we find that NVDA clearly has the necessary functional capability to carry out EISA activities on behalf of Orleans County and Caledonia County, and indeed already acts in that capacity in administering similar programs.

In the present Appeal, Ms. Dimitruk states that Vermont's RPCs "are authorized by statute to perform a variety of functions, including regional planning for a number of topics including energy, land use, transportation, housing, etc., promoting mutual cooperation among municipalities, advising them on public financing, and providing technical and legal support to the towns and cities of

Vermont, among other duties." Appeal at 1-2 (citing Vt. Stat. Ann. tit. 24, § 4345a). She states that the RPCs have been involved in energy planning for many years and that "[e]nergy planning is one of the required elements of a regional plan under Vermont law." *Id.* at 2 (citing Vt. Stat. Ann. tit. 24, §§ 4347, 4348).[3]

Regarding its ability to administer federal grant funding, NVDA states that it "already receives substantial funding support from numerous federal agencies." Letter from Steven H. Patterson, Executive Director, NVDA, to Steven Goering, OHA (August 20, 2009). For a number of years, two of NVDA's largest sources of federal funding have been the U.S. Department of Agriculture and the Federal Highway Administration. *Id.* at 2. In addition, in fiscal year 2008, NVDA administered two grants from the U.S. Department of Housing and Urban Development, including a Community Development Block Grant, received through Vermont's Agency of Commerce and Community Development and the Towns of Lyndon and St. Johnsbury, Vermont. *Id.* (attaching schedule of federal expenditures). In the same year, NVDA also administered two Brownfields grants from the U.S. Environmental Protection Agency, and a grant from the U.S. Small Business Administration, received through the Vermont Small Business Development Center. *Id.* Thus, NVDA clearly has demonstrated experience in utilizing federal funding to conduct various programs on behalf of the citizens of Orleans County and Caledonia County.

Based upon the foregoing, we are satisfied that NVDA has the functional capability to carry out, on behalf of Orleans County and Caledonia County, one or more of the broad activities outlined in the EISA.[4] We believe that granting EECBG Program eligibility to Orleans County and Caledonia

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[3] We also note that, under Vermont law, RPC members are appointed by, and "serve at the pleasure" of, the legislative bodies of the municipalities represented by the RPC. Vt. Stat. Ann. tit. 24, §§ 4343.

[4] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;

County achieves the objective of the EISA while fulfilling the DOE's added requirement that the counties have the functional capability to administer the grant funds. It is clear from the statute that Congress' intent was to make direct funding available to all counties, such as Orleans County and Caledonia County, that meet the population requirements, i.e., a population of greater than 200,000 or one of the ten most populous counties in the State. While we deem it a reasonable interpretation by the agency that the county also have the functional capability to carry out EISA activities, we find the jurisdiction and authority of NVDA to act on behalf of Orleans County and Caledonia County to be fully consistent with that requirement. NVDA is a governmental body recognized by the State of Vermont, and authorized by Orleans County and Caledonia County, and thus is the appropriate vehicle to receive and administer EECBG Program funds that Orleans County and Caledonia County are entitled to receive under the EISA.

It Is Therefore Ordered That:

(1) To the extent that the Appeal filed by Northeastern Vermont Development Association on July 24, 2009, is filed on behalf of Orleans County, Vermont, the Appeal is hereby granted, as set forth in paragraph (2) below.

(2) Orleans County, Vermont, will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) To the extent that the Appeal filed by Northeastern Vermont Development Association on July 24, 2009, is filed on behalf of Caledonia County, Vermont, the Appeal is hereby granted, as set forth in paragraph (4) below.

(4) Caledonia County, Vermont, will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

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11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. 17154.

(5) To the extent that the Appeal filed by Northeastern Vermont Development Association on July 24, 2009, is filed on behalf of Essex County, Vermont, or any unit of government other than Orleans County, Vermont, or Caledonia County, Vermont, the Appeal is hereby denied.

(6) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date:
SEP - 4 2009

Department of Energy
Washington, DC 20585

SEP 10 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Chittenden County Regional Planning Commission

Date of Filing: July 24, 2009

Case Number: TGA-0029

This decision considers an Appeal filed by Chittenden County Regional Planning Commission (Chittenden County RPC) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Chittenden County RPC seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. Although we do not find that Chittenden County RPC qualifies as an eligible unit of local government, the county served by Chittenden County RPC, Chittenden County, Vermont, does so qualify for the reasons set forth below, and will therefore have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not

considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In the April 15, 2009, Federal Register notice, DOE found that, "[a]s defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire, and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 FR at 17462. Northwest RPC's Executive Director, Catherine Dimitruk, filed the present appeal on behalf of all of Vermont's regional planning commissions (RPCs), including Chittenden County RPC. She contends that RPCs are proper substitutes for counties as eligible units of local government under the EISA, "as they perform many of the same functions as fully-

authorized counties do in other states, and particularly that they are perfect candidates for [EECBG funds] because of their expertise, contacts, experience, and effectiveness." Appeal at 2. In essence, under Vermont state law, the RPCs perform many of the traditional governmental functions performed by counties. Vt. Stat. Ann. tit. 24, §§ 4341-4351. These RPCs, in turn, are comprised of one or more counties, all of which are recognized by the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Chittenden County RPC. We do not find that Chittenden County RPC is a "proper substitute" as an eligible unit of local government for the counties within its jurisdiction. However, the county served by Chittenden County RPC, Chittenden County, Vermont, has authorized Chittenden County RPC to represent the county on its behalf in the current Appeal process, and to receive and administer on its behalf any grants it may be eligible to apply for under the EECBG program. Further, as we discuss below, Chittenden County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Chittenden County is one of 14 county governments in the State of Vermont listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Chittenden County therefore meets this criterion.

(2) Population

As noted above, the EISA definition of "eligible unit of local government" includes a county with a population which causes the county to be one of the ten highest populated counties of the State. According to 2007 U.S. Census data, after subtracting the population of the ten Vermont cities eligible to receive EECBG funding from their respective counties, *see* Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A, Chittenden County is the second most populous county in the State of Vermont. We, therefore, find that Chittenden County satisfies the population requirement of the EISA.

(3) Governance Structure

The Appeal filed on behalf of Chittenden County RPC states that Vermont counties "are run by Assistant Judges, elected every four years at the General Election." Appeal at 2. The 2007 Census of Governments describes these assistant or "side" judges as the "principal administrative officers" of counties in the State of Vermont. *See* http://www.census.gov/govs/www/cog2007.html. Based upon this information, we find that Chittenden County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

As noted above, the 2007 Census of Governments states that county governments in Vermont perform "very limited" functions. *Id.* However, in providing for the current appeal process, DOE recognized that "the characterization of city and county governments in the 2007 Census data was not in the context of the EECBG Program" and that, therefore, "the characterization of the governing structure of a city or county may not have been sufficiently informative for the purpose of determining eligibility under the EECBG Program. " 74 FR at 30063. This is clearly the case with respect to the State of Vermont, where as noted in the present Appeal, "laws and government systems have developed in different ways, particularly in the allocation of power among political subdivisions." Appeal at 2.

Thus, even if Chittenden County government lacks the functional capability to, on its own, carry out activities as outlined in the EISA, the county has authorized Chittenden County RPC to "receive and administer any grants for which it may be eligible to apply under the EECBG program." Letter from Honorable Elizabeth M. Gretkowski and Honorable Thomas M. Crowley, Chittenden County, to Steven Goering, Office of Hearings and Appeals (undated, received by OHA August 21, 2009). We note here that, under Vermont law, RPCs are required to "assist and advise . . . authorities within the region to facilitate economic development programs for the appropriate development, improvement, protection and preservation of the region's physical and human resources." Vt. Stat. Ann. tit. 24, § 4345a(1). Further, as explained below, we find that Chittenden County RPC clearly has the necessary functional capability to carry out EISA activities on behalf of Chittenden County, and indeed already acts in that capacity in administering similar programs.

In the present Appeal, Ms. Dimitruk states that Vermont's RPCs "are authorized by statute to perform a variety of functions, including regional planning for a number of topics including energy, land use, transportation, housing, etc., promoting mutual cooperation among municipalities, advising them on public financing, and providing technical and legal support to the towns and cities of Vermont, among other duties." Appeal at 1-2 (citing Vt. Stat. Ann. tit. 24, § 4345a). She states that the RPCs have been involved in energy planning for many years and that "[e]nergy planning is one of the required elements of a regional plan under Vermont law." *Id.* at 2 (citing Vt. Stat. Ann. tit. 24, §§ 4347, 4348).[2]

Regarding its ability to administer federal grant funding, Chittenden County RPC states that it "already receives substantial funding support from numerous federal agencies." Letter from Charles Baker, Executive Director, Chittenden County RPC, to Steven Goering, Office of Hearings and Appeals (August 21, 2009). Among its current activities is the administration of two Brownfields grants from the U.S. Environmental Protection Agency, totaling $400,000. *Id.* (attaching list of ongoing federal grants). Chittenden County RPC also received over $750,000 in grants from the

[2] We also note that, under Vermont law, RPC members are appointed by, and "serve at the pleasure" of, the legislative bodies of the municipalities represented by the RPC. Vt. Stat. Ann. tit. 24, §§ 4343.

Federal Highway Administration, for work in connection with the Lake Champlain Byway under the National Scenic Byways Program. *Id.* In addition, Chittenden County RPC has received funds from other federal agencies, including the Federal Emergency Management Agency and the U.S. Department of Transportation. *Id.* Thus, Chittenden County RPC clearly has demonstrated experience in utilizing federal funding to conduct various programs on behalf of the citizens of Chittenden County.

Based upon the foregoing, we are satisfied that Chittenden County RPC has the functional capability to carry out, on behalf of Chittenden County, one or more of the broad activities outlined in the EISA.[3] We believe that granting EECBG Program eligibility to Chittenden County achieves the objective of the EISA while fulfilling the DOE's added requirement that the county have the functional capability to administer the grant funds. It is clear from the statute that Congress' intent was to make direct funding available to all counties, such as Chittenden County, that meet the population requirements, i.e., a population of greater than 200,000 or one of the ten most populous counties in the State. While we deem it a reasonable interpretation by the agency that the county also have the functional capability to carry out EISA activities, we find the jurisdiction and authority of the Chittenden County RPC to act on behalf of Chittenden County to be fully consistent with that requirement. The Chittenden County RPC is a governmental body recognized by the State of Vermont, and authorized by Chittenden County, and thus is the appropriate vehicle to receive and administer EECBG Program funds that Chittenden County is entitled to receive under the EISA.

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[3] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. 17154.

It Is Therefore Ordered That:

(1) To the extent that the Appeal filed by Chittenden County Regional Planning Commission on July 24, 2009, is filed on behalf of Chittenden County, Vermont, the Appeal is hereby granted, as set forth in paragraph (2) below.

(2) Chittenden County, Vermont, will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: SEP 10 2009

Department of Energy
Washington, DC 20585

SEP 10 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Central Vermont Regional Planning Commission

Date of Filing: July 24, 2009

Case Number: TGA-0030

This decision considers an Appeal filed by Central Vermont Regional Planning Commission (CVRPC) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, CVRPC seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. Although we do not find that CVRPC qualifies as an eligible unit of local government, the county served by CVRPC, Washington County, Vermont, does so qualify for the reasons set forth below, and will therefore have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not

considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In the April 15, 2009, Federal Register notice, DOE found that, "[a]s defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire, and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 FR at 17462. Northwest RPC's Executive Director, Catherine Dimitruk, filed the present appeal on behalf of all of Vermont's regional planning commissions (RPCs), including CVRPC. She contends that RPCs are proper substitutes for counties as eligible units of local government under the EISA, "as they perform many of the same functions as fully-authorized

counties do in other states, and particularly that they are perfect candidates for [EECBG funds] because of their expertise, contacts, experience, and effectiveness." Appeal at 2. In essence, under Vermont state law, the RPCs perform many of the traditional governmental functions performed by counties. Vt. Stat. Ann. tit. 24, §§ 4341-4351. These RPCs, in turn, are comprised of one or more counties, all of which are recognized by the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by CVRPC. We do not find that CVRPC is a "proper substitute" as an eligible unit of local government for the counties within its jurisdiction. However, the county served by CVRPC, Washington County, Vermont, has authorized CVRPC to represent the county on its behalf in the current Appeal process, and to receive and administer on its behalf any grants it may be eligible to apply for under the EECBG program. Further, as we discuss below, Washington County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Washington County is one of 14 county governments in the State of Vermont listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Washington County therefore meets this criterion.

(2) Population

As noted above, the EISA definition of "eligible unit of local government" includes a county with a population which causes the county to be one of the ten highest populated counties of the State. According to 2007 U.S. Census data, after subtracting the population of the ten Vermont cities eligible to receive EECBG funding from their respective counties, *see* Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A, Washington County is the most populous county in the State of Vermont. We, therefore, find that Washington County satisfies the population requirement of the EISA.

(3) Governance Structure

The Appeal filed on behalf of CVRPC states that Vermont counties "are run by Assistant Judges, elected every four years at the General Election." Appeal at 2. The 2007 Census of Governments describes these assistant or "side" judges as the "principal administrative officers" of counties in the State of Vermont. *See* http://www.census.gov/govs/www/cog2007.html. Based upon this information, we find that Washington County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

As noted above, the 2007 Census of Governments states that county governments in Vermont perform "very limited" functions. *Id.* However, in providing for the current appeal process, DOE recognized that "the characterization of city and county governments in the 2007 Census data was not in the context of the EECBG Program" and that, therefore, "the characterization of the governing structure of a city or county may not have been sufficiently informative for the purpose of determining eligibility under the EECBG Program. " 74 FR at 30063. This is clearly the case with respect to the State of Vermont, where as noted in the present Appeal, "laws and government systems have developed in different ways, particularly in the allocation of power among political subdivisions." Appeal at 2.

Thus, even if Washington County government lacks the functional capability to, on its own, carry out activities as outlined in the EISA, the county has authorized CVRPC to "receive and administer any grants for which it may be eligible to apply under the EECBG program." Letter from Honorable K.B. Bloom and Honorable Michael R. Zimmerman, Washington County, to Steven Goering, Office of Hearings and Appeals (August 20, 2009).[2] We note here that, under Vermont law, RPCs are required to "assist and advise . . . authorities within the region to facilitate economic development programs for the appropriate development, improvement, protection and preservation of the region's physical and human resources." Vt. Stat. Ann. tit. 24, § 4345a(1). Further, as explained below, we find that CVRPC clearly has the necessary functional capability to carry out EISA activities on behalf of Washington County, and indeed already acts in that capacity in administering similar programs.

In the present Appeal, Ms. Dimitruk states that Vermont's RPCs "are authorized by statute to perform a variety of functions, including regional planning for a number of topics including energy, land use, transportation, housing, etc., promoting mutual cooperation among municipalities, advising them on public financing, and providing technical and legal support to the towns and cities of Vermont, among other duties." Appeal at 1-2 (citing Vt. Stat. Ann. tit. 24, § 4345a). She states that the RPCs have been involved in energy planning for many years and that "[e]nergy planning is one of the required elements of a regional plan under Vermont law." *Id.* at 2 (citing Vt. Stat. Ann. tit. 24, §§ 4347, 4348).[3]

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[2] CVRPC also serves three towns (Orange, Washington, and Williamstown) in Orange County, Vermont, which adjoins Washington County. Orange County has authorized another Vermont RPC, Two Rivers-Ottauquechee Regional Commission (TRORC), to receive and administer EECBG funds on its behalf, if Orange County is determined to be eligible to receive such funds. An Appeal filed by TRORC is currently pending before this office under OHA Case No. TGA-0032.

[3] We also note that, under Vermont law, RPC members are appointed by, and "serve at the pleasure" of, the legislative bodies of the municipalities represented by the RPC. Vt. Stat. Ann. tit. 24, §§ 4343.

Regarding its ability to administer federal grant funding, CVRPC has submitted information from its "most recent (FY2008) audited financial statements listing the federal programs that CVRPC administered last year." Letter from Susan M. Sinclair, Executive Director, CVRPC, to Steven Goering, Office of Hearings and Appeals (August 20, 2009) (enclosing "Schedule of Federal Financial Assistance"). Among the activities listed therein are two Brownfields grants and two Water Quality Management Planning grants from the U.S. Environmental Protection Agency, disbursed through the Vermont Department of Environmental Conservation. *Id.* In addition, in FY 2008, the U.S. Department of Transportation, through the Vermont Agency of Transportation, awarded CVRPC over $400,000 in funds related to highway planning and construction. *Id.* CVRPC also received funds from the U.S. Department of Homeland Security, passed through the Vermont Department of Public Safety, and from the U.S. Department of Agriculture, passed through the Vermont Department of Forests, Parks and Recreation. *Id.* Finally, CVRPC states that it has also administered funds under the U.S. Department of Housing and Urban Development's Community Development Block Grant Program. *Id.* Thus, CVRPC clearly has demonstrated experience in utilizing federal funding to conduct various programs on behalf of the citizens of Washington County.

Based upon the foregoing, we are satisfied that CVRPC has the functional capability to carry out, on behalf of Washington County, one or more of the broad activities outlined in the EISA.[4] We believe that granting EECBG Program eligibility to Washington County achieves the objective of the EISA while fulfilling the DOE's added requirement that the county have the functional capability

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[4] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. 17154.

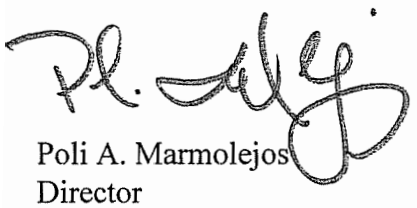
to administer the grant funds. It is clear from the statute that Congress' intent was to make direct funding available to all counties, such as Washington County, that meet the population requirements, i.e., a population of greater than 200,000 or one of the ten most populous counties in the State. While we deem it a reasonable interpretation by the agency that the county also have the functional capability to carry out EISA activities, we find the jurisdiction and authority of CVRPC to act on behalf of Washington County to be fully consistent with that requirement. CVRPC is a governmental body recognized by the State of Vermont, and authorized by Washington County, and thus is the appropriate vehicle to receive and administer EECBG Program funds that Washington County is entitled to receive under the EISA.

It Is Therefore Ordered That:

(1) To the extent that the Appeal filed by Central Vermont Regional Planning Commission on July 24, 2009, is filed on behalf of Washington County, Vermont, the Appeal is hereby granted, as set forth in paragraph (2) below.

(2) Washington County, Vermont, will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.



Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: SEP 10 2009

Department of Energy
Washington, DC 20585

SEP 15 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Addison County Regional Planning Commission

Date of Filing: July 24, 2009

Case Number: TGA-0031

This decision considers an Appeal filed by Addison County Regional Planning Commission (Addison RPC) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Addison RPC seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. Although we do not find that Addison RPC qualifies as an eligible unit of local government, the county served by Addison RPC, Addison County, Vermont, does so qualify for the reasons set forth below, and will therefore have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not

considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In the April 15, 2009, Federal Register notice, DOE found that, "[a]s defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire, and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 FR at 17462. Northwest RPC's Executive Director, Catherine Dimitruk, filed the present appeal on behalf of all of Vermont's regional planning commissions (RPCs), including Addison RPC. She contends that RPCs are proper substitutes for counties as eligible units of local government under the EISA, "as they perform many of the same functions as fully-authorized

counties do in other states, and particularly that they are perfect candidates for [EECBG funds] because of their expertise, contacts, experience, and effectiveness." Appeal at 2. In essence, under Vermont state law, the RPCs perform many of the traditional governmental functions performed by counties. Vt. Stat. Ann. tit. 24, §§ 4341-4351. These RPCs, in turn, are comprised of one or more counties, all of which are recognized by the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Addison RPC. We do not find that Addison RPC is a "proper substitute" as an eligible unit of local government for the counties within its jurisdiction. However, the county served by Addison RPC, Addison County, Vermont, has authorized Addison RPC to represent the county on its behalf in the current Appeal process, and to receive and administer on its behalf any grants it may be eligible to apply for under the EECBG program. Further, as we discuss below, Addison County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Addison County is one of 14 county governments in the State of Vermont listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Addison County therefore meets this criterion.

(2) Population

As noted above, the EISA definition of "eligible unit of local government" includes a county with a population which causes the county to be one of the ten highest populated counties of the State. According to 2007 U.S. Census data, after subtracting the population of the ten Vermont cities eligible to receive EECBG funding from their respective counties, *see* Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A, Addison County is the sixth most populous county in the State of Vermont. We, therefore, find that Addison County satisfies the population requirement of the EISA.

(3) Governance Structure

The Appeal filed on behalf of Addison RPC states that Vermont counties "are run by Assistant Judges, elected every four years at the General Election." Appeal at 2. The 2007 Census of Governments describes these assistant or "side" judges as the "principal administrative officers" of counties in the State of Vermont. *See* http://www.census.gov/govs/www/cog2007.html. Based upon this information, we find that Addison County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

As noted above, the 2007 Census of Governments states that county governments in Vermont perform "very limited" functions. *Id.* However, in providing for the current appeal process, DOE recognized that "the characterization of city and county governments in the 2007 Census data was not in the context of the EECBG Program" and that, therefore, "the characterization of the governing structure of a city or county may not have been sufficiently informative for the purpose of determining eligibility under the EECBG Program. " 74 FR at 30063. This is clearly the case with respect to the State of Vermont, where as noted in the present Appeal, "laws and government systems have developed in different ways, particularly in the allocation of power among political subdivisions." Appeal at 2.

Thus, even if Addison County government lacks the functional capability to, on its own, carry out activities as outlined in the EISA, the county has authorized Addison RPC to "receive and administer any grants for which it may be eligible to apply under the EECBG program." Letter from Honorable Francis Broughton and Honorable Margaret Gossens, Addison County, to Steven Goering, Office of Hearings and Appeals (August 18, 2009). We note here that, under Vermont law, RPCs are required to "assist and advise . . . authorities within the region to facilitate economic development programs for the appropriate development, improvement, protection and preservation of the region's physical and human resources." Vt. Stat. Ann. tit. 24, § 4345a(1). Further, as explained below, we find that Addison County RPC clearly has the necessary functional capability to carry out EISA activities on behalf of Addison County, and indeed already acts in that capacity in administering similar programs.

In the present Appeal, Ms. Dimitruk states that Vermont's RPCs "are authorized by statute to perform a variety of functions, including regional planning for a number of topics including energy, land use, transportation, housing, etc., promoting mutual cooperation among municipalities, advising them on public financing, and providing technical and legal support to the towns and cities of Vermont, among other duties." Appeal at 1-2 (citing Vt. Stat. Ann. tit. 24, § 4345a). She states that the RPCs have been involved in energy planning for many years and that "[e]nergy planning is one of the required elements of a regional plan under Vermont law." *Id.* at 2 (citing Vt. Stat. Ann. tit. 24, §§ 4347, 4348).[2]

Regarding its ability to administer federal grant funding, Addision County RPC states that it "already receives substantial funding support from numerous federal agencies." Letter from Adam G. Lougee, Executive Director, Addison County RPC, to Steven Goering, Office of Hearings and Appeals (August 18, 2009). Among its current activities is the administration of two Brownfields grants from the U.S. Environmental Protection Agency, totaling $400,000. *Id.* In fiscal years 2008 and 2009, Addison County RPC expended over $345,000 in planning funds from the Federal

[2] We also note that, under Vermont law, RPC members are appointed by, and "serve at the pleasure" of, the legislative bodies of the municipalities represented by the RPC. Vt. Stat. Ann. tit. 24, §§ 4343.

Highway Administration, received through the Vermont Agency of Transportation. *Id.* Addison County RPC states that it "also receives funding from a number of other federal agencies," including the U.S. Forest Service, Federal Emergency Management Agency, and Department of Homeland Security. *Id.* at 1-2 (attaching schedules of federal expenditures). Thus, Addison County RPC clearly has demonstrated experience in utilizing federal funding to conduct various programs on behalf of the citizens of Addison County.

Based upon the foregoing, we are satisfied that Addison County RPC has the functional capability to carry out, on behalf of Addison County,[3] one or more of the broad activities outlined in the EISA.[4] We believe that granting EECBG Program eligibility to Addison County achieves the

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[3] Two towns in Addison County (Granville and Hancock) are served by another Vermont RPC, the Two Rivers-Ottauquechee Regional Commission (TRORC). We have already determined that TRORC has the functional capability to carry out, on behalf of the counties it serves, one or more of the activities outlined in the EISA. *Two Rivers-Ottauquechee Regional Commission*, Case No. TGA-0032 (2009). Moreover, Ms. Dimitruk has informed us that Vermont's RPCs "have a long history of working cooperatively on projects, many of which require addressing the difference between County and RPC boundaries. Depending upon the particular program, this is done informally, or through an MOU or other formal agreement." E-Mail from Catherine Dimitruk to Steven Goering, OHA (September 11, 2009). She further states that the "RPCs in question have discussed the boundary issue in regards to the EECBG program and have worked out a plan." *Id.* Addison County may submit any such plan with its application for EECBG funding.

[4] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. 17154.

objective of the EISA while fulfilling the DOE's added requirement that the county have the functional capability to administer the grant funds. It is clear from the statute that Congress' intent was to make direct funding available to all counties, such as Addison County, that meet the population requirements, i.e., a population of greater than 200,000 or one of the ten most populous counties in the State. While we deem it a reasonable interpretation by the agency that the county also have the functional capability to carry out EISA activities, we find the jurisdiction and authority of Addison County RPC to act on behalf of Addison County to be fully consistent with that requirement. Addison County RPC is a governmental body recognized by the State of Vermont, and authorized by Addison County, and thus is the appropriate vehicle to receive and administer EECBG Program funds that Addison County is entitled to receive under the EISA.

It Is Therefore Ordered That:

(1) To the extent that the Appeal filed by the Addison County Regional Planning Commission on July 24, 2009, is filed on behalf of Addison County, Vermont, the Appeal is hereby granted, as set forth in paragraph (2) below.

(2) Addison County, Vermont, will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: SEP 15 2009

Department of Energy
Washington, DC 20585

SEP 14 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Names: Two Rivers-Ottauquechee Regional Commission
Southern Windsor County Regional Planning Commission

Date of Filing: July 24, 2009

Case Numbers: TGA-0032
TGA-0034

This decision considers Appeals filed by the Two Rivers-Ottauquechee Regional Commission (TRORC) and the Southern Windsor County Regional Planning Commission (SWCRPC) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In their Appeals, TRORC and SWCRPC seek a determination by the DOE Office of Hearings and Appeals (OHA) that each is an "eligible unit of local government" to receive block grant funding under the EECBG Program. Although we do not find that TRORC or SWCRPC qualifies as an eligible unit of local government, the counties served by TRORC and SWCRPC, Orange County, Vermont, and Windsor County, Vermont, do so qualify for the reasons set forth below, and will therefore have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few

[governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In the April 15, 2009, Federal Register notice, DOE found that, "[a]s defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire, and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 FR at 17462. Northwest RPC's Executive Director, Catherine Dimitruk, filed

the present appeal on behalf of all of Vermont's regional planning commissions (RPCs), including TRORC and SWCRPC. She contends that RPCs are proper substitutes for counties as eligible units of local government under the EISA, "as they perform many of the same functions as fully-authorized counties do in other states, and particularly that they are perfect candidates for [EECBG funds] because of their expertise, contacts, experience, and effectiveness." Appeal at 2. In essence, under Vermont state law, the RPCs perform many of the traditional governmental functions performed by counties. Vt. Stat. Ann. tit. 24, §§ 4341-4351. These RPCs, in turn, are comprised of one or more counties, all of which are recognized by the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by TRORC and SWCRPC. We do not find that either TRORC or SWCRPC is a "proper substitute" as an eligible unit of local government for the counties within its jurisdiction. However, the counties served by TRORC and SWCRPC, Orange County, Vermont, and Windsor County, Vermont, have authorized TRORC and SWCRPC to represent the counties on their behalf in the current Appeal process, and to receive and administer on their behalf any grants each may be eligible to apply for under the EECBG program. Further, as we discuss below, both Orange County and Windsor County meet all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Orange County and Windsor County are two of 14 county governments in the State of Vermont listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Both Orange County and Windsor County therefore meet this criterion.

(2) Population

As noted above, the EISA definition of "eligible unit of local government" includes a county with a population which causes the county to be one of the ten highest populated counties of the State. According to 2007 U.S. Census data, after subtracting the population of the ten Vermont cities eligible to receive EECBG funding from their respective counties, *see* Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A, Orange County is the ninth most populous county in the State of Vermont, and Windsor County is the fifth most populous county in the state. We, therefore, find that Orange County and Windsor County satisfy the population requirement of the EISA.

(3) Governance Structure

The Appeal filed on behalf of TRORC and SWCRPC states that Vermont counties "are run by Assistant Judges, elected every four years at the General Election." Appeal at 2. The 2007 Census

of Governments describes these assistant or "side" judges as the "principal administrative officers" of counties in the State of Vermont. *See* http://www.census.gov/govs/www/cog2007.html. Based upon this information, we find that both Orange County and Windsor County have the requisite governance structure to receive EECBG funds.

(4) Functional Capability

As noted above, the 2007 Census of Governments states that county governments in Vermont perform "very limited" functions. *Id.* However, in providing for the current appeal process, DOE recognized that "the characterization of city and county governments in the 2007 Census data was not in the context of the EECBG Program" and that, therefore, "the characterization of the governing structure of a city or county may not have been sufficiently informative for the purpose of determining eligibility under the EECBG Program. " 74 FR at 30063. This is clearly the case with respect to the State of Vermont, where as noted in the present Appeal, "laws and government systems have developed in different ways, particularly in the allocation of power among political subdivisions." Appeal at 2.

Thus, even if the government of Orange County or Windsor County lacks the functional capability to, on its own, carry out activities as outlined in the EISA, Orange County has authorized TRORC and Windsor County has authorized both TRORC and SWCRPC to "receive and administer any grants for which it may be eligible to apply under the EECBG program." Letter from Honorable Prudence L. Pease and Honorable Maurice A. Brown, Orange County, to Steven Goering, Office of Hearings and Appeals (August 18, 2009); Letter from Honorable David Singer, Windsor County, to Steven Goering, OHA (undated, received by OHA September 3, 2009).[2] We note here that, under Vermont law, RPCs are required to "assist and advise . . . authorities within the region to facilitate economic development programs for the appropriate development, improvement, protection and preservation of the region's physical and human resources." Vt. Stat. Ann. tit. 24, § 4345a(1). Further, as explained below, we find that both TRORC and SWCRPC clearly have the necessary functional capability to carry out EISA activities on behalf of Orange County and Windsor County, and indeed already act in that capacity in administering similar programs.

In the present Appeal, Ms. Dimitruk states that Vermont's RPCs "are authorized by statute to perform a variety of functions, including regional planning for a number of topics including energy, land use, transportation, housing, etc., promoting mutual cooperation among municipalities, advising them on public financing, and providing technical and legal support to the towns and cities of Vermont, among other duties." Appeal at 1-2 (citing Vt. Stat. Ann. tit. 24, § 4345a). She states that the RPCs have been involved in energy planning for many years and that "[e]nergy planning is one

[2] TRORC serves Orange County and both TRORC and SWCRPC serve Windsor County.

of the required elements of a regional plan under Vermont law." *Id.* at 2 (citing Vt. Stat. Ann. tit. 24, §§ 4347, 4348).[3]

Regarding its ability to administer federal grant funding, TRORC has submitted information "concerning recently completed or on-going federal grant activities in which [TRORC] has been or is currently engaged." Letter from Peter G. Gregory, Executive Director, TRORC, to Steven Goering, OHA (August 20, 2009) (enclosing "Schedule of Expenditures of Federal Awards"). Among the activities listed therein are Brownfields grants received directly from the U.S. Environmental Protection Agency (EPA) and a Water Quality Management Grant received from the EPA through the State of Vermont. *Id.* In addition, the U.S. Department of Transportation, through the State of Vermont, awarded grants to TRORC, including funds for transportation planning, the Safe Routes to School program, and a Hazardous Materials Emergency Preparedness grant. *Id.* TRORC also received funds from the U.S. Department of Homeland Security and the U.S. Department of Agriculture, passed through the State of Vermont, as well as direct funding from the U.S. Department of Interior for a National Park Service Transit Study. *Id.* Thus, TRORC clearly has demonstrated experience in utilizing federal funding to conduct various programs on behalf of the citizens of Orange County and Windsor County.

Similarly, SWCRPC has submitted information regarding federal assistance it received in Fiscal Years 2006 through 2008. Letter from Thomas J. Kennedy, Executive Director, SWCRPC, to Steven Goering, OHA (August 20, 2009) (enclosing "Schedules of Federal Financial Assistance"). SWCRPC has received Brownfields grants directly from the EPA and Water Quality Management Planning and Brownfields Grants from the EPA through the State of Vermont. *Id.* The U.S. Department of Transportation, through the State of Vermont, awarded funds to SWCRPC for transportation planning, the Safe Routes to School program, and hazard mitigation. *Id.* In addition, SWCRPC received funds from the U.S. Department of Homeland Security, passed through the State of Vermont, for activities related to homeland security preparedness, emergency management performance, and map modernization management support. *Id.* Thus, SWCRPC also clearly has demonstrated experience in utilizing federal funding to conduct various programs on behalf of the citizens of Orange County.

Based upon the foregoing, we are satisfied that both TRORC and SWCRPC have the functional capability to carry out, on behalf of Orange County and Windsor County,[4] one or more of the broad

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[3] We also note that, under Vermont law, RPC members are appointed by, and "serve at the pleasure" of, the legislative bodies of the municipalities represented by the RPC. Vt. Stat. Ann. tit. 24, §§ 4343.

[4] Three towns in Orange County (Orange, Washington, and Williamstown) are served by another Vermont RPC, the Central Vermont Regional Planning Commission (CVRPC), and one town in Windsor County (Weston) is served by another RPC, the Windham Regional Commission (Windham RC). We have already determined that both CVRPC and Windham RC have the functional capability to carry out, on behalf of their respective counties, one or more of the activities

activities outlined in the EISA.[5] We believe that granting EECBG Program eligibility to Orange County and Windsor County achieves the objective of the EISA while fulfilling the DOE's added requirement that the counties have the functional capability to administer the grant funds. It is clear from the statute that Congress' intent was to make direct funding available to all counties, such as Orange County and Windsor County, that meet the population requirements, i.e., a population of greater than 200,000 or one of the ten most populous counties in the State. While we deem it a reasonable interpretation by the agency that a county also have the functional capability to carry out EISA activities, we find the jurisdiction and authority of TRORC and SWCRPC to act on behalf of Orange County and Windsor County to be fully consistent with that requirement. TRORC and SWCRPC are governmental bodies recognized by the State of Vermont, and authorized by Orange

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outlined in the EISA. *Central Vermont Regional Planning Commission*, Case No. TGA-0030 (2009); *Windham Regional Commission*, Case No. TGA-0036 (2009). Moreover, Ms. Dimitruk has informed us that Vermont's RPCs "have a long history of working cooperatively on projects, many of which require addressing the difference between County and RPC boundaries. Depending upon the particular program, this is done informally, or through an MOU or other formal agreement." E-Mail from Catherine Dimitruk to Steven Goering, OHA (September 11, 2009). She further states that the "RPCs in question have discussed the boundary issue in regards to the EECBG program and have worked out a plan." *Id.* Orange County and Windsor County may submit any such plan with their respective applications for EECBG funding.

[5] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. 17154.

County and Windsor County, and thus are the appropriate vehicles to receive and administer EECBG Program funds that Orange County or Windsor County is entitled to receive under the EISA.

It Is Therefore Ordered That:

(1) To the extent that the Appeal filed by the Two Rivers-Ottauquechee Regional Commission on July 24, 2009, is filed on behalf of Orange County, Vermont, the Appeal is hereby granted, as set forth in paragraph (4) below.

(2) To the extent that the Appeal filed by the Two Rivers-Ottauquechee Regional Commission on July 24, 2009, is filed on behalf of Windsor County, Vermont, the Appeal is hereby granted, as set forth in paragraph (5) below.

(3) To the extent that the Appeal filed by the Southern Windsor County Regional Planning Commission on July 24, 2009, is filed on behalf of Windsor County, Vermont, the Appeal is hereby granted, as set forth in paragraph (5) below.

(4) Orange County, Vermont, will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(5) Windsor County, Vermont, will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(6) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: SEP 14 2009

Department of Energy
Washington, DC 20585

SEP 15 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Rutland Regional Planning Commission

Date of Filing: July 24, 2009

Case Number: TGA-0033

This decision considers an Appeal filed by Rutland Regional Planning Commission (Rutland RPC) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Rutland RPC seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. Although we do not find that Rutland RPC qualifies as an eligible unit of local government, the county served by Rutland RPC, Rutland County, Vermont, does so qualify for the reasons set forth below, and will therefore have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not

considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In the April 15, 2009, Federal Register notice, DOE found that, "[a]s defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire, and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 FR at 17462. Northwest RPC's Executive Director, Catherine Dimitruk, filed the present appeal on behalf of all of Vermont's regional planning commissions (RPCs), including Rutland RPC. She contends that RPCs are proper substitutes for counties as eligible units of local government under the EISA, "as they perform many of the same functions as fully-authorized

counties do in other states, and particularly that they are perfect candidates for [EECBG funds] because of their expertise, contacts, experience, and effectiveness." Appeal at 2. In essence, under Vermont state law, the RPCs perform many of the traditional governmental functions performed by counties. Vt. Stat. Ann. tit. 24, §§ 4341-4351. These RPCs, in turn, are comprised of one or more counties, all of which are recognized by the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Rutland RPC. We do not find that Rutland RPC is a "proper substitute" as an eligible unit of local government for the counties within its jurisdiction. However, the county served by Rutland RPC, Rutland County, Vermont, has authorized Rutland RPC to represent the county on its behalf in the current Appeal process, and to receive and administer on its behalf any grants it may be eligible to apply for under the EECBG program. Further, as we discuss below, Rutland County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Rutland County is one of 14 county governments in the State of Vermont listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Rutland County therefore meets this criterion.

(2) Population

As noted above, the EISA definition of "eligible unit of local government" includes a county with a population which causes the county to be one of the ten highest populated counties of the State. According to 2007 U.S. Census data, after subtracting the population of the ten Vermont cities eligible to receive EECBG funding from their respective counties, *see* Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A, Rutland County is the fourth most populous county in the State of Vermont. We, therefore, find that Rutland County satisfies the population requirement of the EISA.

(3) Governance Structure

The Appeal filed on behalf of Rutland RPC states that Vermont counties "are run by Assistant Judges, elected every four years at the General Election." Appeal at 2. The 2007 Census of Governments describes these assistant or "side" judges as the "principal administrative officers" of counties in the State of Vermont. *See* http://www.census.gov/govs/www/cog2007.html. Based upon this information, we find that Rutland County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

As noted above, the 2007 Census of Governments states that county governments in Vermont perform "very limited" functions. *Id.* However, in providing for the current appeal process, DOE recognized that "the characterization of city and county governments in the 2007 Census data was not in the context of the EECBG Program" and that, therefore, "the characterization of the governing structure of a city or county may not have been sufficiently informative for the purpose of determining eligibility under the EECBG Program. " 74 FR at 30063. This is clearly the case with respect to the State of Vermont, where as noted in the present Appeal, "laws and government systems have developed in different ways, particularly in the allocation of power among political subdivisions." Appeal at 2.

Thus, even if Rutland County government lacks the functional capability to, on its own, carry out activities as outlined in the EISA, the county has authorized Rutland RPC to "receive and administer any grants for which it may be eligible to apply under the EECBG program." Letter from Honorable Jean Coloutti and Honorable Marlene Burke, Rutland County, to Steven Goering, Office of Hearings and Appeals (August 18, 2009). We note here that, under Vermont law, RPCs are required to "assist and advise . . . authorities within the region to facilitate economic development programs for the appropriate development, improvement, protection and preservation of the region's physical and human resources." Vt. Stat. Ann. tit. 24, § 4345a(1). Further, as explained below, we find that Rutland RPC clearly has the necessary functional capability to carry out EISA activities on behalf of Rutland County, and indeed already acts in that capacity in administering similar programs.

In the present Appeal, Ms. Dimitruk states that Vermont's RPCs "are authorized by statute to perform a variety of functions, including regional planning for a number of topics including energy, land use, transportation, housing, etc., promoting mutual cooperation among municipalities, advising them on public financing, and providing technical and legal support to the towns and cities of Vermont, among other duties." Appeal at 1-2 (citing Vt. Stat. Ann. tit. 24, § 4345a). She states that the RPCs have been involved in energy planning for many years and that "[e]nergy planning is one of the required elements of a regional plan under Vermont law." *Id.* at 2 (citing Vt. Stat. Ann. tit. 24, §§ 4347, 4348).[2]

Regarding its ability to administer federal grant funding, Rutland RPC provided information regarding federal assistance it received in Fiscal Year 2008. Letter from Mark Blucher, Executive Director, Rutland RPC, to Steven Goering, Office of Hearings and Appeals (August 18, 2009) (attaching schedule of financial assistance). Among the activities listed therein is the administration of three Brownfields grants from the U.S. Environmental Protection Agency, received through the State of Vermont Department of Environmental Conservation, and two Water Quality grants from the U.S. Department of Homeland Security, passed through the State of Vermont Agency of Natural

[2] We also note that, under Vermont law, RPC members are appointed by, and "serve at the pleasure" of, the legislative bodies of the municipalities represented by the RPC. Vt. Stat. Ann. tit. 24, §§ 4343.

Resources. *Id.* In FY 2008, Rutland RPC also received over $190,000 from the U.S. Department of Transportation, through the Vermont Agency of Transportation, in Regional Transportation Planning Grants and under the Safe Routes to School Program. *Id.* In the same year, Rutland RPC received over $85,000 in Vermont Emergency Management grants from the Federal Emergency Management Agency, passed through the State of Vermont Department of Public Safety. *Id.* Thus, Rutland RPC clearly has demonstrated experience in utilizing federal funding to conduct various programs on behalf of the citizens of Rutland County.

Based upon the foregoing, we are satisfied that Rutland RPC has the functional capability to carry out, on behalf of Rutland County,[3] one or more of the broad activities outlined in the EISA.[4] We

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[3] One town in Rutland County (Pittsfield) is served by another Vermont RPC, the Two Rivers-Ottauquechee Regional Commission (TRORC). We have already determined that TRORC has the functional capability to carry out, on behalf of the counties it serves, one or more of the activities outlined in the EISA. *Two Rivers-Ottauquechee Regional Commission*, Case No. TGA-0032 (2009). Moreover, Ms. Dimitruk has informed us that Vermont's RPCs "have a long history of working cooperatively on projects, many of which require addressing the difference between County and RPC boundaries. Depending upon the particular program, this is done informally, or through an MOU or other formal agreement." E-Mail from Catherine Dimitruk to Steven Goering, OHA (September 11, 2009). She further states that the "RPCs in question have discussed the boundary issue in regards to the EECBG program and have worked out a plan." *Id.* Rutland County may submit any such plan with its application for EECBG funding.

[4] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. 17154.

believe that granting EECBG Program eligibility to Rutland County achieves the objective of the EISA while fulfilling the DOE's added requirement that the county have the functional capability to administer the grant funds. It is clear from the statute that Congress' intent was to make direct funding available to all counties, such as Rutland County, that meet the population requirements, i.e., a population of greater than 200,000 or one of the ten most populous counties in the State. While we deem it a reasonable interpretation by the agency that the county also have the functional capability to carry out EISA activities, we find the jurisdiction and authority of Rutland RPC to act on behalf of Rutland County to be fully consistent with that requirement. Rutland RPC is a governmental body recognized by the State of Vermont, and authorized by Rutland County, and thus is the appropriate vehicle to receive and administer EECBG Program funds that Rutland County is entitled to receive under the EISA.

It Is Therefore Ordered That:

(1) To the extent that the Appeal filed by the Rutland Regional Planning Commission on July 24, 2009, is filed on behalf of Rutland County, Vermont, the Appeal is hereby granted, as set forth in paragraph (2) below.

(2) Rutland County, Vermont, will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: SEP 15 2009

Department of Energy
Washington, DC 20585

SEP 14 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Names: Two Rivers-Ottauquechee Regional Commission
Southern Windsor County Regional Planning Commission

Date of Filing: July 24, 2009

Case Numbers: TGA-0032
TGA-0034

This decision considers Appeals filed by the Two Rivers-Ottauquechee Regional Commission (TRORC) and the Southern Windsor County Regional Planning Commission (SWCRPC) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In their Appeals, TRORC and SWCRPC seek a determination by the DOE Office of Hearings and Appeals (OHA) that each is an "eligible unit of local government" to receive block grant funding under the EECBG Program. Although we do not find that TRORC or SWCRPC qualifies as an eligible unit of local government, the counties served by TRORC and SWCRPC, Orange County, Vermont, and Windsor County, Vermont, do so qualify for the reasons set forth below, and will therefore have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few

[governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In the April 15, 2009, Federal Register notice, DOE found that, "[a]s defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire, and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 FR at 17462. Northwest RPC's Executive Director, Catherine Dimitruk, filed

the present appeal on behalf of all of Vermont's regional planning commissions (RPCs), including TRORC and SWCRPC. She contends that RPCs are proper substitutes for counties as eligible units of local government under the EISA, "as they perform many of the same functions as fully-authorized counties do in other states, and particularly that they are perfect candidates for [EECBG funds] because of their expertise, contacts, experience, and effectiveness." Appeal at 2. In essence, under Vermont state law, the RPCs perform many of the traditional governmental functions performed by counties. Vt. Stat. Ann. tit. 24, §§ 4341-4351. These RPCs, in turn, are comprised of one or more counties, all of which are recognized by the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by TRORC and SWCRPC. We do not find that either TRORC or SWCRPC is a "proper substitute" as an eligible unit of local government for the counties within its jurisdiction. However, the counties served by TRORC and SWCRPC, Orange County, Vermont, and Windsor County, Vermont, have authorized TRORC and SWCRPC to represent the counties on their behalf in the current Appeal process, and to receive and administer on their behalf any grants each may be eligible to apply for under the EECBG program. Further, as we discuss below, both Orange County and Windsor County meet all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Orange County and Windsor County are two of 14 county governments in the State of Vermont listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Both Orange County and Windsor County therefore meet this criterion.

(2) Population

As noted above, the EISA definition of "eligible unit of local government" includes a county with a population which causes the county to be one of the ten highest populated counties of the State. According to 2007 U.S. Census data, after subtracting the population of the ten Vermont cities eligible to receive EECBG funding from their respective counties, *see* Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A, Orange County is the ninth most populous county in the State of Vermont, and Windsor County is the fifth most populous county in the state. We, therefore, find that Orange County and Windsor County satisfy the population requirement of the EISA.

(3) Governance Structure

The Appeal filed on behalf of TRORC and SWCRPC states that Vermont counties "are run by Assistant Judges, elected every four years at the General Election." Appeal at 2. The 2007 Census

of Governments describes these assistant or "side" judges as the "principal administrative officers" of counties in the State of Vermont. *See* http://www.census.gov/govs/www/cog2007.html. Based upon this information, we find that both Orange County and Windsor County have the requisite governance structure to receive EECBG funds.

(4) Functional Capability

As noted above, the 2007 Census of Governments states that county governments in Vermont perform "very limited" functions. *Id.* However, in providing for the current appeal process, DOE recognized that "the characterization of city and county governments in the 2007 Census data was not in the context of the EECBG Program" and that, therefore, "the characterization of the governing structure of a city or county may not have been sufficiently informative for the purpose of determining eligibility under the EECBG Program. " 74 FR at 30063. This is clearly the case with respect to the State of Vermont, where as noted in the present Appeal, "laws and government systems have developed in different ways, particularly in the allocation of power among political subdivisions." Appeal at 2.

Thus, even if the government of Orange County or Windsor County lacks the functional capability to, on its own, carry out activities as outlined in the EISA, Orange County has authorized TRORC and Windsor County has authorized both TRORC and SWCRPC to "receive and administer any grants for which it may be eligible to apply under the EECBG program." Letter from Honorable Prudence L. Pease and Honorable Maurice A. Brown, Orange County, to Steven Goering, Office of Hearings and Appeals (August 18, 2009); Letter from Honorable David Singer, Windsor County, to Steven Goering, OHA (undated, received by OHA September 3, 2009).[2] We note here that, under Vermont law, RPCs are required to "assist and advise . . . authorities within the region to facilitate economic development programs for the appropriate development, improvement, protection and preservation of the region's physical and human resources." Vt. Stat. Ann. tit. 24, § 4345a(1). Further, as explained below, we find that both TRORC and SWCRPC clearly have the necessary functional capability to carry out EISA activities on behalf of Orange County and Windsor County, and indeed already act in that capacity in administering similar programs.

In the present Appeal, Ms. Dimitruk states that Vermont's RPCs "are authorized by statute to perform a variety of functions, including regional planning for a number of topics including energy, land use, transportation, housing, etc., promoting mutual cooperation among municipalities, advising them on public financing, and providing technical and legal support to the towns and cities of Vermont, among other duties." Appeal at 1-2 (citing Vt. Stat. Ann. tit. 24, § 4345a). She states that the RPCs have been involved in energy planning for many years and that "[e]nergy planning is one

[2] TRORC serves Orange County and both TRORC and SWCRPC serve Windsor County.

of the required elements of a regional plan under Vermont law." *Id.* at 2 (citing Vt. Stat. Ann. tit. 24, §§ 4347, 4348).[3]

Regarding its ability to administer federal grant funding, TRORC has submitted information "concerning recently completed or on-going federal grant activities in which [TRORC] has been or is currently engaged." Letter from Peter G. Gregory, Executive Director, TRORC, to Steven Goering, OHA (August 20, 2009) (enclosing "Schedule of Expenditures of Federal Awards"). Among the activities listed therein are Brownfields grants received directly from the U.S. Environmental Protection Agency (EPA) and a Water Quality Management Grant received from the EPA through the State of Vermont. *Id.* In addition, the U.S. Department of Transportation, through the State of Vermont, awarded grants to TRORC, including funds for transportation planning, the Safe Routes to School program, and a Hazardous Materials Emergency Preparedness grant. *Id.* TRORC also received funds from the U.S. Department of Homeland Security and the U.S. Department of Agriculture, passed through the State of Vermont, as well as direct funding from the U.S. Department of Interior for a National Park Service Transit Study. *Id.* Thus, TRORC clearly has demonstrated experience in utilizing federal funding to conduct various programs on behalf of the citizens of Orange County and Windsor County.

Similarly, SWCRPC has submitted information regarding federal assistance it received in Fiscal Years 2006 through 2008. Letter from Thomas J. Kennedy, Executive Director, SWCRPC, to Steven Goering, OHA (August 20, 2009) (enclosing "Schedules of Federal Financial Assistance"). SWCRPC has received Brownfields grants directly from the EPA and Water Quality Management Planning and Brownfields Grants from the EPA through the State of Vermont. *Id.* The U.S. Department of Transportation, through the State of Vermont, awarded funds to SWCRPC for transportation planning, the Safe Routes to School program, and hazard mitigation. *Id.* In addition, SWCRPC received funds from the U.S. Department of Homeland Security, passed through the State of Vermont, for activities related to homeland security preparedness, emergency management performance, and map modernization management support. *Id.* Thus, SWCRPC also clearly has demonstrated experience in utilizing federal funding to conduct various programs on behalf of the citizens of Orange County.

Based upon the foregoing, we are satisfied that both TRORC and SWCRPC have the functional capability to carry out, on behalf of Orange County and Windsor County,[4] one or more of the broad

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[3] We also note that, under Vermont law, RPC members are appointed by, and "serve at the pleasure" of, the legislative bodies of the municipalities represented by the RPC. Vt. Stat. Ann. tit. 24, §§ 4343.

[4] Three towns in Orange County (Orange, Washington, and Williamstown) are served by another Vermont RPC, the Central Vermont Regional Planning Commission (CVRPC), and one town in Windsor County (Weston) is served by another RPC, the Windham Regional Commission (Windham RC). We have already determined that both CVRPC and Windham RC have the functional capability to carry out, on behalf of their respective counties, one or more of the activities

activities outlined in the EISA.[5] We believe that granting EECBG Program eligibility to Orange County and Windsor County achieves the objective of the EISA while fulfilling the DOE's added requirement that the counties have the functional capability to administer the grant funds. It is clear from the statute that Congress' intent was to make direct funding available to all counties, such as Orange County and Windsor County, that meet the population requirements, i.e., a population of greater than 200,000 or one of the ten most populous counties in the State. While we deem it a reasonable interpretation by the agency that a county also have the functional capability to carry out EISA activities, we find the jurisdiction and authority of TRORC and SWCRPC to act on behalf of Orange County and Windsor County to be fully consistent with that requirement. TRORC and SWCRPC are governmental bodies recognized by the State of Vermont, and authorized by Orange

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outlined in the EISA. *Central Vermont Regional Planning Commission*, Case No. TGA-0030 (2009); *Windham Regional Commission*, Case No. TGA-0036 (2009). Moreover, Ms. Dimitruk has informed us that Vermont's RPCs "have a long history of working cooperatively on projects, many of which require addressing the difference between County and RPC boundaries. Depending upon the particular program, this is done informally, or through an MOU or other formal agreement." E-Mail from Catherine Dimitruk to Steven Goering, OHA (September 11, 2009). She further states that the "RPCs in question have discussed the boundary issue in regards to the EECBG program and have worked out a plan." *Id.* Orange County and Windsor County may submit any such plan with their respective applications for EECBG funding.

[5] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. 17154.

County and Windsor County, and thus are the appropriate vehicles to receive and administer EECBG Program funds that Orange County or Windsor County is entitled to receive under the EISA.

It Is Therefore Ordered That:

(1) To the extent that the Appeal filed by the Two Rivers-Ottauquechee Regional Commission on July 24, 2009, is filed on behalf of Orange County, Vermont, the Appeal is hereby granted, as set forth in paragraph (4) below.

(2) To the extent that the Appeal filed by the Two Rivers-Ottauquechee Regional Commission on July 24, 2009, is filed on behalf of Windsor County, Vermont, the Appeal is hereby granted, as set forth in paragraph (5) below.

(3) To the extent that the Appeal filed by the Southern Windsor County Regional Planning Commission on July 24, 2009, is filed on behalf of Windsor County, Vermont, the Appeal is hereby granted, as set forth in paragraph (5) below.

(4) Orange County, Vermont, will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(5) Windsor County, Vermont, will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(6) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: SEP 14 2009

Department of Energy
Washington, DC 20585

SEP 10 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Bennington County Regional Commission

Date of Filing: July 24, 2009

Case Number: TGA-0035

This decision considers an Appeal filed by Bennington County Regional Commission (BCRC) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, BCRC seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In the April 15, 2009, Federal Register notice, DOE found that, "[a]s defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire, and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 FR at 17462. Northwest RPC's Executive Director, Catherine Dimitruk, filed the present appeal on behalf of all of Vermont's regional planning commissions (RPCs). She contends that RPCs are proper substitutes for counties as eligible units of local government under the EISA, "as they perform many of the same functions as fully-authorized counties do in other states, and particularly that they are perfect candidates for [EECBG funds] because of their expertise, contacts, experience, and effectiveness." Appeal at 2.

II. Analysis

In the present Appeal, Ms. Dimitruk states that Vermont's RPCs "are authorized by statute to perform a variety of functions, including regional planning for a number of topics including energy, land use, transportation, housing, etc., promoting mutual cooperation among municipalities, advising them on public financing, and providing technical and legal support to the towns and cities of Vermont, among other duties." Appeal at 1-2 (citing Vt. Stat. Ann. tit. 24, § 4345a). She states that the RPCs have been involved in energy planning for many years and that "[e]nergy planning is one of the required elements of a regional plan under Vermont law." *Id.* at 2 (citing Vt. Stat. Ann. tit. 24, §§ 4347, 4348).[2]

As noted above, the 2007 Census of Governments states that county governments in Vermont perform "very limited" functions. *Id.* However, in providing for the current appeal process, DOE recognized that "the characterization of city and county governments in the 2007 Census data was not in the context of the EECBG Program" and that, therefore, "the characterization of the governing structure of a city or county may not have been sufficiently informative for the purpose of determining eligibility under the EECBG Program. " 74 FR at 30063. This is clearly the case with respect to the State of Vermont, where as noted in the present Appeal, "laws and government systems have developed in different ways, particularly in the allocation of power among political subdivisions." Appeal at 2.

Thus, even if Vermont county governments lack the functional capability to, on their own, carry out activities as outlined in the EISA, Vermont's RPCs generally do have the necessary functional capability to carry out EISA activities on behalf of the counties they serve, and indeed already act in that capacity in administering similar programs. We note here that, under Vermont law, RPCs are required to "assist and advise . . . authorities within the region to facilitate economic development programs for the appropriate development, improvement, protection and preservation of the region's physical and human resources." Vt. Stat. Ann. tit. 24, § 4345a(1).

Recognizing this unique allocation of power among Vermont's state and local governments, we have found that a regional planning commission, as a governmental body recognized by the State of Vermont, can be an appropriate vehicle to receive and administer EECBG Program funds that an eligible county is entitled to receive under the EISA. *See, e.g., Northwest Regional Planning Commission,* Case No. TGA-0026 (2009).[3] This achieves the objective of the EISA while fulfilling the DOE's added requirement that the county have the functional capability to administer the grant

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[2] We also note that, under Vermont law, RPC members are appointed by, and "serve at the pleasure" of, the legislative bodies of the municipalities represented by the RPC. Vt. Stat. Ann. tit. 24, §§ 4343.

[3] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov . The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

funds. It is clear from the statute that Congress' intent was to make direct funding available to all counties that meet the population requirements of the statute. While we deem it a reasonable interpretation by the agency that the county also have the functional capability to carry out EISA activities, we find the jurisdiction and authority of an RPC to act on behalf of a county government to be fully consistent with that requirement.

In the present case, however, Bennington County, Vermont, the only county in the area served by BCRC, does not meet the population requirement specified by Congress in the EISA. As noted above, for a county to be considered an "eligible unit of local government" under the EISA, it must either have a population of at least 200,000, or be one of the ten highest populated counties of the State. According to 2007 U.S. Census data, the population of Bennington County is 36,452. Annual Estimates of the Population for Counties of Vermont: April 1, 2000 to July 1, 2007 (http://www.census.gov/popest/counties/tables/CO-EST2007-01-50.xls), Population Division, U.S. Census Bureau (March 20, 2008). Further, after subtracting the population of the ten Vermont cities eligible to receive EECBG funding from their respective counties, Bennington County, with a net population of 21,297 after subtracting the population of Town of Bennington, is the 12th most populous county in the State of Vermont.[4]

Because Bennington County does not satisfy the population requirement of the EISA, BCRC cannot receive and administer EECBG Program funds under the EISA on behalf of an eligible county, or otherwise be considered a proper substitute for an eligible unit of local government under the EISA. Therefore, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Bennington County Regional Commission on behalf of Bennington County, Vermont, on July 24, 2009, is hereby denied.

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[4] *See* Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A (listing Town of Bennington, Town of Brattleboro, Burlington, Town of Colchester, Town of Essex, Village of Essex Junction, Town of Hartford, Town of Milton, Rutland, and South Burlington, as the ten Vermont cities eligible to receive EECBG funding); Annual Estimates of the Population for Minor Civil Divisions in Vermont, Listed Alphabetically Within County: April 1, 2000 to July 1, 2007 (http://www.census.gov/popest/cities/tables/SUB-EST2007-05-50.xls), Population Division, U.S. Census Bureau (July 10, 2008) Annual Estimates of the Population for Minor Civil Divisions in Vermont, Listed Alphabetically Within County: April 1, 2000 to July 1, 2007 (http://www.census.gov/popest/cities/tables/SUB-EST2007-05-50.xls), Population Division, U.S. Census Bureau (July 10, 2008); Annual Estimates of the Population for Incorporated Places in Vermont, Listed Alphabetically: April 1, 2000 to July 1, 2007 (http://www.census.gov/popest/cities/tables/SUB-EST2007-04-50.xls), Population Division, U.S. Census Bureau (July 10, 2008).

(2) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: SEP 10 2009

Department of Energy
Washington, DC 20585

SEP 14 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Windham Regional Commission

Date of Filing: July 24, 2009

Case Number: TGA-0036

This decision considers an Appeal filed by Windham Regional Commission (Windham RC) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Windham RC seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. Although we do not find that Windham RC qualifies as an eligible unit of local government, the county served by Windham RC, Windham County, Vermont, does so qualify for the reasons set forth below, and will therefore have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not

considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In the April 15, 2009, Federal Register notice, DOE found that, "[a]s defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire, and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 FR at 17462. Northwest RPC's Executive Director, Catherine Dimitruk, filed the present appeal on behalf of all of Vermont's regional planning commissions (RPCs), including Windham RC. She contends that RPCs are proper substitutes for counties as eligible units of local government under the EISA, "as they perform many of the same functions as fully-authorized

counties do in other states, and particularly that they are perfect candidates for [EECBG funds] because of their expertise, contacts, experience, and effectiveness." Appeal at 2. In essence, under Vermont state law, the RPCs perform many of the traditional governmental functions performed by counties. Vt. Stat. Ann. tit. 24, §§ 4341-4351. These RPCs, in turn, are comprised of one or more counties, all of which are recognized by the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Windham RC. We do not find that Windham RC is a "proper substitute" as an eligible unit of local government for the counties within its jurisdiction. However, the county served by Windham RC, Windham County, Vermont, has authorized Windham RC to represent the county on its behalf in the current Appeal process, and to receive and administer on its behalf any grants it may be eligible to apply for under the EECBG program. Further, as we discuss below, Windham County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

(1) Incorporated Unit of Local Government

Windham County is one of 14 county governments in the State of Vermont listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Windham County therefore meets this criterion.

(2) Population

As noted above, the EISA definition of "eligible unit of local government" includes a county with a population which causes the county to be one of the ten highest populated counties of the State. According to 2007 U.S. Census data, after subtracting the population of the ten Vermont cities eligible to receive EECBG funding from their respective counties, *see* Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A, Windham County is the seventh most populous county in the State of Vermont. We, therefore, find that Windham County satisfies the population requirement of the EISA.

(3) Governance Structure

The Appeal filed on behalf of Windham RC states that Vermont counties "are run by Assistant Judges, elected every four years at the General Election." Appeal at 2. The 2007 Census of Governments describes these assistant or "side" judges as the "principal administrative officers" of counties in the State of Vermont. *See* http://www.census.gov/govs/www/cog2007.html. Based upon this information, we find that Windham County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

As noted above, the 2007 Census of Governments states that county governments in Vermont perform "very limited" functions. *Id.* However, in providing for the current appeal process, DOE recognized that "the characterization of city and county governments in the 2007 Census data was not in the context of the EECBG Program" and that, therefore, "the characterization of the governing structure of a city or county may not have been sufficiently informative for the purpose of determining eligibility under the EECBG Program. " 74 FR at 30063. This is clearly the case with respect to the State of Vermont, where as noted in the present Appeal, "laws and government systems have developed in different ways, particularly in the allocation of power among political subdivisions." Appeal at 2.

Thus, even if Windham County government lacks the functional capability to, on its own, carry out activities as outlined in the EISA, the county has authorized Windham RC to "receive and administer any grants for which it may be eligible to apply under the EECBG program." Letter from Honorable Mary Ann Clarkson, Windham County, to Steven Goering, Office of Hearings and Appeals (August 18, 2009).[2] We note here that, under Vermont law, RPCs are required to "assist and advise . . . authorities within the region to facilitate economic development programs for the appropriate development, improvement, protection and preservation of the region's physical and human resources." Vt. Stat. Ann. tit. 24, § 4345a(1). Further, as explained below, we find that Windham RC clearly has the necessary functional capability to carry out EISA activities on behalf of Windham County, and indeed already acts in that capacity in administering similar programs.

In the present Appeal, Ms. Dimitruk states that Vermont's RPCs "are authorized by statute to perform a variety of functions, including regional planning for a number of topics including energy, land use, transportation, housing, etc., promoting mutual cooperation among municipalities, advising them on public financing, and providing technical and legal support to the towns and cities of

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[2] Windham RC also serves three towns (Readsboro, Searsburg, and Winhall) in Bennington County, Vermont, and one town (Weston) in Windsor County, Vermont. Windsor County has authorized two other Vermont RPCs, the Two Rivers-Ottauquechee Regional Commission (TRORC) and the Southern Windsor County Regional Planning Commission (SWCRPC), to receive and administer EECBG funds on its behalf, if Windsor County is determined to be eligible to receive such funds. Appeals filed by TRORC and SWCRPC are currently pending before this office under OHA Case Nos. TGA-0032 (TRORC) and TGA-0034 (SWCRPC). With respect to the towns served by Windham RC that are in Bennington County, we have already issued a decision finding that Bennington County does not meet the population requirement specified by Congress in the EISA for the county to be considered an "eligible unit of local government" under the EISA. *Bennington County Regional Commission,* Case No. TGA-0035 (2009). However, as noted in the April 15, 2009, Federal Register notice, county governments that do not meet the eligibility requirements for direct formula grants from DOE are eligible for program funds through the State in which they are located. 74 FR at 17462. Thus, Bennington County will be eligible to apply for EECBG funds through the State of Vermont.

Vermont, among other duties." Appeal at 1-2 (citing Vt. Stat. Ann. tit. 24, § 4345a). She states that the RPCs have been involved in energy planning for many years and that "[e]nergy planning is one of the required elements of a regional plan under Vermont law." *Id.* at 2 (citing Vt. Stat. Ann. tit. 24, §§ 4347, 4348).[3]

Regarding its ability to administer federal grant funding, Windham RC has submitted information from its financial audits for fiscal years 2004 through 2008. Letter from James P. Matteau, Executive Director, Windham RC, to Steven Goering, Office of Hearings and Appeals (August 19, 2009) (enclosing "Statements of Federal Financial Assistance" for FY 2004 through 2007 and "State of Vermont Subrecipient Schedule of Federal Expenditures" for FY 2008). Among the activities listed therein are Brownfields grants, Clean Water grants, and a Livable Communities grant from the U.S. Environmental Protection Agency. *Id.* In addition, in FY 2004 through 2008, the U.S. Department of Transportation, through the Vermont Agency of Transportation, awarded grants to Windham RC, including funds for intermodal transportation studies and the Safe Routes to School program. *Id.* Windham RC also received funds from the U.S. Department of Homeland Security, passed through the Vermont Department of Public Safety, for activities including emergency response planning, map modernization and management, and pre-disaster mitigation. *Id.* Thus, Windham RC clearly has demonstrated experience in utilizing federal funding to conduct various programs on behalf of the citizens of Windham County.

Based upon the foregoing, we are satisfied that Windham RC has the functional capability to carry out, on behalf of Windham County, one or more of the broad activities outlined in the EISA.[4] We

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[3] We also note that, under Vermont law, RPC members are appointed by, and "serve at the pleasure" of, the legislative bodies of the municipalities represented by the RPC. Vt. Stat. Ann. tit. 24, §§ 4343.

[4] The EISA authorizes a broad range of activities including, *inter alia*:

1) Development of an energy efficiency and conservation strategy;
2) Building energy audits and retrofits, including weatherization;
3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
4) Transportation programs to conserve energy;
5) Building code development, implementation, and inspections;
6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
9) Installation of energy efficient traffic signals and street lighting;
10) Installation of renewable energy technologies in or on government buildings;

believe that granting EECBG Program eligibility to Windham County achieves the objective of the EISA while fulfilling the DOE's added requirement that the county have the functional capability to administer the grant funds. It is clear from the statute that Congress' intent was to make direct funding available to all counties, such as Windham County, that meet the population requirements, i.e., a population of greater than 200,000 or one of the ten most populous counties in the State. While we deem it a reasonable interpretation by the agency that the county also have the functional capability to carry out EISA activities, we find the jurisdiction and authority of Windham RC to act on behalf of Windham County to be fully consistent with that requirement. Windham RC is a governmental body recognized by the State of Vermont, and authorized by Windham County, and thus is the appropriate vehicle to receive and administer EECBG Program funds that Windham County is entitled to receive under the EISA.

It Is Therefore Ordered That:

(1) To the extent that the Appeal filed by the Windham Regional Commission on July 24, 2009, is filed on behalf of Windham County, Vermont, the Appeal is hereby granted, as set forth in paragraph (2) below.

(2) Windham County, Vermont, will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: SEP 14 2009

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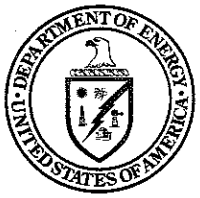
11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. 17154.



Department of Energy
Washington, DC 20585

AUG 19 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Village of Woodridge, Illinois

Date of Filing: July 24, 2009

Case Number: TGA-0037

This decision considers an Appeal filed by the Village of Woodridge, Illinois (Village of Woodridge) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, the Village of Woodridge seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, the Village of Woodridge would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.[1] For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 Fed. Reg. 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: http://www.eecbg.energy.gov/). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

as "eligible unit of local government" for the purpose of the EECBG Program. A city or county is an "eligible unit of local government" under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city's eligibility and again in determining a county's eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an "eligible unit of local government," DOE determined that a geographical subdivision also must have a "functional government" with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has "relatively few [governmental] responsibilities," or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local "government" for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an "eligible

unit of local government" is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

> A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department's determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, the Village of Woodridge contends that DOE inappropriately failed to identify the town as a unit of local government eligible to apply for direct funding under the EECBG Program. According to the Village of Woodridge, it was denied eligibility based upon the 2007 Census population data relied upon by DOE, which indicates that the Village of Woodridge has less than the 35,000 population eligibility threshold established by the EISA, more specifically that the city had a 2007 population of 34,151. However, the Village of Woodridge contests the use of this data by DOE. The Village of Woodridge states that, at its request, a special census of specific blocks within the village was conducted by the U.S. Census Bureau in 2008. According to the Village of Woodridge, the results of that special census were released in September 3, 2008, and document "the

population increase of 2,668 persons over Woodridge's 2004 population of 33,253 for a total population of 35,921." Appeal, Attachment 2. The Village of Woodridge therefore claims that it should be determined eligible to apply for direct funding under the EECBG Program.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by the Village of Woodridge and have determined that its Appeal must be denied. The Village of Woodridge is a unit of local government identified in 2007 GID, and clearly has the governance structure and functional capability to carry out the broad range of activities specified in the EISA. However, as explained below, the Village of Woodridge fails to meet the EISA population requirement based upon 2007 U.S. Census estimates data utilized by DOE for purposes of the EECBG Program.

The U.S. Census Bureau is the official government source for population data and related information. In determining the EECBG Program eligibility of cities and counties, DOE relied on the Census 2007 Population Estimates data (April 1, 2000 to July 1, 2007) released by the U.S. Census Bureau on July 10, 2008. As stated by DOE in the April 15, 2009, Federal Register notice, this was "the most recent and accurate population data from the U.S. Census" at the time the EECBG Program was implemented. 74 Fed. Reg. 17462. The 2007 Census data relied upon by DOE shows the Village of Woodridge as having a 2007 population of 34,151,[2] below the 35,000 population threshold established by the EISA and does not qualify the Village of Woodridge as one of the ten most populous cities in the State of Illinois. Thus, we find that the Village of Woodridge was properly omitted by DOE from the listing of cities determined by DOE to be eligible to apply for direct funding under the EECBG Program.

In its Appeal, the Village of Woodridge claims that a special census of special blocks within the village, taken by the U.S. Census Bureau in 2008, had the effect of adjusting its 2007 population above the 35,000 threshold. However, the supporting documentation provided by the Village of Woodridge does not support that claim. While it appears that the results of the special census, released in September 2008, had the effect of increasing the Village of Woodrigde's population by a net of 2,631, that adjustment was made in reference to the village's April 1, 2000, Census estimated base population and not the village's 2004 Census population, as asserted by the Village

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[2] The U.S. Census Bureau provided an opportunity for local governments to request corrections to the initially released 2007 population data. The time in which to file a population challenge closed on January 5, 2009. DOE indicated in the April 15, 2009, Federal Register notice that it would update the 2007 population data it utilized to reflect successful challenges submitted to the U.S. Census Bureau. A listing of the successful challenges can be found at: http://www.census.gov/popest/archives/2000s/vintage_2007/07s_challenges.html. According to that listing, the Village of Woodridge did not file a successful challenge to the initial 2007 population estimates released by the U.S. Census Bureau.

of Woodridge in its appeal.[3] According to the 2007 Census data utilized by DOE, the Village of Woodridge had an April 1, 2000, estimated base population of 31,003, and there is no year when the population of the village has exceeded 35,000.[4]

We find DOE's decision to use uniformly the 2007 population estimates, the best available Census data at the time the EECBG Program was established, to be a prudent exercise of agency discretion. It would be impracticable to implement the EECBG Program in a cohesive and timely manner if individual units of local government were permitted to present alternative or subsequently released population data to determine EECBG Program eligibility. For that reason, the June 24, 2009, Federal Register notice that established the present appeal process provides that issues regarding DOE's methodology for determining the population of a city or county are not appealable, specifically stating:

> [T]he determination of DOE to rely on the 2007 Census data is not reviewable on appeal. DOE recognizes that more recent data have been made available by the U.S. Census Bureau. However, in order to provide certainty as to the funding levels of entities determined to be "eligible units of local government," DOE relied on the most recent data available at the time the formula allocations were announced. The availability of updated (as opposed to corrected 2007 data) is not reviewable on appeal.

74 Fed. Reg. at 30064 (emphasis supplied). Accordingly, the Village of Woodridge's appeal must be denied.

It Is Therefore Ordered That:

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[3] The documentation presented in the Village of Woodridge appeal shows that the 2008 special census of the selected area resulted in a population count of 3,052, compared to the "April 1, 2000 Special Census Base Count" of 421, yielding an increase of 2,631. *See* Appeal, Attachment 2, page 3. The Village of Woodridge also submitted a summary of calculations showing a net increase of 2,668. *Id.*, page 4. These calculations appear to be in error. In any event, it is clear that the adjustment related to 2000 Census data and not 2004 Census data.

[4] According to the U.S. Census data relied upon by the DOE Office of Energy Efficiency and Renewable Energy, released on July 10, 2008, the Village of Woodridge had an estimated population of 34,218 in 2006, which is the highest population recorded for the village. As indicated above, this data shows Village of Woodridge with a 2007 population of 34,151, disqualifying the village for direct EECBG Program funding. Moreover, we further observe that according to revised 2007 population data, subsequently released by the U.S. Census Bureau on July 1, 2009, but which DOE will also not utilize because it was issued after the eligibility determinations were made, *see* 74 Fed. Reg. 17461, the Village of Woodridge had a drop in its 2007 estimated population, to 34,026.

(1) The Appeal filed by the Village of Woodridge, Illinois, on July 24, 2009, is hereby denied.

(2) This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: AUG 19 2009

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: PSI Energy, Inc.

Date of Filing: January 6, 1995

Case Number: VEA-0001

On January 6, 1995, PSI Energy, Inc. (PSI) filed an Appeal from an October 3, 1994 determination issued by the Department of Energy's (DOE) Office of Environmental Management (OEM). Appeal of PSI Energy, Inc. (November 1, 1994). In this decision, we consider PSI's claim that the OEM has erroneously determined its liability for payment into the Uranium Enrichment Decontamination and Decommissioning Fund (the D&D Fund) established under the Energy Policy Act of 1992, Pub. L. No. 102-486, § 1101, 106 Stat. 2953 (1992) (codified at 42 U.S.C. § 2297(g)-1 (1994)). PSI's D&D Fund assessment was based on 42,518 separative work units (SWUs). If PSI's Appeal were granted, it would pay no assessment into the D&D Fund.

I. Background

Since the era of the Manhattan Project, the DOE and its predecessors have engaged in the process of uranium enrichment in order to meet the nation's national security, research and electrical generation requirements.<1> Uranium enrichment is the process by which uranium is prepared for use in commercial electrical generation or weapons production. This process increases the concentration of a particular isotope of uranium-- uranium-235 (U-235)--above the naturally occurring percentage of 0.711%. The percentage of U-235 contained in a parcel of uranium is referred to as its "assay." Most commercial power generating plants require fuel with assays between 2.5 and 4.5 percent.

The enrichment process involves separating uranium feed into two portions, and transferring U-235 molecules from one portion to the other. The resulting portions of uranium are called "the product" and "the tails." The product consists of enriched uranium (having a higher than natural percentage of U-235). The other portion, the tails, consists of depleted uranium (having a lower than natural percentage of U-235). The effort required to separate the two isotopes is referred to as separative

work and is measured in terms of separative work units (which are commonly referred to as SWUs). The SWU is the common unit of measure of uranium enrichment services used in the nuclear power industry.

In the United States the uranium enrichment process has been performed solely at three DOE plants which used gaseous diffusion technology to achieve separation of the isotopes. The emergence of newer, more efficient technologies and the globalization of the uranium enrichment market have rendered the government-owned plants obsolete and uncompetitive. It therefore became necessary to decommission and replace the gaseous diffusion plants and to recover the costs of these operations. On October 24, 1992, Congress enacted the Energy Policy Act. The Act established a Uranium Enrichment Decontamination and Decommissioning Fund (the D&D Fund) to pay for the costs of decontamination, decommissioning and other remedial action activities at DOE's uranium enrichment facilities, and for reimbursement of certain decontamination and decommissioning, reclamation, and other remedial action costs incurred by licensees at active uranium or thorium processing sites.

The legislative history indicates that Congress intended that the D&D Fund be financed by those entities that had directly benefited from the operation of the plants, and that the allocation of assessments be

apportioned in accordance with the degree which those entities had benefited from the uranium enrichment program. H. Rep. No. 474, 102nd. Cong., 2d sess.144, *reprinted in* 1992 U.S. Code Cong. & Admin. News 1954, 1967 ("The prevailing view on the allocation of costs of cleaning up these plants is that it should be based on benefits received from the program").<2> Accordingly, the statute mandates contributions to the D&D Fund from both the governmental entities and the domestic utilities that took delivery of enriched uranium from the plants. After considering various methods of apportioning responsibility for the D&D Fund, Congress determined that the benefits received from the program could best be measured by each entity's receipt of DOE-originated SWUs. See Id.<3> Therefore, the statute requires that each domestic utility's D&D Fund assessment be based upon the total number of SWUs that it purchased from the DOE prior to October 24, 1992. However, since Congress recognized that utilities often purchased or sold enrichment services in the secondary market, the statute further provides:

(1) a utility shall be considered to have purchased a separative work unit from the Department if such separative work unit was produced by the Department, but purchased by the utility from another source; and

(2) a utility shall not be considered to have purchased a separative work unit from the Department if such separative work unit was purchased by the utility, but sold to another source.

42 U.S.C. § 2297g-1(c). As a result, a domestic utility's D&D Fund assessment is based upon the following formula: A+B-C=X, where X is the number of SWUs upon which the utility's D&D Fund assessment is based; A is the total number of SWUs that the utility purchased from the DOE prior to October 24, 1992; B is the number of DOE-produced SWUs purchased by the utility in the secondary market prior to October 24, 1992; and C is the number of DOE-produced SWUs transferred or sold by the utility prior to October 24, 1992.

Utilities were required to purchase and then deliver to the DOE enough natural uranium feed for DOE to conduct the enrichment requested by the utility. DOE then charged the utility, on a per SWU basis, for the amount of the separative work necessary to enrich the natural uranium feed provided by the utility to the weight and product assay sought by the utility.

The relationship between separative work, feed and enriched uranium can be analogized to the production of apple cider. One making apple cider might squeeze twenty apples with a great deal of force to make one gallon of apple cider (therefore leaving relatively little juice remaining in the crushed apples). Alternatively, one might choose to squeeze the apples only half as hard but use forty apples instead of twenty and still end up with one gallon of apple cider (leaving a relatively greater amount of juice in the crushed apples). The apples in this example can be analogized to uranium feed, the apple juice to the U-235 isotope, the squeezing force to separative work, the crushed apples to the tails, and the apple cider itself to the product. Just as the production of a given quantity of apple cider can be achieved through the use of different combinations of apples and squeezing force, a given quantity of uranium enrichment can be produced by different combinations of feed and separative work. For example, an enrichment could be performed using X SWUs and Y kilograms of natural uranium feed at a tails assay of .2 or it could be performed using fewer SWUs and more natural uranium feed (and therefore a higher tails assay) with exactly the same result in terms of quantity and product assay. The varying quantities of separative work and feed required to produce a given quantity of enriched uranium at a given level of enrichment are set forth in the Standard Table of Enrichment Services published by the DOE. By ascertaining the tails assay (the percentage of the U-235 isotope remaining in the tails after the enrichment is completed), the combination of separative work and natural uranium feed needed to produce the desired quantity and product assay can be determined. An increased tails assay results in fewer SWUs and a higher natural feed requirement. Conversely, a decreased tails assay results in a higher number of SWUs and a lower natural feed requirement. When utilities placed orders for enrichment services with the DOE, in addition to selecting the quantity and level of enrichment (the product assay) they chose the tails assay to which the uranium feed was to be depleted (and therefore the specific amounts of separative work and natural uranium feed to be used). The DOE in turn required that the utility provide the corresponding amount of

uranium feed and charged the utility for the number of SWUs needed to produce the product ordered at the selected tails assay.

Adding a layer of complexity to this process is the fact that the uranium enrichment market relies upon the "transaction tails" method of determining tails assay. There are two methods of determining the tails assay percentage to be used in a SWU calculation: (1) the "operating" or "as produced" tails method; and (2) the "transaction tails" method. Under the operating or as produced method, the tails assay used to calculate the amount of natural uranium feed to be supplied by the purchaser and the amount of separative work to be purchased is the actual tails assay at which the enrichment was conducted. In contrast, under the transaction tails method, computations of separative work and feed requirements are independent of the actual tails assay used by the DOE to conduct the enrichment. Instead, under the transaction tails method, the purchaser would select the tails assay that was most economically beneficial to it and then provide the corresponding amount of natural uranium feed. The utility would then be charged for the number of SWUs indicated by the Standard Table of Enrichment Services. In other words, the number of SWUs purchased in a transaction using the transaction tails method was determined by the tails assay selected by the purchaser *instead of the actual tails assay* produced by the enrichment. During the assessment period the DOE used the "transaction tails" method to determine the tails assay to be used when calculating how many SWUs were to be purchased by domestic utilities seeking uranium enrichment services.

The practice of using the transaction tails method was also adopted in the secondary market for enriched uranium, where utilities resold enriched uranium originally purchased from the DOE, as well as SWU credits and feed credits. In the secondary market, the price of enriched uranium was based upon the market value of its two components, natural uranium feed and separative work. In some circumstances, utilities seeking to sell enriched uranium found separate purchasers for the feed and separative work components or purchasers who wished to purchase a different combination of separative work and feed than the enriched uranium had when it was first purchased from DOE. The use of the transaction tails assay method in the secondary market facilitated such transactions.<4> As a result, the tails assay used to determine the amount of separative work and natural uranium feed purchased in the secondary market transaction could vary from both that which was actually used to enrich the uranium and the transaction tails assay used in the original purchase.

II. Analysis

The present case involves a domestic utility, PSI, that purchased SWUs from the DOE and then later resold the enriched uranium produced by the SWUs to six other domestic utilities and one foreign company. Due to the difference in the transaction tails assays between PSI's original purchase from DOE and three of the resale transactions, PSI sold 42,518 fewer SWUs than it had originally purchased from the DOE. The question before us is whether PSI's D&D Fund assessment should include the 42,518 SWU difference.

In 1981 and 1982, the DOE provided uranium to PSI enriched at a transaction tails assay of 0.2%. In order to obtain this enriched uranium, PSI supplied DOE with natural uranium feed and purchased 295,961 SWUs from the DOE. PSI intended to use the enriched uranium in its unconstructed Marble Hill Nuclear Generating Station. However, after PSI canceled construction of the Marble Hill plant in 1984, the company entered into a series of transactions in 1984 and 1985 to divest itself of the enriched uranium. Specifically at issue are three of these transactions.

In each of the three transactions, PSI received money from the Buyer as consideration for the "SWU component" of the enriched uranium, plus a quantity of natural uranium feed as consideration for the "feed material component" of the enriched uranium. In the secondary market, as was the case when PSI purchased from the DOE, the number of SWUs purchased and the amount of natural uranium feed provided by the Buyer for a transaction involving a given quantity of enriched uranium was based in part on the transaction tails assay agreed to by the parties. In all three secondary market transactions at issue, the parties based these quantities on an assumed tails assay of 0.3%. Thus, the same enriched uranium

which had originally been purchased from the DOE based on a transaction tails assay of 0.2% was now being resold based on a tails assay of 0.3%.

As explained above, the transaction tails assay and the resulting SWU and feed components assigned to a given quantity of enriched uranium for the purposes of a sale bears no relation to the number of SWUs and amount of feed *actually used* in the process of enriching the uranium. Thus, in both the primary (DOE to PSI) and secondary (PSI to other sources) market transactions at issue in this case, the tails assays were *assumed* to be 0.2% and 0.3%, respectively. Because of this change in assumed tails assay, the enriched uranium at resale had a lesser "SWU component" and a greater "feed material component" than when PSI first purchased it from the DOE.

In calculating PSI's special assessment, the OEM found that PSI purchased a total of 295,961 SWUs from the DOE but, due to the difference in tails assays in the transactions described above, sold a total of only 253,443 SWUs to other sources. Accordingly, the OEM concluded that PSI should be held responsible for a D&D Fund assessment based on 42,518 SWUs, the difference between the number of SWUs purchased by PSI and the number of SWUs it sold to other sources.

PSI, contending that it is not subject to the special assessment, filed the present Appeal on January 6, 1995. Comments on PSI's Appeal were submitted by the OEM on March 22, 1995, and by Virginia Electric and Power Company (Virginia Power), the Buyer in one of the transactions at issue, on January 17, 1995. On July 20, 1995, PSI submitted a response to OEM's comments.

PSI argues that it is not subject to the special assessment because: (1) it "sold all of its material that was enriched by the DOE;" (2) the utility "may be prevented from passing on the Special Assessment to current ratepayers because Indiana law only allows recovery for actual fuel consumed in the generation of electricity;" and (3) the assessment constitutes an "unlawful exaction" by the Government in violation of the Fifth Amendment to the U.S. Constitution. Reply of PSI Energy, Inc. (July 20, 1995) at 2-7. After considering PSI's arguments and reviewing the record in this case, we find that PSI was properly assessed for the contested 42,518 SWUs.

A. PSI's Sales of SWUs in the Secondary Market

We turn first to PSI's claim that since it resold all of the uranium in its inventory enriched by DOE, it must have resold all of the 295,961 SWUs it purchased in order to obtain that uranium as well. As discussed above, the DOE and the secondary market used the *transaction tails* method to calculate the number of SWUs transferred in a transaction. As a result, the number of SWUs purchased in order to obtain a given parcel of enriched uranium was not fixed, but rather was determined by tails assay selected by the purchaser (or agreed to by both parties in the case of a secondary market transaction). Therefore, the assumption upon which PSI's contention is based, that the number of SWUs associated with a given parcel of enriched uranium remains constant, is incorrect. Long Island Lighting Company, 25 DOE ¶ 80,146 (1995).<5>

PSI further relies for support on the Energy Policy Act of 1992, contending that it would be contrary to the intent of the Act to levy an assessment on a utility that sold all the DOE-enriched uranium it had ever received simply because some of the uranium was sold at a different tails assay. "[N]owhere in the Act is there any reference to differentiation of SWUs purchased on the basis of tails assays." Reply of PSI Energy, Inc. (July 20, 1995) at 2-3.

PSI is correct that there is no specific reference in the Energy Policy Act to tails assay as the basis for the special assessment. However, neither is the assessment based on the quantity of enriched uranium purchased and sold by a utility, as implied by the Appellant. Rather, the statute clearly states that a utility's assessment is to be based on the number of *SWUs* it purchased from the DOE, unless the SWUs were "purchased by the utility, but sold to another source." There is no dispute that PSI purchased 295,961 SWUs from the DOE. This is the basis for PSI's special assessment before accounting for SWUs it sold to other sources. The method of adjusting the assessment to account for PSI's sales of SWUs in the secondary

market was explained by OEM in issuing the Part 766 regulations.

If a utility purchased DOE-produced SWUs from another utility, the purchasing utility's assessment will be based on the SWUs specified in contracts or other probative documents generated at the time of the secondary market purchase. The selling utility's assessment will be reduced by an amount that will be determined by the SWUs sold to the purchasing utility.

Uranium Enrichment Decontamination and Decommissioning Fund; Procedures for Special Assessment of Domestic Utilities, 59 Fed. Reg. 41956, 41958 (1994). Accordingly, PSI's assessment could only be reduced by the number of SWUs sold by PSI as "specified in contracts or other probative documents generated at the time of the secondary market purchase." As explained below, documentation related to the three sales at issue support the OEM's conclusion that PSI sold a total of 253,433 SWUs to other sources, leaving an assessment based on 42,518 SWUs.

PSI submitted to OEM copies of the agreements under which two of the sales were made. One of the agreements, dated November 28, 1984, was between PSI ("Seller") and Indiana and Michigan Electric Company ("Buyer"). The agreement states:

Buyer agrees to buy and Seller agrees to sell that quantity of Enriched Uranium Product in the form of UF6, and at the U235 weight percentage, containing certain nominal SWU and equivalent nominal NATURAL FEED MATERIAL, all as set forth in the table attached hereto and incorporated herein by reference as Appendix A (hereinafter referred to as ?EUP').

Appendix A states that the "EUP to be transferred by Seller to Buyer at DOE" contained 103,846 SWUs.

Similarly, a December 26, 1984 agreement between PSI ("Seller") and Virginia Electric and Power Company ("Buyer") states that the "Buyer agrees to buy and Seller agrees to sell all its right to, title to and interest in the SWU Component contained within the EUP as specified in Appendix A." Appendix A to this agreement lists the total of the SWU Component as equal to 36,907 SWUs.

The record in this case does not contain a copy of the agreement between PSI and Steag Kernenergie GmbH, a German company, which governed the third sale at issue. However, in a November 1, 1994 submission to OEM, PSI stated:

We sold 24,176 SWU(s) to Steag Kernenergie GmbH. (German). The agreement required PSI to use 14,971 inventory SWU and 9,705 commitment SWU (assignment) at .30% tails assay. However, per the memorandum dated Oct. 10, 1984 (Exhibit I) PSI had to transfer 18,793 SWU at .20% tails assay from inventory in order to complete the sale.

Thus, PSI does not dispute that under the agreement by which this sale was made, PSI sold to Steag Kernenergie GmbH *14,971 of its inventory SWUs at 0.3% tails assay*. Because the Energy Policy Act states "a utility shall not be considered to have purchased a separative work unit from the Department if such separative work unit was purchased by the utility, but sold to another source," it is the number of SWUs "sold" to Steag, i.e. 14,971 SWUs, that is critical in determining PSI's assessment.

We therefore must agree with OEM that PSI, having purchased 295,961 SWUs from the DOE, sold only 253,443 SWUs to other sources, and therefore was properly assessed for the 42,518 SWUs it did not sell in the secondary market.

B. Ability of PSI to Recover the Special Assessment in its Utility Rates

The Energy Policy Act provides that "[a]ny special assessment . . . shall be deemed a necessary and reasonable current cost of fuel and shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost." 42 U.S.C. § 2297g-1(g). PSI argues that despite this language "it may be prevented from passing on the Special Assessment to current ratepayers because Indiana law only

allows recovery for actual fuel costs for fuel consumed in the generation of electricity . . . ." Reply of PSI Energy, Inc. (July 20, 1995) at 3.

DOE responds that the above provision of the statute

makes a utility's historical SWU costs comparable, for ratemaking purposes, to its current fuel costs, so that its Special Assessment may be ?fully' recovered, notwithstanding the criteria for fuel cost recovery under state law. Otherwise, the provision would have no meaning since utilities are already subject to state-level rate recovery requirements, which often restrict fuel cost recovery to actual fuel costs.

Response of the Department of Energy (March 22, 1995) at 11.

PSI has not made a persuasive showing that it cannot recover the cost of the Special Assessment under state law. Rather, the utility merely asserts in general terms that it "may" be prevented from doing so. Appeal of PSI Energy, Inc. (November 1, 1994) at 3 (citing Ind. Code § 8-1-2-42(d)). Moreover, even if we were to assume that Indiana state law might prevent PSI from passing through the Special Assessment in its rates, it is clear that the state law would be pre-empted by the federal Energy Policy Act.

In determining whether state law is pre-empted by a federal statute, the first question is whether an intent to preempt is "express in the terms of the statute." Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 604-05 (1991). In the absence of express language, the intent of Congress to preempt state law can be "implicit if . . . the goals ?sought to be obtained' and the ?obligations imposed' reveal a purpose to preclude state authority." Id. at 605 (quoting Rice v. Santa Fe Elevator Corp., 331 U. S. 218, 230 (1947)). Finally, "[e]ven when Congress has not chosen to occupy a particular field, pre-emption may occur to the extent that state and federal law actually conflict." Id.

In the present case, the intent of the Congress to preempt state law is express in the terms of the Energy Policy Act. The statute declares that the special assessment "shall be fully recoverable in rates in all jurisdictions . . . ." 42 U.S.C. § 2297g-1(g). As OEM argues, we cannot discern what meaning this provision could have other than to preempt state laws "in all jurisdictions" that would not allow recovery of the special assessment in a utility's rates. In addition, such state laws would be pre-empted because they would "actually conflict" with the express terms of the Energy Policy Act. Mortier, 501 U.S. at 605.

Moreover, "the goals sought to be obtained'" by the special assessment "and the obligations imposed' reveal a purpose to preclude state authority." Id. The legislative history of the Energy Policy Act discusses the need to allocate the "cost of cleaning up" the gaseous diffusion plants "based on the benefits received from the program." H. Rep. No. 474, 102nd. Cong., 2d sess.144, *reprinted in* 1992 U.S. Code Cong. & Admin. News 1954, 1967. State laws that would not allow for the recovery of the special assessment in utility rates would frustrate the stated purpose of the legislation--to apply the special assessment in a fair and equitable manner to all beneficiaries of the program. Each of the above considerations lead us to conclude that Indiana state law would be pre-empted by the federal Energy Policy Act's mandate that the special assessment "shall be fully recoverable in rates in all jurisdictions . . . ." 42 U.S.C. § 2297g-1(g).

C. Constitutionality of the Energy Policy Act

Finally, PSI argues that the special assessment constitutes an "unlawful exaction" by the Government, and cites a recent decision of the United States Court of Federal Claims. Reply of PSI Energy, Inc. (July 20, 1995) at 5-7 (citing Yankee Atomic Electric Company v. United States, No. 94-555C (June 22, 1995)). In Yankee Atomic, the court found that, because of the "fixed-price character" of the contracts by which the DOE's predecessor sold SWUs to a utility,

by imposing the assessment . . . , the Government dishonors the very promise it had earlier made: that the price to be charged for its services would not exceed the contract-stated maximum. Legislation so plainly directed at undoing a contract liability previously assumed by the Government is an impermissible exercise of sovereign power.

Yankee Atomic, slip op. at 7-8.

We will ultimately defer to the rulings of the federal courts on the issue of the constitutionality of the Energy Policy Act. However, to date no order has been issued enjoining the DOE's enforcement of the Act in cases like the present one, and the United States has recently filed a notice of appeal in the Yankee Atomic case. The appeal will be heard by the United States Court of Appeals for the Federal Circuit. While this litigation is pending, the Department has stated that it "must continue to fulfill its statutory obligation under the Energy Policy Act of 1992 by collecting special assessments." Letter from Judy C. Fulner, Uranium Enrichment Decontamination and Decommissioning Fund Manager, DOE, to Donald P. Bogard, Cinergy Corporation (November 27, 1995).

III. Conclusion

There is no question that Congress' choice of DOE-produced SWUs as the means of measuring a utility's proportionate share of uranium enrichment cleanup costs has had an unforeseen economic consequence for PSI and its rate-payers. When the firm resold to other sources the uranium enriched with SWUs purchased from the DOE, it certainly had no idea that changing the tails assay (and thus reducing the "SWU component" of the enriched uranium) would later cause it to be assessed for the 42,518 SWUs it did not resell. However, PSI also received a corresponding economic benefit as a result of the change in tails assay. The enriched uranium resold by PSI had a greater "feed material component" than when the uranium was purchased. Although it received lesser consideration for the reduced SWU component of the enriched uranium, PSI received a larger quantity of natural uranium feed as consideration for the "feed material component" of the uranium. Because the change in tails assay was a part of the bargain agreed to by PSI, we can assume that PSI found it to its advantage to essentially convert part of the SWU component of the enriched uranium into feed material before selling it in the secondary market.

PSI's situation is by no means unique among domestic utilities, none of whom could have foreseen the eventual creation of the D&D Fund and the institution of the SWU assessment and all of whom, if they would have been able to foresee the SWU assessment, could have accordingly changed their behavior. Nor is it unusual in today's world to assign by law the responsibility for cleaning up the environment to any party that ever had an interest in a particular site which requires remediation. That is the way the law was made, and DOE has no other choice but to assess PSI on the basis of the net amount of DOE-produced SWUs that the utility bought and sold.

For the reasons set forth above, we find that the contentions set forth in the PSI's Appeal are without merit. Accordingly, we have determined that its Appeal shall be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by PSI Energy, Inc., Case No. VEA-0001, on January 6, 1995, is hereby denied.

(2) This is a Final Order of the Department of Energy

George B. Breznay

Director

Office of Hearings and Appeals

Date:

<1>In this decision we make frequent reference to the DOE's uranium enrichment program, which prior to the DOE's creation in 1977 had been conducted by its predecessors, the Energy Research and Development Administration, which administered the program from 1974 through 1977, and the Atomic

Energy Commission, which administered the program from its inception until 1974. In 1993, Congress created the United States Enrichment Services Corporation and transferred administration of the uranium enrichment program to it. Unless stated otherwise, when we refer to the DOE's uranium enrichment program, we are also referring to the program as administered by DOE's predecessors.

<2>The D&D Fund is to consist of annual deposits of $480 million per fiscal year, to be adjusted for inflation on an annual basis.

<3>Collection of special assessments is authorized for either a period of fifteen years or until $2.25 billion (adjusted for inflation) has been collected, whichever occurs first.

<4>For example, a purchaser that wished to purchase fewer SWUs and more feed could bargain for the use of a higher transaction tails assay to meet its needs. Similarly a seller could meet the needs of a purchaser seeking only feed credits by first finding a second purchaser to sell its enriched uranium to at a higher transaction tails assay than had been used in its original enrichment in exchange for feed credits and then reselling the feed credits to the first purchaser.

<5> If the DOE and the secondary market had used the as produced method to calculate the number of SWUs sold to utilities, PSI's contention would be valid. Had this been the case, a fixed number of SWUs could have been associated with a given parcel of enriched uranium and the laws of physics would have dictated that if a utility had received a parcel of uranium from the DOE and then sold it, the number of SWUs purchased would always equal the number of SWUs sold.

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Cincinnati Gas and Electric Co.

Date of Filing: January 6, 1995

Case Number: VEA-0002

On January 6, 1995, Cincinnati Gas and Electric Co. (CG&E) filed an Appeal from an October 3, 1994 determination issued by the Department of Energy's (DOE) Office of Environmental Management (OEM). Appeal of Cincinnati Gas and Electric Co. (November 9, 1994). In this decision, we consider CG&E's claim that the OEM has erroneously determined its liability for payment into the Uranium Enrichment Decontamination and Decommissioning Fund (the D&D Fund) established under the Energy Policy Act of 1992, Pub. L. No. 102-486, § 1101, 106 Stat. 2953 (1992) (codified at 42 U.S.C. § 2297(g)-1 (1994)). CG&E's D&D Fund assessment was based on 8,803.517 separative work units (SWUs). If CG&E's Appeal were granted, it would pay no assessment into the D&D Fund.

I. Background

Since the era of the Manhattan Project, the DOE and its predecessors have engaged in the process of uranium enrichment in order to meet the nation's national security, research and electrical generation requirements.(1) Uranium enrichment is the process by which uranium is prepared for use in commercial electrical generation or weapons production. This process increases the concentration of a particular isotope of uranium-- uranium-235 (U-235)--above the naturally occurring percentage of 0.711%. The percentage of U-235 contained in a parcel of uranium is referred to as its "assay." Most commercial power generating plants require fuel with assays between 2.5 and 4.5 percent.

The enrichment process involves separating uranium feed into two portions, and transferring U-235 molecules from one portion to the other. The resulting portions of uranium are called "the product" and "the tails." The product consists of enriched uranium (having a higher than natural percentage of U-235). The other portion, the tails, consists of depleted uranium (having a lower than natural

percentage of U-235). The effort required to separate the two isotopes is referred to as separative work and is measured in terms of separative work units (which are commonly referred to as SWUs). The SWU is the common unit of measure of uranium enrichment services used in the nuclear power industry.

In the United States the uranium enrichment process has been performed solely at three DOE plants which used gaseous diffusion technology to achieve separation of the isotopes. The emergence of newer, more efficient technologies and the globalization of the uranium enrichment market have rendered the government-owned plants obsolete and uncompetitive. It therefore became necessary to decommission and replace the gaseous diffusion plants and to recover the costs of these operations. On October 24, 1992, Congress enacted the Energy Policy Act. The Act established a Uranium Enrichment Decontamination and Decommissioning Fund (the D&D Fund) to pay for the costs of decontamination, decommissioning and other remedial action activities at DOE's uranium enrichment facilities, and for reimbursement of certain decontamination and decommissioning, reclamation, and other remedial action costs incurred by licensees at active uranium or thorium processing sites.

The legislative history indicates that Congress intended that the D&D Fund be financed by those entities

that had directly benefited from the operation of the plants, and that the allocation of assessments be apportioned in accordance with the degree which those entities had benefited from the uranium enrichment program. H. Rep. No. 474, 102nd. Cong., 2d sess.144, *reprinted in* 1992 U.S. Code Cong. & Admin. News 1954, 1967 ("The prevailing view on the allocation of costs of cleaning up these plants is that it should be based on benefits received from the program").(2) Accordingly, the statute mandates contributions to the D&D Fund from both the governmental entities and the domestic utilities that took delivery of enriched uranium from the plants. After considering various methods of apportioning responsibility for the D&D Fund, Congress determined that the benefits received from the program could best be measured by each entity's receipt of DOE-originated SWUs. See id.(3) Therefore, the statute requires that each domestic utility's D&D Fund assessment be based upon the total number of SWUs that it purchased from the DOE prior to October 24, 1992. However, since Congress recognized that utilities often purchased or sold enrichment services in the secondary market, the statute further provides:

(1) a utility shall be considered to have purchased a separative work unit from the Department if such separative work unit was produced by the Department, but purchased by the utility from another source; and

(2) a utility shall not be considered to have purchased a separative work unit from the Department if such separative work unit was purchased by the utility, but sold to another source.

42 U.S.C. § 2297g-1(c). As a result, a domestic utility's D&D Fund assessment is based upon the following formula: A+B-C=X, where X is the number of SWUs upon which the utility's D&D Fund assessment is based; A is the total number of SWUs that the utility purchased from the DOE prior to October 24, 1992; B is the number of DOE-produced SWUs purchased by the utility in the secondary market prior to October 24, 1992; and C is the number of DOE-produced SWUs transferred or sold by the utility prior to October 24, 1992.

Utilities were required to purchase and then deliver to the DOE enough natural uranium feed for DOE to conduct the enrichment requested by the utility. DOE then charged the utility, on a per SWU basis, for the amount of the separative work necessary to enrich the natural uranium feed provided by the utility to the weight and product assay sought by the utility.

The relationship between separative work, feed and enriched uranium can be analogized to the production of apple cider. One making apple cider might squeeze twenty apples with a great deal of force to make one gallon of apple cider (therefore leaving relatively little juice remaining in the crushed apples). Alternatively, one might choose to squeeze the apples only half as hard but use forty apples instead of twenty and still end up with one gallon of apple cider (leaving a relatively greater amount of juice in the crushed apples). The apples in this example can be analogized to uranium feed, the apple juice to the U-235 isotope, the squeezing force to separative work, the crushed apples to the tails, and the apple cider itself to the product. Just as the production of a given quantity of apple cider can be achieved through the use of different combinations of apples and squeezing force, a given quantity of uranium enrichment can be produced by different combinations of feed and separative work. For example, an enrichment could be performed using X SWUs and Y kilograms of natural uranium feed at a tails assay of .2 or it could be performed using fewer SWUs and more natural uranium feed (and therefore a higher tails assay) with exactly the same result in terms of quantity and product assay. The varying quantities of separative work and feed required to produce a given quantity of enriched uranium at a given level of enrichment are set forth in the Standard Table of Enrichment Services published by the DOE. By ascertaining the tails assay (the percentage of the U-235 isotope remaining in the tails after the enrichment is completed), the combination of separative work and natural uranium feed needed to produce the desired quantity and product assay can be determined. An increased tails assay results in fewer SWUs and a higher natural feed requirement. Conversely, a decreased tails assay results in a higher number of SWUs and a lower natural feed requirement. When utilities placed orders for enrichment services with the DOE, in addition to selecting the quantity and level of enrichment (the product assay) they chose the tails assay to which the uranium feed was to be depleted (and therefore the specific amounts of separative work and natural

uranium feed to be used). The DOE in turn required that the utility provide the corresponding amount of uranium feed and charged the utility for the number of SWUs needed to produce the product ordered at the selected tails assay.

Adding a layer of complexity to this process is the fact that the uranium enrichment market relies upon the "transaction tails" method of determining tails assay. There are two methods of determining the tails assay percentage to be used in a SWU calculation: (1) the "operating" or "as produced" tails method; and (2) the "transaction tails" method. Under the operating or as produced method, the tails assay used to calculate the amount of natural uranium feed to be supplied by the purchaser and the amount of separative work to be purchased is the actual tails assay at which the enrichment was conducted. In contrast, under the transaction tails method, computations of separative work and feed requirements are independent of the actual tails assay used by the DOE to conduct the enrichment. Instead, under the transaction tails method, the purchaser would select the tails assay that was most economically beneficial to it and then provide the corresponding amount of natural uranium feed. The utility would then be charged for the number of SWUs indicated by the Standard Table of Enrichment Services. In other words, the number of SWUs purchased in a transaction using the transaction tails method was determined by the tails assay selected by the purchaser *instead of the actual tails assay* produced by the enrichment. During the assessment period the DOE used the "transaction tails" method to determine the tails assay to be used when calculating how many SWUs were to be purchased by domestic utilities seeking uranium enrichment services.

The practice of using the transaction tails method was also adopted in the secondary market for enriched uranium, where utilities resold enriched uranium originally purchased from the DOE, as well as SWU credits and feed credits. In the secondary market, the price of enriched uranium was based upon the market value of its two components, natural uranium feed and separative work. In some circumstances, utilities seeking to sell enriched uranium found separate purchasers for the feed and separative work components or purchasers who wished to purchase a different combination of separative work and feed than the enriched uranium had when it was first purchased from DOE. The use of the transaction tails assay method in the secondary market facilitated such transactions.(4) As a result, the tails assay used to determine the amount of separative work and natural uranium feed purchased in the secondary market transaction could vary from both that which was actually used to enrich the uranium and the transaction tails assay used in the original purchase.

II. Analysis

The present case involves a domestic utility, CG&E, that purchased SWUs from the DOE and then later resold the enriched uranium produced by the SWUs to five other domestic utilities and one fuel fabricator. From 1977 through 1983, the DOE provided enriched uranium to CG&E, which the company intended to use in its unconstructed Wm. H. Zimmer Nuclear Generating Station. However, after CG&E canceled construction of the Zimmer plant in 1984, the company entered into a series of transactions to divest itself of the enriched uranium. Due to a loss of uranium in the fabrication of the plant's initial core and because of the difference in the transaction tails assays between CG&E's original purchase from the DOE and two of the resale transactions, CG&E sold 8,803.517 fewer SWUs than it had originally purchased from the DOE. The question before us is whether CG&E's D&D Fund assessment should include the 8,803.517 SWU difference.

In one of the transactions at issue in this case, CG&E sold the initial core for the Zimmer Unit to Pennsylvania Power & Light Company (PP&L). CG&E originally purchased 210,219.917 SWUs from the DOE for the enrichment of the initial core. However, when the initial core arrived at the Zimmer Unit after fabrication, it had a separative work value of 208,164.085 SWUs. The OEM therefore concluded that there was a loss of 2,055.832 SWUs in the fabrication of the initial core, and that CG&E sold only 208,164.085 SWUs in its sale of the core to PP&L. In reaching this conclusion, the OEM relied on data contained in the Nuclear Materials Management and Safeguards System (NMSS), a data base containing records of the movement of all nuclear materials. The OEM also based its conclusion on contemporaneous contractual documentation submitted by PP&L, including a list of the shipments of enriched uranium from the

Zimmer unit to PP&L's fuel fabricator.

The other two transactions at issue involve enriched uranium originally obtained by CG&E in 1982 and 1983. In 1982, CG&E received 3,160.059 kgs of uranium enriched by the DOE at a transaction tails assay of 0.2%. To pay for the enrichment of this material, CG&E purchased 19,911.532 SWUs from the DOE. The following year, CG&E received 21,633.618 kgs of uranium enriched at a transaction tails assay of 0.28%, and purchased 69,190.138 SWUs from the DOE for its enrichment.

In the secondary market, as was the case when CG&E purchased from the DOE, the number of SWUs purchased for a transaction involving a given quantity of enriched uranium was based in part on the transaction tails assay agreed to by the parties. In both secondary market transactions at issue, the parties based this quantity on an assumed tails assay of 0.3%. Thus, the same enriched uranium which had originally been purchased from the DOE based on a transaction tails assay of 0.2% and 0.28% was now being resold based on a tails assay of 0.3%.

As explained above, the transaction tails assay and the resulting SWU and feed components assigned to a given quantity of enriched uranium for the purposes of a sale bear no relation to the number of SWUs and amount of feed *actually used* in the process of enriching the uranium. Thus, in the primary (DOE to CG&E) and secondary (CG&E to other sources) market transactions at issue in this case, the tails assays were *assumed* to be 0.2% and 0.28% (in the primary market) and 0.3% (in the secondary market). Because of this change in assumed tails assay, the enriched uranium at resale had a lesser "SWU component" and a greater "feed material component" than when CG&E first purchased it from the DOE.

In calculating CG&E's special assessment, the OEM found that CG&E purchased a total of 498,947.057 SWUs from the DOE but, due to fabrication loss and the difference in tails assays in the transactions described above, sold a total of only 490,143.540 SWUs to other sources. Accordingly, the OEM concluded that CG&E should be held responsible for a D&D Fund assessment based on 8,803.517 SWUs, the difference between the number of SWUs purchased by CG&E and the number of SWUs it sold to other sources.

CG&E, contending that it is not subject to the special assessment, filed the present Appeal on January 6, 1995. Comments on CG&E's Appeal were submitted by the OEM on March 22, 1995, and by PECO Energy Company (PECO), the buyer in one of the transactions at issue, on January 18, 1995. On July 20, 1995, CG&E submitted a reply to the OEM's comments.

CG&E argues that it is not subject to the special assessment because: (1) it "sold all of its material that was enriched by the DOE;" (2) the utility "may be prevented from passing on the Special Assessment to current ratepayers because Ohio law only allows recovery for actual fuel consumed in the generation of electricity;" and (3) the assessment constitutes an "unlawful exaction" by the Government in violation of the Fifth Amendment to the U.S. Constitution. Reply of CG&E (July 20, 1995) at 2-7.

PECO acknowledges in its reply that it purchased SWUs from CG&E, and notes that this purchase was correctly accounted for in its Special Assessment. Letter from Edward J. Cullen, Jr., PECO, to OHA (January 13, 1995). However, PECO argues that the Energy Policy Act does not impose upon it "the responsibility for assessments based upon SWU's which are not shown by the transfer documents between PECO Energy and CG&E to have been acquired by PECO Energy." Id. PECO opposes any resolution of the present Appeal that would result in it paying a Special Assessment based on SWUs that it never acquired. Id.

For the reasons explained below, after considering the arguments and reviewing the record in this case, we find that the DOE properly assessed CG&E for the contested 8,803.517 SWUs.

A. CG&E's Sales of SWUs in the Secondary Market

We turn initially to CG&E's claim that since it resold all of the uranium in its inventory enriched by DOE,

it must have resold all of the 498,947.057 SWUs it purchased in order to obtain that uranium as well. We must reject this claim for two reasons. First, CG&E could not have sold *all* of the SWUs it purchased as 2,055.832 SWUs were lost in the fabrication of the initial core of the Zimmer plant. This is not disputed by CG&E, nor does the company argue in its Appeal or in its reply why it should not be assessed for SWUs associated with uranium it clearly could not have resold.

Second, regarding the two secondary market transactions at issue based on an assumed tails assay of 0.3%, we are not persuaded that CG&E sold the same number of SWUs that it purchased from the DOE. As discussed above, the DOE and the secondary market used the *transaction tails* method to calculate the number of SWUs transferred in a transaction. As a result, the number of SWUs purchased in order to obtain a given parcel of enriched uranium was not fixed, but rather was determined by tails assay selected by the purchaser (or agreed to by both parties in the case of a secondary market transaction). Therefore, the assumption upon which CG&E's contention is based, that the number of SWUs associated with a given parcel of enriched uranium remains constant, is incorrect. Long Island Lighting Company, 25 DOE ¶ 80,146 (1995).(5)

CG&E further relies for support on the Energy Policy Act of 1992, contending that it would be contrary to the intent of the Act to levy an assessment on a utility that sold all the DOE-enriched uranium it had ever received simply because some of the uranium was sold at a different tails assay. "[N]owhere in the Act is there any reference to differentiation of SWUs purchased on the basis of tails assays." Reply of CG&E, Inc. (July 20, 1995) at 2-3.

CG&E is correct that there is no specific reference in the Energy Policy Act to tails assay as the basis for the special assessment. However, neither is the assessment based on the quantity of enriched uranium purchased and sold by a utility, as implied by the Appellant. Rather, the statute clearly states that a utility's assessment is to be based on the number of *SWUs* it purchased from the DOE, unless the SWUs were "purchased by the utility, but sold to another source." There is no dispute that CG&E purchased a total of 498,947.057 SWUs from the DOE. This is the basis for CG&E's special assessment before accounting for SWUs it sold to other sources. The method of adjusting the assessment to account for CG&E's sales of SWUs in the secondary market was explained by the OEM in issuing the Part 766 regulations.

If a utility purchased DOE-produced SWUs from another utility, the purchasing utility's assessment will be based on the SWUs specified in contracts or other probative documents generated at the time of the secondary market purchase. The selling utility's assessment will be reduced by an amount that will be determined by the SWUs sold to the purchasing utility.

Uranium Enrichment Decontamination and Decommissioning Fund; Procedures for Special Assessment of Domestic Utilities, 59 Fed. Reg. 41956, 41958 (1994). Accordingly, CG&E's assessment could only be reduced by the number of SWUs sold by CG&E as "specified in contracts or other probative documents generated at the time of the secondary market purchase."

CG&E has never disputed the OEM's finding that "CG&E's resale documentation indicates that some of the resales were at a higher percent tails assay." Appeal at 2. Neither has the company submitted any probative documents to substantiate its claim that it sold more than 82,353.976 SWUs in the two transactions at issue based on a 0.3% tails assay. Because CG&E originally purchased 89,101.67 SWUs from the DOE for the enrichment of the uranium transferred in these two transactions, we reject the company's unsupported argument that it "sold all of the SWU that it purchased . . . ." Appeal at 2.

Therefore, we must agree with the OEM that CG&E, having purchased 498,947.057 SWUs from the DOE, sold only 490,143.540 SWUs to other sources, and therefore was properly assessed for the 8,803.517 SWUs it did not sell in the secondary market.

B. Ability of CG&E to Recover the Special Assessment in its Utility Rates

The Energy Policy Act provides that "[a]ny special assessment . . . shall be deemed a necessary and

reasonable current cost of fuel and shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost." 42 U.S.C. § 2297g-1(g). CG&E argues that despite this language "it may be prevented from passing on the Special Assessment to current ratepayers because Ohio law only allows recovery for actual fuel costs for fuel consumed in the generation of electricity . . . ." Reply of CG&E (July 20, 1995) at 3.

DOE responds that the above provision of the statute

makes a utility's historical SWU costs comparable, for ratemaking purposes, to its current fuel costs, so that its Special Assessment may be ?fully' recovered, notwithstanding the criteria for fuel cost recovery under state law. Otherwise, the provision would have no meaning since utilities are already subject to state-level rate recovery requirements, which often restrict fuel cost recovery to actual fuel costs.

Response of the Department of Energy (March 22, 1995) at 12.

CG&E has not made a persuasive showing that it cannot recover the cost of the Special Assessment under state law. Rather, the utility merely asserts in general terms that it "may" be prevented from doing so. Reply of CG&E (July 20, 1995) at 3, 4-5. Moreover, even if we were to assume that Ohio state law might prevent CG&E from passing through the Special Assessment in its rates, it is clear that the state law would be preempted by the federal Energy Policy Act.

In determining whether state law is preempted by a federal statute, the first question is whether an intent to preempt is "express in the terms of the statute." Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 604-05 (1991). In the absence of express language, the intent of Congress to preempt state law can be "implicit if . . . the goals ?sought to be obtained' and the ?obligations imposed' reveal a purpose to preclude state authority." Id. at 605 (quoting Rice v. Santa Fe Elevator Corp., 331 U. S. 218, 230 (1947)). Finally, "[e]ven when Congress has not chosen to occupy a particular field, pre-emption may occur to the extent that state and federal law actually conflict." Id.

In the present case, the intent of the Congress to preempt state law is express in the terms of the Energy Policy Act. The statute declares that the special assessment "shall be fully recoverable in rates in all jurisdictions . . . ." 42 U.S.C. § 2297g-1(g). As the OEM argues, we cannot discern what meaning this provision could have other than to preempt state laws "in all jurisdictions" that would not allow recovery of the special assessment in a utility's rates. In addition, such state laws would be preempted because they would "actually conflict" with the express terms of the Energy Policy Act. Mortier, 501 U.S. at 605.

Moreover, "the goals ?sought to be obtained'" by the special assessment "and the ?obligations imposed' reveal a purpose to preclude state authority." Id. The legislative history of the Energy Policy Act discusses the need to allocate the "cost of cleaning up" the gaseous diffusion plants "based on the benefits received from the program." H. Rep. No. 474, 102nd. Cong., 2d sess.144, *reprinted in* 1992 U.S. Code Cong. & Admin. News 1954, 1967. State laws that would not allow for the recovery of the special assessment in utility rates would frustrate the stated purpose of the legislation--to apply the special assessment in a fair and equitable manner to all beneficiaries of the program. Each of the above considerations leads us to conclude that, in the event of an actual conflict, Ohio state law would be preempted by the federal Energy Policy Act's mandate that the special assessment "shall be fully recoverable in rates in all jurisdictions . . . ." 42 U.S.C. § 2297g-1(g).

C. Constitutionality of the Energy Policy Act

Finally, CG&E argues that the special assessment constitutes an "unlawful exaction" by the Government, and cites a recent decision of the United States Court of Federal Claims. Reply of CG&E (July 20, 1995) at 5-7 (citing Yankee Atomic Electric Company v. United States, No. 94-555C (June 22, 1995)). In Yankee Atomic, the court found that, because of the "fixed-price character" of the contracts by which the DOE's predecessor sold SWUs to a utility,

by imposing the assessment . . . , the Government dishonors the very promise it had earlier made: that the price to be charged for its services would not exceed the contract-stated maximum. Legislation so plainly directed at undoing a contract liability previously assumed by the Government is an impermissible exercise of sovereign power.

Yankee Atomic, slip op. at 7-8.

We will ultimately defer to the rulings of the federal courts on the issue of the constitutionality of this provision of the Energy Policy Act. However, to date no order has been issued enjoining the DOE's enforcement of the Act in cases like the present one, and the United States has filed an appeal in the Yankee Atomic case. The appeal will be heard by the United States Court of Appeals for the Federal Circuit. While this litigation is pending, the Department has stated that it "must continue to fulfill its statutory obligation under the Energy Policy Act of 1992 by collecting special assessments." Letter from Judy C. Fulner, Uranium Enrichment Decontamination and Decommissioning Fund Manager, DOE, to Donald P. Bogard, Cinergy Corporation (November 27, 1995).

III. Conclusion

There is no question that Congress' choice of DOE-produced SWUs as the means of measuring a utility's proportionate share of uranium enrichment cleanup costs has had an unforeseen economic consequence for CG&E and its rate-payers. When the firm resold to other sources the uranium enriched with SWUs purchased from the DOE, it certainly had no idea that changing the tails assay (and thus reducing the "SWU component" of the enriched uranium) would later cause it to be assessed for SWUs it did not resell. Nor could it have known that it would be assessed for SWUs lost in the fabrication of fuel that it never burned, and later sold. However, CG&E's situation is by no means unique among domestic utilities, none of whom could have foreseen the eventual creation of the D&D Fund and the institution of the SWU assessment and all of whom, if they would have been able to foresee the SWU assessment, could have accordingly changed their behavior. Nor is it unusual in today's world to assign by law the responsibility for cleaning up the environment to any party that ever had an interest in a particular site which requires remediation. That is the way the law was made, and DOE has no other choice but to assess CG&E on the basis of the net amount of DOE-produced SWUs that the utility bought and sold

For the reasons set forth above, we find that the contentions set forth in the CG&E's Appeal are without merit. Accordingly, we have determined that its Appeal shall be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Cincinnati Gas & Electric Company, Case No. VEA-0002, on January 6, 1995, is hereby denied.

(2) This is a Final Order of the Department of Energy

George B. Breznay

Director

Office of Hearings and Appeals

Date:

(1)In this decision we make frequent reference to the DOE's uranium enrichment program, which prior to the DOE's creation in 1977 had been conducted by its predecessors, the Energy Research and Development Administration, which administered the program from 1974 through 1977, and the Atomic Energy Commission, which administered the program from its inception until 1974. In 1993, Congress created the United States Enrichment Services Corporation and transferred administration of the uranium

enrichment program to it. Unless stated otherwise, when we refer to the DOE's uranium enrichment program, we are also referring to the program as administered by DOE's predecessors.

(2)The D&D Fund is to consist of annual deposits of $480 million per fiscal year, to be adjusted for inflation on an annual basis.

(3)Collection of special assessments is authorized for either a period of fifteen years or until $2.25 billion (adjusted for inflation) has been collected, whichever occurs first.

(4)For example, a purchaser that wished to purchase fewer SWUs and more feed could bargain for the use of a higher transaction tails assay to meet its needs. Similarly a seller could meet the needs of a purchaser seeking only feed credits by first finding a second purchaser to sell its enriched uranium to at a higher transaction tails assay than had been used in its original enrichment in exchange for feed credits and then reselling the feed credits to the first purchaser.

(5) If the DOE and the secondary market had used the as produced method to calculate the number of SWUs sold to utilities, CG&E's contention would be valid. Had this been the case, a fixed number of SWUs could have been associated with a given parcel of enriched uranium and the laws of physics would have dictated that if a utility had received a parcel of uranium from the DOE and then sold it, the number of SWUs purchased would always equal the number of SWUs sold.

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Long Island Lighting Company

Date of Filing: December 14, 1994

Case Number: VEA-0003

On December 14, 1994, the Long Island Lighting Company (LILCO) filed an Appeal from a November 14, 1994 determination issued to it by the Department of Energy's Office of Environmental Management (OEM). In this decision, we consider LILCO's claim that the OEM erroneously determined its special assessment for payment into the Uranium Enrichment Decontamination and Decommissioning Fund (the D&D Fund) established under the Energy Policy Act of 1992. Pub. L. No. 102-486, 42 U.S.C.A. 2297(g), *et seq.* (1994). If LILCO's Appeal were granted, its D&D Fund assessment would be based on 3,178 separative work units (SWU) instead of 21,250.

I. BACKGROUND

Since the era of the Manhattan Project, the DOE and its predecessors have engaged in the process of uranium enrichment in order to meet the nation's national security, research and electrical generation requirements. (1) Uranium enrichment is the process by which uranium is prepared for use in commercial electrical generation or weapons production by increasing the concentration of a particular isotope of uranium-- uranium-235 (U-235)-- above the naturally occurring percentage of 0.711%. The percentage of U-235 contained in a parcel of uranium is referred to as its "assay."

Most commercial power generating plants require fuel with assays between 2.5 and 4.5 percent.

The enrichment process involves separating uranium feed into two portions, and transferring U-235 molecules from one portion to the other. The resulting portions of uranium are called "the product" and "the tails." The product consists of enriched uranium (having a higher than natural percentage of U-235). The other portion, the tails, consists of depleted uranium (having a lower than natural percentage of U-235). The effort required to separate the two isotopes is referred to as separative work and is measured in terms of separative work units (which are commonly referred to as SWU). The SWU is the common unit of measurement for uranium enrichment services used by the nuclear power industry.

In the United States the uranium enrichment process has been performed solely at three DOE plants which used the gaseous diffusion technology to achieve separation of the isotopes. (2) The emergence of newer, more efficient technologies and the globalization of the uranium enrichment market have rendered the government owned plants obsolete and uncompetitive. It therefore became necessary to decommission and replace the gaseous diffusion plants and to recover the costs of these operations. On October 24, 1992, Congress amended Chapter 28 of the Atomic Energy Act of 1954 to establish a Uranium Enrichment Decontamination and Decommissioning Fund (the D&D Fund) to pay for the costs of decontamination, decommissioning and other remedial action activities at DOE's uranium enrichment facilities, and for reimbursement of certain decontamination and decommissioning, reclamation, and other remedial action costs incurred by licensees at active uranium or thorium processing sites.

The legislative history indicates that Congress intended that the D&D fund be financed by those entities that had directly benefited from the operation of the plants, and that the allocation of assessments be

apportioned in accordance to the degree which those entities had benefited from the uranium enrichment program. H. Rep. No. 474, 102nd. Cong., 2d sess.144, *reprinted in* 1992 U.S. Code Cong. & Admin. News 1954, 1967 ("The prevailing view on the allocation of costs of cleaning up these plants is that it should be based on benefits received from the program"). (3) Accordingly, the statute mandates contributions to the D&D Fund from both the governmental entities and the domestic utilities that took delivery of enriched uranium from the plants. After considering various alternative methods of apportioning responsibility for the D&D Fund, Congress determined that the benefits received from the program could best be measured by each entity's receipt of DOE- originated SWU. See id. (4) Therefore the statute requires that each domestic utility's D&D Fund assessment be based upon the total number of SWU that it purchased from the DOE for the purpose of commercial electrical generation prior to October 24, 1992. However, since Congress recognized that utilities often purchased or sold enrichment services in the secondary market, the statute further provides:

(1) a utility shall be considered to have purchased a separative work unit from the Department if such separative work unit was produced by the Department, but purchased by the utility from another source; and

(2) a utility shall not be considered to have purchased a separative work unit from the Department if such separative work unit was purchased by the utility, but sold to another source.

42 U.S.C.S. § 2297g-1(c); *codified at* 10 C.F.R. § 766.101. As a result, a domestic utility's D&D Fund assessment will be based upon the following formula: A+B-C=X, where X is the number of SWU that the utility's D&D Fund assessment is to be based upon; A is the total number of SWU that the utility purchased from the DOE prior to October 24, 1992; B is the number of DOE-produced SWU purchased by the utility in the secondary market prior to October 24, 1992; and C is the number of DOE-produced SWU transferred or sold by the utility prior to October 24, 1992.

Utilities were required to purchase and then deliver to the DOE enough natural uranium feed for DOE to conduct the enrichment requested by the utility. DOE then charged the utility, on a per SWU basis, for the amount of the separative work necessary to enrich the natural uranium feed provided by the utility to the weight and product assay sought by the utility.

The relationship between separative work, feed and enriched uranium can be analogized to the production of apple cider. One making apple cider might squeeze twenty apples with a great deal of force to make one gallon of apple cider (therefore leaving relatively little juice remaining in the crushed apples). Alternatively, one might choose to squeeze the apples only half as hard but use forty apples instead of twenty and still end up with one gallon of apple cider (leaving a relatively greater amount of juice in the crushed apples). The apples in this example can be analogized to uranium feed, the apple juice to the U-235 isotope, the squeezing force to separative work, the crushed apples to the tails, and the apple cider itself to the product. Just as the production of a given quantity of apple cider can be achieved through the use of different combinations of apples and squeezing force, a given quantity of uranium enrichment can be produced by different combinations of feed and separative work. For example, an enrichment could be performed using X SWU and Y kilograms of natural uranium feed at a tails assay of .2 or it could be performed using fewer SWUs and more natural uranium feed (and therefore a higher tails assay) with exactly the same result in terms of quantity and product assay. The varying quantities of separative work and feed required to produce a given quantity of enriched uranium at a given level of enrichment are set forth in the Standard Table of Enrichment Services published by the DOE in the Federal Register. By ascertaining the tails assay (the percentage of the U-235 isotope remaining in the tails after the enrichment is completed), the combination of separative work and natural uranium feed needed to produce the desired quantity and product assay can be determined. An increased tails assay results in fewer SWU and a higher natural feed requirement. Conversely, a decreased tails assay results in a higher number of SWU and a lower natural feed requirement. When utilities placed orders for enrichment services with the DOE, in addition to selecting the quantity and level of enrichment (the product assay) they chose the tails assay to which the uranium feed was to be depleted (and therefore the specific amounts of separative work and

natural uranium feed to be used). The DOE in turn required that the utility provide the corresponding amount of uranium feed and charged the utility for the number of SWU needed to produce the product ordered at the selected tails assay.

Adding a layer of complexity to this process is the fact that the commercial uranium enrichment market relies upon the "transaction tails" method of determining the tails assay figure. There are two methods of determining the tails assay percentage to be used in a SWU calculation: (1) the "operating" or "as produced" tails method; and (2) the "transaction tails" method. Under the operating or as produced method, the tails assay used to calculate the amount of natural uranium feed to be supplied by the purchaser and the amount of separative work to be purchased is the actual tails assay at which the enrichment was conducted. In contrast, under the transaction tails method, computations of separative work and feed requirements are independent of the actual tails assay used by the DOE to conduct the enrichment. Instead, under the transaction tails method, the purchaser would select the tails assay that was most economically beneficial to it and then provide the corresponding amount of natural uranium feed. The utility would then be charged for the number of SWU indicated by the standard table of enrichment services (even though the actual uranium enrichment would often be conducted at a different tails assay). In other words, the number of SWU purchased in a transaction using the transaction tails method was determined by the tails assay selected by the purchaser *instead of the actual tails assay* used in the enrichment. During the assessment period the DOE used the "transaction tails" method to determine the tails assay to be used when calculating how many SWUs were to be purchased by domestic utilities seeking uranium enrichment services.

The practice of using the transaction tails method carried over into the secondary market for enriched uranium, where utilities resold enriched uranium originally purchased from the DOE, as well as SWU credits and feed credits. In the secondary market, the price of enriched uranium was based upon the market value of its two components, natural uranium feed and separative work. In some circumstances, utilities seeking to sell enriched uranium found separate purchasers for the feed and separative work components, or purchasers who wished to purchase a different combination of separative work and feed than the enriched uranium had when it was first purchased from DOE. The use of the transaction tails assay method in the secondary market facilitated such transactions. (5) As a result, the tails assay used to determine the amount of separative work and natural uranium feed purchased in the secondary market transaction could vary from both that which was actually used to enrich the uranium and the transaction tails assay used in the original purchase.

II. ANALYSIS

The present case involves a domestic utility, LILCO, that purchased SWU from the DOE and then later sold the enriched uranium produced by the SWU (the first reload) to the DOE. Due to the difference in the transaction tails assays between LILCO's original purchase of the first reload from DOE and the transaction returning the first reload to the DOE, LILCO sold 18,072 fewer SWU than it had originally purchased from the DOE. The question before us is whether LILCO's D&D Fund assessment should include the 18,072 SWU difference.

On August 19, 1982, the DOE shipped 26,886 kilograms of enriched uranium to LILCO, enriched at a transaction tails assay of .2%. In order to obtain this enriched uranium, LILCO had supplied DOE with 129,921 kg. of natural uranium feed and had purchased 94,760 SWU from the DOE. LILCO had intended to use this enriched uranium for the first reload of its Shoreham, N.Y. generating plant reactor. However, LILCO eventually abandoned its plans to operate the Shoreham plant and therefore sought to liquidate its uranium inventory which included the "first reload" uranium. Therefore, in 1991, it entered into a series of transactions aimed at divesting itself of the first reload uranium. First, LILCO entered into an agreement with the Power Authority of the State of New York (PASNY) in which LILCO agreed to assign 102,354 SWU to PASNY. Then, LILCO sold all of the first reload uranium back to DOE at a transaction tails assay of .3%. In return for the first reload uranium, DOE granted LILCO 76,688 SWU credits as well as credits for 150,286 kg. of natural uranium feed. By changing the tails assay used in this transaction from

.2% to .3% LILCO was able to sell fewer SWU (76,688) back to the DOE than it had originally purchased and a larger amount (150,286 kg.) of natural uranium feed than it had originally supplied, effectively allowing LILCO to convert the difference of 18,072 SWU to 20,365 kg. of natural uranium feed credits. As part of the transaction, DOE then transferred 102,354 SWU to PASNY which consisted of the 76,688 SWU credits it had provided to LILCO in exchange for the first reload uranium (along with the feed credits) and an additional 25,666 SWU credits that LILCO had on DOE's books therefore fulfilling LILCO's contractual obligation to PASNY. Finally, LILCO sold the natural uranium feed credits it received from DOE to another utility. In this way, LILCO divested itself of both the natural uranium feed and SWU components of the first reload.

In calculating LILCO's special assessment, the OEM found that due to the difference in transaction tails assays, while LILCO had originally purchased 94,760 SWU when it obtained the first reload uranium, it had only transferred 76,688 SWU when it resold the first reload to DOE. Accordingly, the OEM concluded that LILCO should be held responsible for the D&D Fund assessment on the remaining 18,072 SWU. On November 14, 1994, the OEM issued a determination of LILCO's D&D Fund assessment in which it found that LILCO was liable for assessment based on a total of 21,250 SWU which consisted of the remaining 18,072 first reload SWU and 3,178 SWU attributable to LILCO's original Shoreham reactor core. LILCO does not contest its liability for the 3,178 original Shoreham SWU. (6) The Office of Hearings and Appeals issued procedural regulations which were effective on April 20, 1995. These new regulations established a new Part 1003 in Chapter 10 of the Code of Federal Regulations, and they include a Subpart C for appeals, which will apply to future D&D Fund appeals instead of the procedures in Subpart H of 10 C.F.R. Part 205. 60 Fed. Reg. 15004 (March 21, 1995). On the same date, DOE issued technical corrections to the appeal provision in 10 C.F.R. § 766.104(d) to make it refer to 10 C.F.R., Part 1003, Subpart C. This change does not affect the present case, since it was filed before those changes. (7) LILCO, contending that it should not be assessed for the balance of the first reload SWU, filed the present Appeal on December 14, 1994. Comments on LILCO's Appeal were submitted by both the OEM and the Power Authority of the State of New York (PASNY) on February 10, 1995. On March 7, 1995, LILCO submitted a response to OEM and PASNY's comments. On April 27, 1995, OHA conducted an informal telephone conference relating to this Appeal with officials from OEM, PASNY and LILCO. (8)

On appeal, LILCO argues that it should not be assessed for the balance of the first reload SWU, contending that since: (1) it sold all of the first reload uranium to DOE, it must have therefore sold all of the first reload SWU to DOE as well, and (2) Congress' intent in creating the SWU assessment was to place the "burden" of the decontamination and decommissioning program upon those utilities that benefited from use of the DOE's uranium enrichment facilities, assessing utilities that transferred all of their enriched uranium inventories without generating electricity is contrary to Congressional intent. After reviewing the submissions of the parties and the record, we find that LILCO was properly assessed for the contested 18,072 SWU.

We turn first to LILCO's claim that since it returned all of the first reload uranium to the DOE, it must have returned all of the 94,760 SWU it purchased in order to obtain that uranium as well. If the DOE and the secondary market had used the "as produced" method to calculate the number of SWUs sold to utilities this would be a valid contention. If the "as produced" method had been used, a fixed number of SWUs could have been associated with a given parcel of enriched uranium and the laws of physics would have dictated that if a utility had received a parcel of uranium from the DOE and then sold it, the number of SWUs purchased would then equal the number of SWU sold. As the preceding discussion indicates however, the DOE and the secondary market did not use the as produced method but rather used the transaction tails method to calculate each utility's SWU purchases. As a result, the number of SWU purchased in order to obtain a given parcel of enriched uranium was not directly determined by the amount of separative work actually performed, but rather was determined by the tails assay selected by the purchaser (or agreed to by both parties in the case of a secondary market transaction). Nor was the number of SWU needed to obtain a particular parcel of enriched uranium fixed, but rather was subject to change. Therefore, the assumption upon which LILCO's contention is based, that the number of SWU associated with a given parcel of enriched uranium remains constant, is unwarranted. (9)

Moreover, we note that LILCO's assertion that it did not have any SWU "left over" is irrelevant. The question before us is not whether LILCO had physical possession or legal title to the 18,072 first reload SWU, since the SWU assessment is *not* levied on the basis of existing SWU inventory. Instead, the statute established a framework which requires that any DOE-produced SWU purchased by a domestic utility prior to October 24, 1992 and not sold to another source prior to October 24, 1992, would be part of its assessment, regardless of whether the SWU was consumed in commercial power generation, lost in fabrication, held in inventory until after the assessment period, or as happened in the present case, converted into natural uranium feed credits. Accordingly, since LILCO sold fewer first reload SWU than it had originally purchased from DOE during the assessment period, the statute mandates that the difference be included in its SWU assessment. For these reasons, the OEM properly determined that 76,688 instead of 94,760 SWU were transferred back to the DOE by LILCO with the First Reload uranium. Accordingly, we find LILCO's contentions to the contrary are without merit.

Finally, we turn to LILCO's contention that OEM's assessment of LILCO for the balance of the first reload SWU is contrary to congressional intent. The legislative history indicates that by levying a portion of the responsibility for the decontamination and decommissioning of the DOE's uranium enrichment facilities upon domestic utilities that purchased uranium enrichment services from the DOE, Congress sought to place the economic burden of the D&D effort upon the parties that benefited from the uranium enrichment program and to apportion the responsibility among the domestic utilities equitably. H. Rep. No. 474, 102nd. Cong., 2d sess.144, *reprinted in* 1992 U.S. Code Cong. & Admin. News 1954, 1967. LILCO argues that since it never generated any electricity from the first reload, it did not "benefit" from the uranium enrichment services used to produce it. Therefore, LILCO argues, it is not among the parties that Congress sought to hold responsible for the enrichment services performed upon the first reload uranium.

As an initial matter, we note that LILCO did receive an economic benefit from the 18,072 first reload SWU that were not transferred to the DOE. By changing the tails assay of the first reload uranium, LILCO received an additional 30,365 kg. of natural uranium feed credits from the DOE, and it is safe to assume that the receipt of feed credits instead of SWU credits conferred an economic advantage upon LILCO. It is therefore difficult to conclude that LILCO did not receive any benefits from the SWU it converted into uranium feed. Accordingly, the question before us is whether Congress intended that the benefit received from generating electricity is the only type of benefit that Congress sought to apportion by basing each domestic utility's D&D Fund assessment upon purchases of SWU. We find that neither the statute, nor its legislative history supports LILCO's argument that the SWU assessment is limited only to those SWU that actually generated electrical power.

Instead, the legislative history indicates that Congress specifically rejected a proposal to base the D&D Fund assessment upon electrical generation. Congress established purchases of DOE-produced SWU as the exclusive basis upon which domestic utilities' D&D Fund assessments are to be based. The clear implication is that Congress found purchases of SWU from the DOE's uranium enrichment facilities to be the best indicator of how benefits from the facilities were apportioned among the program's customers. The fact that the statute offers no alternative basis for determining responsibility further clarifies this intent. We therefore find that Congress intended that each domestic utility's D&D Fund assessment be based solely upon its purchases of DOE-produced SWU and that LILCO's contentions to the contrary are without merit.

There is no question that EPACT's choice of DOE-produced SWU as the means of measuring a utility's proportionate share of the uranium enrichment cleanup will have an unforeseen (though minor) economic consequence for LILCO and its rate-payers. When LILCO returned the first reload uranium to DOE, it certainly had no idea that changing the tails assay (and thus reducing the number of SWU attributable to the unused product) would later cause it to be assessed for the 18,072 SWU that it converted into natural uranium feed credits. However, LILCO's situation is by no means unique among domestic utilities, none of whom could have foreseen the eventual creation of the D&D Fund and the institution of the SWU assessment and all of whom, if they would have been able to foresee the SWU assessment, could have changed their behavior to avoid buying as many SWU. (10) That is simply the way the law was made, and

DOE has no other choice but to assess LILCO on the basis of the net amount of DOE-produced SWU that LILCO bought and sold.

III. CONCLUSION

For the reasons set forth above, we find that the contentions set forth in the Long Island Lighting Company's Appeal are without merit. Accordingly, we have determined that its Appeal shall be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by the Long Island Lighting Company (Case No. VEA-0003) on December 14, 1994, is hereby denied.

(2) This is a Final Order of the Department of Energy

George B. Breznay

Director

Office of Hearings and Appeals

(1) In this decision we make frequent reference to the DOE's uranium enrichment program, which prior to the DOE's creation in 1977 had been conducted by its predecessors, the Energy Research and Development Administration (ERDA), which administered the program from 1974 through 1977, and the Atomic Energy Commission, which administered the program from its inception until 1974. In 1993, Congress created the United States Enrichment Services Corporation and transferred administration of the uranium enrichment program to it. Unless stated otherwise, when we refer to the DOE's uranium enrichment program, we are also referring to the program as administered by DOE's predecessors.

(2) Two of these plants are still operating.

(3) The D&D Fund is to consist of annual deposits of $480 million per fiscal year, to be adjusted for inflation on an annual basis.

(4) Collection of the special assessment is authorized for either a period of fifteen years or until $2.25 billion (adjusted for inflation) has been collected, whichever occurs first.

(5) For example, a purchaser that wished to purchase fewer SWU and more feed could bargain for the use of a higher transaction tails assay to meet its needs. Similarly a seller could meet the needs of a purchaser seeking only feed credits by first finding a second purchaser to sell its enriched uranium to at a higher transaction tails assay than had been used in its original enrichment in exchange for feed credits and then reselling the feed credits to the first purchaser.

(6) On August 15, 1994, the DOE implemented the EPACT's D&D Fund mandate by issuing its final rule establishing the methods and procedures to be utilized by the DOE's Office of Environmental Management (OEM) to invoice and collect the special assessment. 10 C.F.R. Part 766, 59 Fed. Reg. 41956 (August 15, 1994). Under Part 766, the OEM is required to reconcile each utility's purchases of SWU in the primary and secondary markets as well as their secondary market sales. The next step of the reconciliation process set forth in Part 766 requires the OEM to issue special assessment invoices to each domestic utility on an annual basis. 10 C.F.R. § 766.103. The special assessment invoices are to set forth each domestic utility's annual assessment and a detailed explanation of how it was calculated by the DOE. Id. Under 10 C.F.R. § 766.104(c), domestic utilities are allowed an opportunity to request an adjustment of their annual assessment. Any domestic utility disputing a written determination issued in response to a request for adjustment has the right to file an administrative Appeal with the Office of Hearings and Appeals (OHA) under § 766.104(d). The procedures set forth at §766.104(d) are supplemented for this case by OHA's

general procedural rules for appeals set forth at 10 C.F.R., Part 205, Subpart H.

(7) The Office of Hearings and Appeals issued procedural regulations which were effective on April 20, 1995. These new regulations established a new Part 1003 in Chapter 10 of the Code of Federal Regulations, and they include a Subpart C for appeals, which will apply to future D&D Fund appeals instead of the procedures in Subpart H of 10 C.F.R. Part 205. 60 Fed. Reg. 15004 (March 21, 1995). On the same date, DOE issued technical corrections to the appeal provision in 10 C.F.R. § 766.104(d) to make it refer to 10 C.F.R., Part 1003, Subpart C. This change does not affect the present case, since it was filed before those changes.

(8) A slight difference exists between the weight of the First Reload uranium as originally purchased and the weight of the enriched uranium returned to the DOE; however, there is no significance to that difference for the purposes of the present Appeal.

(9) Moreover, since the DOE and the secondary market used the transaction tails method to calculate the number of SWU purchased from the DOE or transferred in the secondary market, it was clearly reasonable for DOE to use the transaction tails assay to calculate each domestic utility's SWU assessment as well. The contemporaneous records documenting SWU transactions are based upon transaction tails method calculations. It is unlikely that records documenting the operating tails assays of the enriched uranium sold to domestic utilities by the DOE even exist. Use of the transaction tails assay to calculate each domestic utility's SWU assessment is therefore the only reasonable course of action available to the DOE.

(10) For example, a firm could have used higher transaction tails assays when purchasing from the DOE, therefore allowing itself to purchase fewer SWU.

March 17, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Niagara Mohawk Power Corporation

Date of Filing: January 31, 1995

Case Number: VEA-0004

On January 31, 1995, the Niagara Mohawk Power Corporation (Niagara) filed an Appeal from a November 21, 1994 determination issued to it by the Department of Energy's (DOE) Office of Environmental Management (OEM). In this decision, we consider Niagara's claim that the OEM has erroneously determined its liability for payment into the Uranium Enrichment Decontamination and Decommissioning Fund (the D&D Fund) established under the Energy Policy Act of 1992. Pub. L. No. 102-486, 42 U.S.C.A. 2297(g), *et seq.* (1994). If Niagara's Appeal were granted, its D&D Fund assessment would be reduced by 6,547 separative work units (SWUs).

I. Background

Since the era of the Manhattan Project, the DOE and its predecessors have engaged in the process of uranium enrichment in order to meet the nation's national security, research and electrical generation requirements.(1) This case concerns legislation requiring that domestic utilities contribute to a fund to pay clean-up costs associated with the program.

A. Uranium Enrichment

Nuclear-powered utilities require enriched uranium. Enriched uranium is uranium in which the concentration of a particular isotope of uranium, uranium-235 (U-235), is increased above the naturally occurring percentage of 0.711%. The percentage of U-235 contained in uranium is referred to as its "assay." Most commercial power plants require fuel with assays between 2.5 and 4.5 percent.

The uranium enrichment process involves separating uranium feed into two portions, and transferring U-235 molecules from one portion to the other. The resulting portions of uranium are called "the product" and "the tails." The product consists of enriched uranium (having a higher than natural percentage of U-235). The other portion, the tails, consists of depleted uranium (having a lower than natural percentage of U-235). The effort required to separate the two isotopes is referred to as separative work and is measured in terms of separative work units (which are commonly referred to as SWU.). The SWU is the common unit of measurement for uranium enrichment services used by the nuclear power industry.

B. The DOE's Uranium Enrichment Program

In the United States the uranium enrichment process has been performed solely at three DOE plants which used gaseous diffusion technology to achieve separation of the isotopes. The emergence of newer, more efficient technologies and the globalization of the uranium enrichment market have rendered the government-owned plants obsolete and uncompetitive. It therefore became necessary to decommission and replace the gaseous diffusion plants and to recover the costs of those operations. On October 24, 1992, Congress enacted the Energy Policy Act. The act established a Uranium and Enrichment Decontamination

and Decommissioning Fund (the D&D Fund) to pay for the costs of decontamination, decommissioning and other remedial action activities at DOE's uranium enrichment facilities, and for reimbursement of certain decontamination and decommissioning, reclamation, and other remedial action costs incurred by licensees at active uranium or thorium processing sites.

The legislative history indicates that Congress intended that the D&D fund be financed by those entities that had directly benefitted from the operation of the plants, and that the allocation of assessments be apportioned in accordance to the degree which those entities had benefited from the uranium enrichment program. H.Rep. No. 474, 102nd. Cong., 2d sess.144, *reprinted in* 1992 U.S. Code Cong. & Admin. News 1954, 1967 ("The prevailing view on the allocation of costs of cleaning up these plants is that it should be based on benefits received from the program.")(2) Accordingly, the statute mandates contributions to the D&D Fund from both the governmental entities and the domestic utilities that took delivery of enriched uranium from the plants. After considering various methods of apportioning responsibility for the D&D Fund, Congress determined that the benefits received from the program could best be measured by each entity's receipt of DOE-originated SWUs. See id.(3) Therefore, the statute requires that each domestic utility's D&D Fund assessment be based upon the total number of SWUs that it purchased from the DOE prior to October 24, 1992. However, since Congress recognized that utilities often purchased or sold enrichment services in the secondary market, the statute further provides:

(1) a utility shall be considered to have purchased a separative work unit from the Department if such separative work unit was produced by the Department, but purchased by the utility from another source; and

(2) a utility shall not be considered to have purchased a separative work unit from the Department if such separative work unit was purchased by the utility, but sold to another source.

42 U.S.C. § 2297g-1(c). As a result, a domestic utility's D&D Fund assessment is based upon the following formula: A+B-C=X, where X is the number of SWUs upon which the utility's D&D Fund assessment is based; A is the total number of SWUs that the utility purchased from the DOE prior to October 24, 1992; B is the number of DOE-produced SWUs purchased by the utility in the secondary market prior to October 24, 1992; and C is the number of DOE-produced SWUs transferred or sold by the utility prior to October 24, 1992.

Utilities were required to purchase and then deliver to the DOE enough natural uranium feed for DOE to conduct the enrichment requested by the utility. DOE then charged the utility, on a per SWU basis, for the amount of the separative work necessary to enrich the natural uranium feed provided by the utility to the weight and product assay sought by the utility.

C. The Enrichment and Fabrication of Uranium Into Nuclear Fuel

To begin the procurement of nuclear fuel, a utility must first estimate the amount of enriched uranium that it will ultimately need to load in its nuclear reactor. A utility then places an order for enrichment services with DOE approximately six months prior to the time that the enriched uranium is to be delivered to its fabricator. See Response of the Department of Energy (March 31, 1995) at 3 (hereinafter "Response"). The Department invoices the utility for the number of SWUs it purchased and transfers the title of the enriched uranium to the utility when the specified amount of enriched uranium is delivered to the fabricator. Id. The fabricator records the number of SWUs that were delivered by the Department on behalf of the utility. Id. at 3 and 4. Once the enriched uranium and associated SWUs are purchased from DOE, title to them remains with the utility throughout the fabrication process. Id.

On many occasions the amount of enriched material actually needed for the reactor changes between the time the utility places an order and the time fabrication is completed. Because of this lack of precision in the nuclear fuel procurement process, the fabricator and the utility must "settle" on the actual number of SWUs that were needed to fabricate the fuel. Id. When this occurs, the fabricator and the utility either reach a cash settlement, or the fabricator maintains a credit balance for the SWUs the utility has already

provided for future use. For instance, the present case involves a settlement Niagara made with its fuel fabricator, General Electric (GE). In this instance, if a settlement were made in cash, GE would keep the unneeded surplus amount of enriched uranium and associated SWUs, would pay Niagara in cash, and Niagara would then transfer title to the enriched uranium and associated SWUs to GE, thus resulting in a "sale" of SWUs to GE. By contrast, if a settlement were made in the form of a SWU credit, Niagara would maintain title to the enriched uranium and associated SWUs and GE would promise to credit Niagara with the same quantity of material when it fabricated Niagara's next reload. Under this instance, no "sale" would occur. It is precisely this instance that is the focus of the present case.

D. The D&D Fund Regulations

On August 8, 1994, the DOE issued regulations implementing the relevant provisions of the Act. 59 Fed. Reg. 41956 (August 15, 1994). These regulations are set forth at 10 C.F.R. Part 766. Pursuant to the regulations, a domestic utility that objects to the OEM's determination of its D&D Fund assessment may file an appeal with the DOE's Office of Hearings and Appeals (OHA). 10 C.F.R. § 766.104(d). Thus far, the OHA has issued a number of decisions with respect to such appeals. See PSI Energy, Inc., 6 Fed. Energy Guidelines ¶ 80, 165 (1996); Long Island Lighting Co., 25 DOE ¶ 80,146 (1995).

II. Analysis

The present case involves a domestic utility, Niagara, that purchased SWUs from the DOE. On July 7, 1994, DOE sent a letter to all nuclear utilities, including Niagara, requesting that the utilities submit documentation on settlements with their fuel fabricators. See Letter from Joe W. Parks, D&D Fund Reconciliation Officer, DOE, to William R. D'Angelo, Supervisor-Fuels, Niagara Mohawk Power Corporation (July 7, 1994). In an August 18, 1994 letter from DOE, DOE clarified this request by stating that "if the settlement resulted from an overdelivery of SWU to GE, the amount of overdelivery would be considered a sale of SWUs to GE and, . . . would be deducted from the SWUs purchased from DOE in that year." Appeal at 1 and 2.

On September 23, 1994, Niagara responded to DOE's July 7 letter by providing a summary of the settlements it made with its fuel fabricator, GE. In this letter, Niagara indicated that it purchased and sold SWUs on Reloads 1 through 12 for the Nine Mile Point 1 Reactor and Reloads 1 and 2 for the Nine Mile Point 2 Reactor. Niagara identified fourteen cash settlements and a single credit settlement of 6,547 SWUs. See Letter from David A. Brilbeck, Niagara Mohawk Power Corporation, to Ed Marshall, DOE (September 23, 1994). The credit settlement was made on Reload 12 for the Nine Mile Point 1 Reactor which took place in February 1992. GE applied the credit to Reload 13 which did not take place until December 1994. Id.

On November 21, 1994, DOE responded to Niagara's September 23 letter and agreed to reduce Niagara's Special Assessment by 1,427 SWUs to reflect more accurately the net difference resulting from the cash settlements received from GE. However, DOE indicated that it does not agree that the 6,547 SWU credit carried over from Reload 12 of the Nine Mile Point 1 Reactor to Reload 13 should be deducted from the SWU used to determine Niagara's assessment. Letter from Ann M. Lovell, Office of the Assistant Manager for Enrichment Facilities to David Brilbeck, Niagara Mohawk Power Corporation (November 21, 1994). Accordingly, the OEM concluded that it "only considered as credits or debits transactions in which monetary settlements were made." Id. The OEM further concluded that Niagara should be held responsible for a D&D Fund assessment based on 1,993,362.583 SWU which includes the 6,547 SWU being carried over as a credit until Niagara purchased Reload 13.

Niagara, contending that it is not subject to a special assessment for the 6,547 SWU credit, filed the present Appeal on January 31, 1995. Comments on Niagara's Appeal were submitted by the OEM on March 31, 1995. On June 2, 1995, Niagara submitted a response to OEM's comments.

Niagara argues that it is not subject to the special assessment for the 6,547 SWU credit because: (1) it is

"inconsistent with EPACT and erroneous as a matter of law;" (2) DOE has not provided Niagara with a basis for its determination; and (3) DOE's "failure to provide reasons for its rejection of Niagara's proposed adjustment constitutes a denial of due process." Niagara's Appeal at 3-6. After considering Niagara's arguments and reviewing the record in this case, we find that Niagara was properly assessed for the 6,547 SWU credit.

A. The Energy Policy Act of 1992

We turn first to Niagara's claim that DOE's rejection of its proposed adjustment to a special assessment is inconsistent with EPACT and erroneous as a matter of law. Niagara focuses this argument on Section 1802(c)(2) of EPACT, which states the following:

A utility shall not be considered to have purchased a separative work unit from the Department if such separative work unit was purchased by the utility, but **sold** to another source (emphasis added).

42 U.S.C. § 2297g-1(c)(2).

Niagara contends that DOE has chosen to give the word "sold" a restrictive meaning beyond that contemplated in the statute by concluding that a transaction constitutes a sale only if the consideration for the transfer of SWU is money. Niagara's Appeal at 4. Niagara further states that Congress clearly established that its view that the allocation of costs of cleaning up the enrichment plants "should be based on the benefits received from the enrichment program and not on some artificial methodology that focuses on the type of consideration given in exchange for the SWU." Id. It is Niagara's contention that it receives no more benefit from SWU that are transferred to its fabricator for a future credit than it does for SWU transferred to its fabricator for cash. Id.

As an initial matter, Niagara is correct that it was Congress' intention that payments made to the D&D Fund should be based on the benefits received. As stated above, the legislative history indicates that Congress intended that the D&D Fund be financed by those entities that had directly benefited from the operation of the plants, and that the allocation of assessments be apportioned in accordance with the degree to which those entities had benefited from the uranium enrichment program. H. Rep. No. 474, 102nd. Cong., 2d sess.144, *reprinted in* 1992 U.S. Code Cong. & Admin. News 1954, 1967. Accordingly, the statute mandates contributions to the D&D Fund from both the governmental entities and the domestic utilities that took delivery of enriched uranium from the plants. Furthermore, the statute mandates that each domestic utility's D&D Fund assessment be based upon the total number of SWUs that it purchased from the DOE prior to October 24, 1992.

In the present case, DOE responds that Niagara has not provided any documentation that shows that it **sold** the 6,547 SWUs prior to October 24, 1992. As mentioned above, Niagara received a SWU credit for Reload 12 in February 1992. Unlike the fourteen cash settlements made between Niagara and its fabricator, GE, DOE argues that Niagara did not transfer title to the 6,547 SWUs during the time they were recorded as credits by GE nor did it receive any consideration for its credit settlement. Response of the Department of Energy at 7. Accordingly, the OEM contends that it has properly determined Niagara's Special Assessment. Id.

Our analysis focuses on the Act, pursuant to which DOE-produced SWUs purchased by a utility are subject to the assessment unless they are "sold." The legislative history of EPACT is silent with respect to how the word "sold" in the statute should be interpreted. Therefore, according to statutory rules of construction, we must look to the plain, common meaning of the word. See McNally v. United States, 483 U.S. 350, 358-59 (1987) (interpreting commonly used phrase according to "common understanding" where Congress has "not indicated" an intent to depart from it). Indeed, the very fact that Congress did not define the word "sold" in EPACT is evidence that Congress intended a "common sense" interpretation of its meaning. See Indiana Michigan Power Company, et al. v. Department of Energy, No. 95-1279 (D.C. Cir. July 23, 1996). In this regard, it is appropriate to rely on the commonly accepted Uniform Commercial Code definition that a "sale" requires the passage of title. U.C.C. § 2-106(1) (1977). Therefore, the main

issue presented in this case is whether Niagara transferred title to GE for the 6,547 SWUs. After a review of the record in this case, we are convinced that Niagara did not transfer title for the SWUs at issue. See Carolina Power & Light Company, 26 DOE ¶80,111 (1996) (Carolina).

Under Niagara's SWU credit transaction, unlike its cash transactions where full and absolute rights were relinquished, Niagara maintained legal title to the enriched uranium and associated SWU and GE promised to credit Niagara with the same quantity of material when it fabricated the next reload. No sale occurred through this transaction because title to the SWUs did not pass to GE. In fact, nothing resembling a sale occurred. It is the legal form the parties gave this transaction, a SWU credit for a future reload, that prevents Niagara under the Act and the Part 766 regulations, which require a "sale," from deducting the SWUs associated with the credit settlement from the number of SWUs purchased from DOE. We must keep in mind the DOE regulations, which provide that the utility that purchased SWUs from the DOE is subject to an assessment based on those SWUs unless the utility demonstrates that it "sold" those SWUs to another party within the meaning of the Act. In order to demonstrate that it "sold" the SWUs to another Niagara must submit "reliable and adequately probative records." 10 C.F. R. § 766.104(c); Carolina, 26 DOE ¶80,111 at 80,535 (1996).

Niagara has provided us with a copy of the relevant portions of the contract between itself and GE which provided for the reimbursement to Niagara of excess SWUs either through a cash payment or "through provision of a quantity of natural or enriched uranium, as appropriate, equal to the value to such variance; provided such value is greater than one hundred dollars ($100)." See Letter from Gary D. Wilson, Chief Counsel, Niagara, to OHA (July 29, 1996). Niagara has indicated that pursuant to this provision of its contract, GE requested and Niagara agreed for GE to issue "a credit for future supply of material in lieu of a cash payment." See June 2, 1995 Reply to Office of Environmental Management Response. However, based on our review, there is no language in these portions of the contract concerning the transfer of title to these SWUs to GE, or language which indicates that Niagara agrees to relinquish its full and absolute rights to these excess SWUs. Thus, the contract does not support the conclusion that Niagara transferred title to GE, and Niagara has produced no other documents, e.g., general accounting records or tax documents, to demonstrate that title passed to GE with respect to the 6,547 SWUs. Thus, Niagara has failed to submit "reliable and adequately probative records" demonstrating that it sold 6,547 SWUs to GE.

This conclusion is consistent with the Act. To permit the characterization of the 6,547 SWUs at issue as "sold" would defeat the purpose of the Act, which was to allocate responsibility for contributions based on the benefits received from the DOE's uranium enrichment program. The provision for the deduction for SWUs sold to another party was intended to excuse a utility from an assessment for separative work from which it did not benefit. We believe Niagara benefitted from the 6,547 SWU at issue, and Niagara has submitted no evidence to the contrary. We therefore must agree with the OEM and find that Niagara was properly assessed for these 6,547 SWUs.

B. DOE's Basis for Its Determination

Niagara also contends that it should not be assessed for the 6,547 SWU credit because DOE failed to provide a rational basis for its findings, and therefore DOE's determination is arbitrary and capricious. The arbitrary and capricious standard for review of agency actions is narrow and is invoked only when an agency's decision is not supported on any rational basis. See Moore v. Madigan, 789 F.Supp. 1479 (W.D. Mo. 1992). In this case, we agree that OEM did not initially provide Niagara with a detailed explanation of the reasons for its determination regarding the distinction between cash settlements with GE and SWU credits redeemable in future fuel deliveries. However, consistent with the language of the statute, OEM did notify Niagara that it must produce documentation that it actually sold the 6,547 SWUs to GE. As we have stated above, Niagara failed to demonstrate that it "sold" the 6,547 SWUs to GE by submitting reliable and adequately probative records. In view of Niagara's failure to support its contention regarding the purported sale of these SWUs to GE, we find that OEM's determination did indeed have a rational basis. We therefore reject Niagara's claim that DOE's decision to assess it for those 6,547 SWUs was arbitrary and capricious.

In addition, Niagara argues that the OEM's failure to provide reasons for its rejection of Niagara's assessment adjustment constitutes a denial of due process. The record is clear that Niagara has not been denied due process. OEM properly notified Niagara that it would focus on passage of title to the relevant SWUs. Moreover, it has been given an opportunity to be heard by filing its Appeal of the OEM's determination with the Office of Hearings and Appeals. 10 C.F.R. § 766.104(d). Niagara has been given several opportunities to come forward with evidence to support its claim that it sold the 6,547 SWUs to GE. Furthermore, the record now contains a clearer explanation of the reasons why DOE did not reduce Niagara's assessment by the 6,547 SWUs at issue. For these reasons, we find this argument to be without merit.

III. Conclusion

For the reasons set forth above, we find that the OEM properly assessed Niagara Mohawk Power Corporation for 6,547 SWUs. Accordingly, we have determined that Niagara Mohawk Power Corporation's Appeal shall be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by the Niagara Mohawk Power Corporation (Case No. VEA-0004) on January 31, 1995, is hereby denied.

(2) This is a Final Order of the Department of Energy

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 17, 1997

(1) In this decision we make frequent reference to the DOE's uranium enrichment program, which prior to the DOE's creation in 1977 had been conducted by its predecessors, the Energy Research and Development Administration, which administered the program from 1974 through 1977, and the Atomic Energy Commission, which administered the program from its inception until 1974. In 1993, Congress created the United States Enrichment Services Corporation and transferred administration of the uranium enrichment program to it. Unless stated otherwise, when we refer to the DOE's uranium enrichment program, we are also referring to the program as administered by DOE's predecessors.

(2) The D&D Fund is to consist of annual deposits of $480 million per fiscal year, to be adjusted for inflation on an annual basis.

(3) Collection of the special assessment is authorized for either a period of fifteen years or until $2.25 billion (adjusted for inflation) has been collected, whichever occurs first.

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Carolina Power & Light Company

Date of Filing: March 1, 1995

Case Number: VEA-0005

On March 2, 1995, Carolina Power & Light Company (CP&L) filed an Appeal from a February 2, 1995 determination issued by the Department of Energy's (DOE) Office of Environmental Management (OEM). Under that determination, CP&L's assessment for the DOE's Uranium Enrichment Decontamination and Decommissioning Fund (the D&D Fund) is based on 4,855,691.167 separative work units (SWUs). In its Appeal, CP&L contends that 78,917.709 SWUs were erroneously included in that amount.

I. Background

Beginning with the era of the Manhattan Project, the DOE and its predecessors engaged in the process of uranium enrichment in order to meet the nation's security, research, and electrical generation requirements (hereinafter the DOE's uranium enrichment program). This case concerns legislation requiring that domestic utilities contribute to a fund to pay clean-up costs associated with the program.

A. Uranium Enrichment

Nuclear-powered utilities require enriched uranium. Enriched uranium is uranium in which the concentration of a particular isotope of uranium, uranium-235 (U-235), is increased above the naturally occurring percentage of 0.711%. The percentage of U-235 contained in uranium is referred to as its "assay." Most commercial power plants require fuel with assays between 2.5 and 4.5 percent.

The uranium enrichment process involves separating uranium feed into two portions, and transferring U-235 molecules from one portion to the other. The resulting portions of uranium are called "the product" and "the tails." The product consists of enriched uranium (having a higher than natural percentage of U-235). The other portion, the tails, consists of depleted uranium (having a lower than natural percentage of U-235). The effort required to separate the two isotopes is referred to as separative work and is measured in terms of separative work units, i.e., SWUs.

B. The DOE's Uranium Enrichment Program

The DOE's uranium enrichment program was administered by the DOE and two predecessor agencies. The Atomic Energy Commission (AEC) administered the program from its inception until 1974; the Energy Research and Development Administration administered the program from 1974 until the DOE's creation in 1977. The DOE administered the program until 1993, when Congress transferred the program to the newly-created United States Enrichment Services Corporation. Unless otherwise indicated, references to the DOE's uranium enrichment program include the program, as administered by the DOE's predecessors.

The DOE performed its uranium enrichment services at three plants, which were the sole source of uranium enrichment services in the United States. Utilities paid for such services in one of two ways. In cases where the utility leased the enriched uranium from the DOE, the utility paid lease and "burnup"

charges. The burnup charge was based on the separative work, or SWUs, associated with the consumed material. In cases where the utility did not lease enriched uranium from the DOE, the utility provided natural uranium to the DOE, and the DOE enriched the uranium to the utility's specifications. The utility paid the DOE for the enrichment services based on the separative work, or SWUs, required.

The emergence of newer, more efficient technologies and the globalization of the uranium enrichment market rendered the DOE plants obsolete. It therefore became necessary to decommission and replace the gaseous diffusion plants and to recover the costs of these operations. Congress addressed these issues in Sections 1101 through 1105 of the Energy Policy Act of 1992, which added Sections 1801 through 1805 to the Atomic Energy Act of 1954 (the Act), providing for the establishment of the D&D Fund. 42 U.S.C. §§ 2297g through 2297g-4.

C. The Act's Provisions

Section 1801 of the Act provides for the establishment of the Decontamination and Decommissioning Fund, i.e., the D&D Fund. 42 U.S.C. § 2297g. Section 1801 also provides for the investment of such funds pending their expenditure. Id.

Section 1802 of the Act sets forth the mechanism for funding the D&D Fund. 42 U.S.C. § 2297g-1. Section 1802(a) provides for total yearly deposits of $480,000,000, adjusted for inflation. Section 1102(b) provides for contributions from domestic utilities that purchased uranium enrichment services from the DOE and from other sources. Section 1802© sets forth the formula to be used in determining a given utility's assessment. Sections 1802(d) through (g) deal with other aspects of the assessment.

Section 1802© of the Act requires contributions from domestic utilities based on their proportional use of the DOE uranium enrichment program prior to the date of the Act, subject to a $150,000,000 maximum. 42 U.S.C. § 2297g-1(c). Each utility's contribution percentage is measured as a fraction in which the numerator is the total number of SWUs that the utility purchased "for the purpose of commercial electricity generation" and the denominator is the total number of DOE-produced SWUs, regardless of their purpose.

Section 1802© further specifies that the number of SWUs purchased from the DOE be adjusted to reflect SWUs purchased or sold in the secondary market. As a result, a domestic utility's D&D Fund assessment equals the total number of SWUs that the utility purchased from the DOE, plus the number of DOE-produced SWUs purchased by the utility in the secondary market, minus the number of DOE-produced SWUs sold by the utility.

Consistent with the statutory language, the legislative history indicates that Congress intended that the D&D Fund be financed by those entities that had directly benefited from the DOE's enrichment program, and that a given entity's assessment reflect the degree to which it had benefited from the program. H. Rep. No. 474, 102d Cong., 2d sess. 144, reprinted in U.S. Code Cong. & Admin. News 1954, 1967 ("The prevailing view on the allocation of costs of cleaning up these plants is that it should be based on benefits received from the program."). The legislative history further indicates, that after considering various methods for measuring the benefits received from the program, Congress determined that such benefits could best be measured based on the receipt of DOE-originated SWUs. See H. Rep. at 144-45, U.S. Code Cong. & Admin. News at 1967-68.

D. The D&D Fund Regulations

On August 8, 1994, the DOE issued regulations implementing the relevant provisions of the Act. 59 Fed. Reg. 41956 (August 15, 1994). These regulations are set forth at 10 C.F.R. Part 766.

Pursuant to the regulations, a domestic utility that objects to the OEM's determination of its D&D Fund assessment may file an appeal with the DOE's Office of Hearings and Appeals (OHA). 10 C.F.R. §

766.104(d). Thus far, the OHA has issued three decisions with respect to such appeals. Cincinnati Gas and Electric Co., 25 DOE ¶ _____ (August 19, 1996); PSI Energy, Inc., 25 DOE ¶ 80,165 (1996); Long Island Lighting Co., 25 DOE ¶ 80,146 (1995).

II. CP&L's Appeal

CP&L contends that its D&D Fund assessment should be reduced by a total of 78,917.709 SWUs. These SWUs represent 1.6 percent of CP&L's total assessment (78,917.709/4,855,691.167 = .016).

The disputed SWUs fall into three categories. The first category consists of 4,907.278 SWUs associated with enriched uranium that CP&L leased and then consumed pursuant to a 1969 Agreement. The second category consists of 37,399.278 SWUs purchased from a foreign utility. The third category consists of 36,610.652 SWUs that CP&L identifies as "fabrication overage."

III. Analysis

A. SWUs Associated with Leased Enriched Uranium

CP&L contends that the SWUs associated with enriched uranium that was leased from the AEC and consumed by CP&L were "leased" and, therefore, not "purchased" within the meaning of the Act. As explained below, we have concluded that these SWUs were "purchased" and, therefore, are subject to the assessment.

As an initial matter, we have difficulty conceptualizing a "leased" SWU. A SWU is the measure of a service, i.e., an enrichment service. Thus, while a SWU can be "purchased," we fail to see how it can be "leased." What can be leased is the enriched uranium produced by the enrichment service.

Despite the foregoing, CP&L contends that the SWUs in question were not purchased SWUs. CP&L maintains that the 1969 Agreement provides for the "lease" of SWUs and, therefore, that such SWUs cannot be considered as "purchased."

1. The 1969 Agreement

Contrary to CP&L's assertion, the 1969 Agreement did not provide for the lease of SWUs. The 1969 Agreement is entitled "Special Nuclear Material Lease Agreement." The word "lease" refers to nuclear material, i.e., the enriched uranium provided by the AEC.

Moreover, the economic substance of the 1969 Agreement was the purchase of separative work, or SWUs, from the DOE. As explained below, the DOE had historically provided separative work to utilities through leases of enriched uranium.

CP&L does not dispute that AEC historically provided enriched uranium to utilities pursuant to lease agreements. It is also undisputed that utilities paid a burnup charge based on the separative work, or SWUs, associated with the enriched uranium that was consumed.

As the result of subsequent legislation permitting the private ownership of enriched uranium,(1) the AEC provided utilities with the option to purchase enriched uranium held under their lease agreements. Utilities electing to do so entered into in-situ agreements in which they purchased the unconsumed enriched uranium and associated SWUs.

As the foregoing indicates, the economic substance of the lease of enriched uranium was the purchase of separative work or SWUs. The AEC provided to a utility a given amount of enriched uranium, and the payments made by the utility to the AEC included a payment based on the separative work associated with

the enriched uranium consumed by the utility. That fact alone is a sufficient basis upon which to conclude that CP&L purchased that separative work. Moreover, in 1970, CP&L entered into an in-situ purchase agreement with the AEC, pursuant to which CP&L purchased the remaining enriched uranium and paid for that material based on the SWUs associated therewith. There can be no doubt that in both transactions, CP&L paid for separative work performed by the AEC to enrich uranium provided to CP&L and the economic substance of the lease agreement was the same as the purchase agreement insofar as the acquisition of enrichment services is concerned.

2. The Meaning of "Purchase" in the Act

Based on the foregoing, it is clear that SWUs associated with consumed leased uranium are "purchased" within the meaning of the Act and the D&D Fund regulations. 42 U.S.C. § 2297g-1(c); 10 C.F.R. § 766.102(a). The Act and the D&D Fund regulations base the special assessment on "SWUs purchased" from the DOE, not on "enriched uranium purchased" from the DOE. Thus, the status of the enriched uranium as "purchased" or "leased" is not relevant. In both cases, the utility paid for DOE enrichment services, based on the separative work performed by the DOE to produce enriched uranium. Because the word "purchased" would apply to separative work regardless of whether it is used to produce purchased or leased uranium, the Act and the D&D Fund regulations apply to that separative work.

Consistent with the foregoing, the preamble to the D&D regulations states that SWUs associated with leased enriched uranium that is consumed are "purchased" SWUs. The preamble states in relevant part:

Leased material is appropriately included as part of the Special Assessment to the extent that the material was for the purpose of electricity generation. Utilities paid "use and burnup charges" for the portion of leased material that they consumed. Therefore, leased material is being treated as purchased material and is subject to the Special Assessment. A utility's Special Assessment will be adjusted for those portions of SWUs in leased material that it did not consume and that were returned to the Government. ...

59 Fed. Reg. 41957. Thus, the preamble clearly addresses the situation of SWUs associated with consumed leased material.

Moreover, CP&L's attempted exclusion of SWUs associated with consumed leased uranium is contrary to the purpose of the Act. The purpose of the Act is to assess utilities based on the benefit they derived from the DOE's enrichment services, the unit measure of which is separative work or SWUs. Historically, the DOE provided enrichment services to utilities through leases of enriched uranium, and utilities benefited from those services to the extent that they consumed the enriched uranium. CP&L has provided no argument as to why the exclusion of such services in this instance would be consistent with the Act's purpose and we see none. Instead, we find that the exclusion of SWUs associated with consumed leased uranium would be contrary to the Act.

As the foregoing indicates, we have determined that the SWUs associated with the enriched uranium that was leased and consumed by CP&L pursuant to the 1969 Agreement are "purchased" within the meaning of the Act. Accordingly, they should not be deducted from CP&L's assessment.

B. SWUs Recovered from a Waste Stream Purchased from a Foreign Utility

CP&L contends that the SWUs recovered from a waste stream purchased from a foreign utility are not "purchased" within the meaning of the Act.(2) CP&L argues that the purchase of such SWUs is "too remote" to be a "purchase" from the DOE. CP&L July 1995 submission at 4.

It is undisputed that the Act provides that a utility's assessment includes DOE-produced SWUs purchased in the secondary market.(3) It is also undisputed that the Act does not contain an exception for DOE-produced SWUs that are purchased from a foreign utility. In fact, such an exception would be contrary to the purpose of the Act, i.e., to assess domestic utilities based on the extent to which they benefited from

the DOE's enrichment services.

Consistent with the foregoing, the preamble to the D&D regulations specifically provides that DOE-produced SWUs purchased from a foreign utility are not excepted from a domestic utility's SWU purchases:

During the reconciliation process, DOE will identify these SWUs from information provided by utilities and from other sources to which DOE has access, such as the Nuclear Materials Management and Safeguards System (NMMSS), a joint DOE-Nuclear Regulatory Commission (NRC) database. DOE-produced SWUs that were sold to foreign utilities and later re-entered the domestic commercial market would have the effect of increasing the number of DOE-produced SWUs purchased by domestic utilities for the purpose of commercial electricity generation in relation to the total number of DOE-produced SWUs purchased from the DOE for all purposes, as stated in the [Act]. The Special Assessment invoices will contain information on the total number of DOE-produced SWUs purchased by domestic utilities, including those purchased from foreign utilities. When the reconciliation process is complete, DOE will provide utilities with a summary of all adjustments made during the process.

59 Fed. Reg. 41958. As the preamble indicates, in order to determine the extent to which domestic utilities benefited from the DOE's enrichment services, the DOE's calculation must include DOE-produced SWUs purchased from foreign utilities.

The fact that the SWUs in question were associated with a waste stream purchased from a foreign utility does not change the fact that they were DOE-produced SWUs purchased by CP&L. The SWUs represented the enriched uranium that remained in the waste stream. Because the enriched uranium resulted from separative work performed by the DOE, the separative work or SWUs was a benefit that CP&L obtained from the DOE's enrichment program. Accordingly, there is simply no basis for excluding them from CP&L's purchases.

C. SWUs Identified by CP&L as "Fabrication Overage"

CP&L contends that SWUs associated with what it refers to as "fabrication overage" should not be included in its assessment. Before discussing CP&L's legal arguments, it is important to understand what CP&L means when it refers to "fabrication overage."

1. CP&L's "Fabrication Overage"

CP&L identifies "fabrication overage" by reference to excerpts from two agreements between CP&L and fuel fabricators. Those excerpts indicate that CP&L was required to furnish to the fabricator a quantity of enriched uranium slightly in excess of 100 percent of the amount required by the fuel design. These amounts ranged from 100.5 percent to 101.5 percent. The only excerpt submitted that describes the excess refers to it as "an allowance for scrap, losses incurred during fabrication processes, process sampling and archive material removal." CP&L July 1995 Submission, Extract 7 (emphasis added). Based on the foreging excerpt, we will henceforth refer to the extra enriched uranium as a "fabrication allowance."

2. Whether the SWUs Associated with Fabrication Allowances are Properly Included in CP&L's D&D Fund Assessment

a. Whether the SWUs at issue were "purchased for the purpose of commercial electricity generation"

CP&L argues that even though it purchased the SWUs associated with the fabrication allowance, CP&L did not purchase those SWUs "for the purpose of commercial electricity generation." CP&L maintains that SWUs must be associated with enriched uranium included in the fabricated fuel in order to be "for the purpose of commercial electricity generation."

As an initial matter, we note that the record does not permit a conclusion as to whether any of the fabrication allowance was actually included in the fabricated fuel. It seems to us that it is theoretically possible that a substantial part or even all of the extra enriched uranium provided as an allowance could be included in the final product. In many types of fabrications, compliance with a design specification is subject to certain variances. Neither party has addressed the issue of whether that could occur in reactor fuel fabrication and, therefore, the record is silent on the issue.

More importantly, however, we need not reach the issue of whether any of the fabrication allowance was included in the fabricated fuel. As explained below, in either case, the SWUs associated with the fabrication allowance would be "purchased for purpose of commercial electricity generation" within the meaning of the Act.

Enrichment services associated with fabrication allowances fall within the plain meaning of the statutory phrase "purchased for the purpose of commercial electricity generation." It is undisputed that fabrication allowances are a necessary part of the fabrication of reactor fuel. Fuel fabricators required that utilities furnish an amount of enriched uranium in excess of the amount required by the fuel design in order to cover losses during the fabrication process.(4) Accordingly, the enrichment services associated with those allowances are "purchased for the purpose of commercial electricity generation." Had Congress intended to exclude such enrichment services from the Act, Congress would have based the assessment on enriched uranium "used in reactor fuel."(5)

Consistent with the foregoing, the preamble to the D&D regulations clearly provides that SWUs associated with fabrication allowances are "purchased for the purpose of commercial electricity generation." The preamble states:

Several commenters requested clarification as to how DOE will treat fabrication losses in calculating the Special Assessment. The commenters stated that fuel fabrication losses were not used in commercial electricity generation and therefore should not be included in the calculation of the Special Assessments.

In determining a utility's Special Assessment, the [Act] does not require a SWU to have actually been used in

commercial electricity generation, but only to have been purchased for that purpose. Therefore, DOE will not adjust Special Assessments to exclude fabrication losses.

59 Fed. Reg. 41958. As the preamble indicates, to exclude SWUs lost in the fabrication process would be inconsistent with the Act.

Moreover, the inclusion of fabrication allowances is consistent with the intent of the Act. The legislative history reflects a clear congressional intent that utilities be assessed based on the degree to which they had benefited from the DOE's enrichment program. "The prevailing view on the allocation of costs of cleaning up these plants is that it should be based on benefits received from the program." H. Rep. No. 474, 102d Cong., 2d sess. 144, reprinted in U.S. Code Cong. & Admin. News 1954, 1967. Utilities benefited from enrichment services associated with fabrication allowances, just as they benefited from enrichment services associated with the enriched uranium included in the reactor fuel. Accordingly, the inclusion of enrichment services associated with fabrication allowances is consistent with Congress' stated intent.

b. Whether the SWUs at issue were "sold" to another party

CP&L's alternative argument is that even if the SWUs associated with the fabrication allowance were purchased for the purpose of commercial electricity generation, the fabrication allowance was "sold" to the fabricator and, therefore, the associated SWUs are deductible from CP&L's assessment. In support of that characterization, CP&L quotes from two agreements providing for the passage of title to the fabricators of any enriched uranium that was not part of the fabricated fuel delivered to CP&L.

The OEM disagrees with CP&L's position that the fabrication allowance was "sold" within the meaning of the Act. The OEM notes that it was industry practice for a utility and fabricator to have a settlement statement which identified whether the amount of enriched uranium provided by the utility exceeded, or was less than, the contract amount. Where the settlement sheet showed that the enriched uranium provided exceeded that amount, the settlement statement showed an amount owing to the utility based on the excess SWUs. The OEM treated those excess SWUs as "sold" to the fabricator within the meaning of the Act. The OEM states that because the fabrication allowance was included in the contract amount, it was not the basis for an adjustment. CP&L has not challenged the OEM's description of the general nature of settlement statements or argued that this general description does not accurately describe CP&L's settlement statements.

Our analysis starts with the Act, pursuant to which DOE-produced SWUs purchased by a utility are subject to the assessment unless they are "sold." Consistent with this provision of the Act, the DOE regulations provide that the utility that purchased SWUs from the DOE is subject to an assessment based on those SWUs unless the utility demonstrates that it "sold" those SWUs to another party within the meaning of the Act. In order to demonstrate that it "sold" the SWUs to another the utility must submit "reliable and adequately probative records." 10 C.F.R. § 766.104(c).

CP&L has failed to demonstrate that the fabrication allowance at issue was "sold" within the meaning of the Act. CP&L has never asserted, let alone demonstrated, that any of enriched uranium that constituted the fabrication allowance was not needed for the fabrication process. Instead, CP&L merely asserted that the fabrication allowance was not "necessarily" needed for the fabrication. That is not a sufficient basis upon which to conclude that, after the fabrication, there remained excess enriched uranium as to which title could pass. Thus, CP&L has failed to submit "reliable and adequately probative records" demonstrating that there was any excess material as to which title passed.

The foregoing conclusion is supported by the excerpts of the fabrication agreements submitted by CP&L. As discussed above, the fabrication allowance is defined as "for scrap, losses incurred during fabrication processes, process sampling and archive material removal." Thus, the apparent intent of the provision providing for the passage of title to any enriched uranium not included in the fabricated fuel was to protect the fabricator for having to account for the enriched uranium lost or otherwise used in the fabrication process.

In any event, to permit the characterization of the fabrication allowances at issue as "sold" within the meaning of the Act would defeat the purpose of the Act, which was to allocate responsibility for contributions based on the benefits received from the DOE's uranium enrichment program. The provision for the deduction for SWUs sold to another party was intended to excuse a utility from an assessment for separative work from which it did not benefit. CP&L benefited from the separative work required to produce the enriched uranium needed to fabricate its fuel, including the separative work associated with the fabrication allowance. Accordingly, the inclusion of the SWUs associated with the fabrication allowance in its assessment is consistent with the intent of the Act.

D. The Lawfulness of the D&D Fund Assessment

Finally, CP&L argues that its objections to the calculation of its SWU assessment should not be construed as a waiver of any right to challenge the lawfulness of the assessment program in general. We recognize that the United States Court of Federal Claims has held a particular D&D Fund assessment to be an unlawful exaction. Yankee Atomic Electric Co. v. United States, 33 Fed. Cl. 580 (1995). The United States has filed an appeal with the United States Court of Appeals for the Federal Circuit. The DOE will ultimately defer to the rulings of the federal courts on the constitutionality of the assessments. Nonetheless, to date no order has been issued enjoining the DOE's enforcement of the Act in cases like the present one. Accordingly, in such cases, pending the resolution of the Yankee Atomic litigation, the OEM is continuing to collect the assessments required by the Act. PSI Energy, Inc., 25 DOE ¶ 80,165 at 80,671

(1996).

IV. Conclusion

For the reasons set forth above, we find that the contentions set forth in CP&L's Appeal are without merit. Accordingly, we have determined that the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Carolina Power & Light Company, VEA-0005, on March 2, 1995, is hereby denied.

(2) This is a Final Order of the Department of Energy.

George B. Breznay

Director

Office of Hearings and Appeals

Date:

(1)Private Ownership of Special Nuclear Materials Act, Pub. Law 88-489, 78 Stat. 601 (1964).

(2)CP&L originally contended that the DOE had already assessed another utility for the SWUs in question. CP&L withdrew that contention after the OEM stated that it had subtracted the SWUs from the account of the utility that sold the enriched material to CP&L.

(3)Section 1802(c) provides:

(1) a utility shall be considered to have purchased a separative work unit from the Department if such separative work unit was produced by the Department, but purchased by the utility from another source; and

(2) a utility shall not be considered to have purchased a separative work unit from the Department if such separative work unit was purchased by the utility, but sold to another source.

42 U.S.C. § 2297g-1(c).

(4)The OEM provided the following description of fuel fabrication:

... First, the Department delivers enriched uranium to fuel fabricators in the form of uranium hexaflouride (UF6) for the account of utilities. The fabricators use chemical conversion operations to transform the UF6 into uranium dioxide (UO2), a powder. The UO2 powder is then mixed with a binder, cold-pressed into small cylindrical pellets, and sintered to increase the density of the UO2. The pellets are then ground to a specified diameter. These pellets vary in size according to design characteristics of the reactor in which they will be used, but the typical dimensions are .35 inches in diameter and .6 inches in length. The pellets are stacked in zirconium alloy tubes (called cladding) to form long thin fuel rods. Normally, between 64 and 100 fuel rods are combined to complete either the fuel assembly or fuel bundle.

June 23, 1995 OEM Submission at 6 n.2.

(5)For this reason, CP&L's submission of a 1989 DOE employee's letter to a fabricator concerning what constitutes "excess enriched uranium" under a "Utility Services Contract" is irrelevant. That letter refers to "excess enriched uranium" as "material never intended to be used in a DOE's customer's reactor." As an

initial matter, we question whether that letter represents a correct interpretation of the relevant contract, which is not a part of the record. More importantly, however, assuming arguendo that that letter is a proper interpretation of the relevant contract, the letter is irrelevant to whether a fabrication allowance is includable in a utility's D&D Fund assessment. As indicated above, the Act does not define covered SWUs as those "intended to be used in a DOE's customer's reactor," and, therefore, that standard is irrelevant to whether the Act covers fabrication allowances.

March 13, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Quivira Mining Company

Date of Filing: October 12, 1995

Case Number: VEA-0007

Quivira Mining Company (Quivira) filed an Appeal of a determination issued by the Environmental Restoration Division of the Department of Energy Albuquerque Operations Office (Environmental Restoration). The determination concerned Quivira's request for reimbursement for the federal portion of its remedial action costs at its Lake Ambrosia mill site. 10 C.F.R. Part 765 ("Reimbursement for Costs of Remedial Action at Active Uranium and Thorium Processing Sites"). Quivira appeals the disallowance of $2,181,428 in total remedial action costs, the federal portion of which would be $658,791. As explained below, we have determined that Environmental Restoration correctly disallowed the claimed costs, but that Quivira should be permitted the opportunity to file an amended claim with respect to one of the categories of disallowed costs.

I. Regulatory Background

A. General

Historically, uranium mills produced uranium for the federal government and commercial entities. The production of uranium resulted in uranium tailings, which are radioactive sand-like particles produced when uranium is extracted from uranium ore. Originally, neither the owners of uranium mills nor the federal government understood the potential hazard posed by the tailings. As a result, the owners of uranium mills simply piled the tailings on site.

As a result of the realization that the uranium tailings posed a health hazard, Congress passed two statutes. The first was the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA). The second was Title X of the Energy Policy Act of 1992 (EPACT).

B. The UMTRCA

The UMTRCA requires that owners of active uranium sites, such as Quivira, take remedial action with respect to the uranium tailings and other by-product material on site. The UMTRCA applies to all such material and, therefore, applies to by-product material that resulted from uranium produced for the federal government, as well as that produced for commercial purposes. The UMTRCA does not contain any provision permitting reimbursement to the uranium mill owners for their remedial action costs.

C. The EPACT

The EPACT provides that uranium mill owners may claim reimbursement for that portion of their remedial action costs that is attributable to uranium sales to the federal government, hereinafter referred to as the

federal portion. 42 U.S.C. § 2296a(b). The EPACT provides that claims for reimbursement shall be accompanied by "reasonable documentation." Id. § 2296a-1.

The EPACT further provides for the promulgation of implementing regulations. The DOE subsequently promulgated such regulations, which are set forth at 10 C.F.R. Part 765.(1)

D. Part 765

Part 765 sets forth the regulatory requirements governing reimbursement for remedial action costs at uranium and thorium processing sites. Under the regulations, the mill owner submits its claimed total remedial action costs. The DOE reviews those costs and issues a determination, either allowing or disallowing the claimed costs. The mill owner is entitled to reimbursement for the federal portion of those costs. The federal portion is based on the mill's federal reimbursement ratio, i.e., the mill's by- product material attributable to production of uranium for the federal government divided by the mill's total by-product material as of October 24, 1992. The reimbursable amount is determined by multiplying the federal reimbursement ratio by the firm's total approved remedial action costs.

Section 765.20 sets forth the procedures for submitting claims. Section 765.20(d) addresses the issue of documentation. Section 765.20(d)(1) provides that documentation prepared contemporaneous to the time the cost was incurred "should be used when available." Section 765.20(d)(2) provides that documentation not prepared contemporaneous to the time the cost was incurred "may be used" when it is the "only means available" to document the claimed costs. Section 765.20(f) provides that each licensee "should utilize generally accepted accounting principles consistently throughout the claim."

Upon the promulgation of Part 765, the DOE published a "Draft DOE Guidance" for the preparation of claims. In April 1995, the DOE published a final "DOE Guidance." The DOE Guidance provides detailed guidance concerning the preparation of claims.

II. Factual Background

This case concerns Quivira's Lake Ambrosia site, which is located near its Grants, New Mexico field office. Quivira produced uranium at the Lake Ambrosia site from 1958 to 1985. Although there is no uranium being mined at present, some uranium is still being recovered from waste water. As a result of this recovery, Quivira is an "active site" within the meaning of the EPACT.

At least as early as 1978, when the UMTRCA was passed, Quivira has undertaken remedial action at the Lake Ambrosia site. This action has included the use of heavy equipment to move and stabilize tailings and other by-product material. The claimed depreciation cost for some of this equipment is one of the two categories of costs at issue in this Appeal.

In addition to its Grants, New Mexico field office, Quivira has two field offices located in Utah and Wyoming, as well as a home office in Oklahoma. Quivira's reallocation of home office overhead expenses to the New Mexico office is the other matter at issue in this Appeal.

III. Procedural Background

In 1994, Quivira filed the reimbursement claim at issue in this Appeal. This was the first claim filed by Quivira and covers the period 1989 through 1993. Quivira subsequently filed a claim for an earlier period, 1985 through 1988. Quivira then filed a third claim, for 1994.

For the period 1989 through 1993, Quivira claimed $15,129,884 in remedial action costs. In a July 6, 1995 determination, Environmental Restoration allowed $12,543,172, and disallowed $2,586,712, in claimed costs.

On October 12, 1995, Quivira filed the instant appeal. Quivira's appeal is limited to two categories of disallowed costs totaling $2,121,428, i.e., (i) depreciation of equipment that had already been expensed or fully depreciated prior to the claim period and (ii) home office expenses reallocated to the New Mexico field office and, hence, the reclamation project.

Subsequent to the filing of the Appeal, Environmental Restoration filed comments, and Quivira filed a reply. A hearing was held on June 27, 1996. Subsequent to the hearing both parties filed post- hearing comments. The final submission was received on October 8, 1996.

IV. Analysis

Both categories of claimed costs at issue in this Appeal concern costs that were not reflected on Quivira's historical accounting records. Instead, Quivira developed the costs for the purpose of claiming reimbursement under the EPACT. Quivira claims that both departures from its historical books and records are necessary for Quivira to obtain the reimbursement contemplated by the EPACT.

A. Depreciation of Equipment That Had Already Been Expensed or Fully Depreciated

1. The Disallowed Depreciation

Quivira appeals $1,091,968 in disallowed depreciation. It is undisputed that this depreciation concerns equipment that had a zero book value throughout the claim period, because it had been expensed or fully depreciated prior to 1989. It is also undisputed that Quivira calculated the claimed depreciation solely for the purpose of filing the instant claim and did not make any modification to its historical books and records to reflect the claimed depreciation.

In support of its calculation of the claimed depreciation for the purpose of making the instant claim, Quivira contends that it could have recorded the depreciation in question during the claim period and would have done so had it known then that it would be able to receive reimbursement. In support of its contention that it could have recorded the depreciation in question, Quivira cites the acquisition of its stock by Rio Algom Mining Corporation (Rio Algom) in 1989. Quivira contends that Rio Algom could have (i) written up the value of the equipment to 1989 market values and (ii) pushed down those values to Quivira's books.

Aside from its assertion that it could have contemporaneously reported the claimed depreciation, Quivira argues that the equipment in question decreased in value over the course of the reclamation effort and that Quivira is entitled to reimbursement for that decrease. Quivira also appears to argue that, regardless of the decrease in value, the government benefitted from the use of the equipment and, therefore, must reimburse Quivira for that benefit.

2. Whether the Claimed Depreciation is Allowable

The EPACT provides for reimbursement of the federal portion of a licensee's reclamation "costs." Thus, contrary to Quivira's argument, the EPACT does not provide for reimbursement based on the purported "benefit" to the federal government.

Although the EPACT provides for the reimbursement of "costs" supported by "reasonable documentation," the EPACT does not specify the types of costs that are allowable or what constitutes "reasonable documentation." Instead, the EPACT confers upon the DOE the responsibility for promulgating regulations and making determinations concerning those issues.

The DOE made a general determination in the DOE Guidance that depreciation of equipment that has already been expensed or fully depreciated is not an allowable cost. The Draft DOE Guidance had identified "charges for fully depreciated or fully costed equipment" in a list of "non-reimbursable" costs. Draft DOE Guidance at II-8. The final DOE Guidance reiterated that rule:

Depreciation also should not be charged for equipment which has been fully depreciated or fully costed, regardless of whether the depreciation or costing occurred during the conduct of reimbursable or non-reimbursable activities.

DOE Guidance at II-4. The final DOE Guidance also identified "charges for fully depreciated or fully costed equipment" in a list of "non-reimbursable" costs. Id. at II-8.

Quivira argues, in essence, that the DOE Guidance should not be applied to the instant situation, because Quivira has not recovered the full value of the equipment from the DOE. Thus, under Quivira's view, the DOE Guidance would be applied only when a licensee had, over a period of time, been reimbursed for the full value of the equipment and then attempted to claim (i) depreciation a second time or (ii) a use charge. That view is contrary to the DOE Guidance, which expressly states that depreciation on equipment that has already been expensed or fully depreciated is non- reimbursable "regardless of whether the depreciation or costing occurred during the conduct of reimbursable or non-reimbursable activities." DOE Guidance at II-4.

Quivira also argues that, regardless of the DOE Guidance, it is entitled, as an equitable matter, to the claimed depreciation under the EPACT. Quivira argues that the equipment had value which decreased over the course of the claim period.

As an initial matter, we question Quivira's assertions concerning the market value of the equipment at the beginning of the claim period. The market values were based on general industry 1989 data for the relevant model and age of each piece of equipment. Thus, the valuation of the equipment (i) was not based on an actual inspection by an independent appraiser and (ii) did not take into account the radioactive contamination of the equipment. Quivira itself has indicated that the cost of decontaminating the equipment would preclude its sale and, instead, result in on-site burial.

We also question whether the value of the equipment declined over the claim period. The DOE has reimbursed Quivira for $690,000 for major maintenance work, including engine overhauls and rebuilding transmissions, which may have preserved the useful life of the equipment. That amount was in addition to another $167,000 for parts and consumable supplies that were installed or consumed in Quivira's maintenance shop.

Finally, even assuming that some decline in actual value may have occurred, that decline is not a reimbursable cost under the EPACT. Even Quivira concedes that the conventional method of recognizing the cost of capital equipment is amortization at the time of purchase and the recognition of that cost over its useful life as depreciation expense. Quivira also concedes that the disputed depreciation departs from this conventional method in that it is based on a reamortization of the equipment at the beginning of the claim period based on a determination of the current "market value." There is nothing in the EPACT that suggests that Congress intended such an unorthodox and expanded definition of costs. In fact, such an approach would be contrary to the EPACT, because its net effect would be to shift previously reported capital costs forward to the claim period, thereby creating the potential for reimbursement for capital costs other than those attributable to the reclamation effort.

In making the foregoing determination, we have considered and rejected Quivira's position that its 1989 acquisition by Rio Algom is relevant to its claim. As an initial matter, we note that regardless of whether Rio Algom "could have" written up the value of the equipment in 1989 and pushed down the values to Quivira's books, Rio Algom did not do so. As a result, Quivira's contemporaneous records do not support the instant claim. See 10 C.F.R. § 765.20(d). More importantly, even if Rio Algom had written up the

value of the equipment and pushed down those values to Quivira's books, Quivira would not be entitled to the claimed depreciation. Under Quivira's theory, each subsequent acquisition of Quivira by another entity would permit another write up and round of depreciation on the equipment. The simple fact is that Quivira, not Rio Algom or any subsequent purchaser, is the licensee. Thus, it is Quivira's costs, not those of an acquiring entity, that are reimbursable under the EPACT.

Having concluded that Quivira is not entitled to the claimed depreciation, the question remains whether there is any depreciation that may be claimed on the equipment. Quivira requests the opportunity to amend its claim to request reimbursement for equipment purchased in 1987 and 1988 that, if depreciated from the date of acquisition, would result in depreciation in the claim period. When this issue was raised at oral argument, there was some uncertainty concerning what equipment was at issue, whether it had already been depreciated, and whether the submission of a claim for any such equipment would raise other issues. From the record, it appears that Quivira's ability to document the purchase price of the equipment is one such issue. Based on the foregoing, we have determined that Quivira should be permitted to file an amended claim with respect to depreciation for equipment purchased in 1987 and 1988 for DOE's review and a subsequent determination. Any such determination would be appealable to this Office.

B. Overhead Expenses

1. The Disputed Overhead Expenses

Quivira appeals Environmental Restoration's disallowance of $1,089,460 in reallocated home office expenses. During the claim period, Quivira had allocated home office expenses based on "estimated time to be spent."

Quivira argues that the allocation during the claim period, based on "estimated time to be spent," turned out to be inaccurate for 1991 through 1993. Quivira states that the estimates were based on the assumption that the Wyoming site would require an increased amount of home office attention, based in turn on the assumption that construction would begin on that site. Quivira states that as a result of delay in the initiation of construction, a significant amount of the home office support estimated for the Wyoming site was redirected to support the New Mexico field office, which in turn managed the Lake Ambrosia mill site.

2. Whether the Reallocated Home Office Expenses are Allowable

The regulations provide that documentation prepared contemporaneous to the time the cost was incurred should be used "when available." 10 C.F.R. § 765.20(d)(1). The rationale for relying on a licensee's contemporaneous records is obvious. Allowing a licensee to claim that the costs (or in this instance the allocation of costs) set forth in its contemporaneous records are understated creates an upward bias in claimed costs: a licensee will rely on its contemporaneous records when it is to the licensee's advantage and argue for upward adjustments when it can muster an argument that those records are somehow inaccurate. Accordingly, the ultimate issue is not whether a given cost could have been calculated a different way: instead, the question is whether a licensee can demonstrate that allowing it to depart from its contemporaneous records in a given instance will result in a more accurate statement of its total costs.

As indicated above, Quivira's contemporaneous records did not allocate the claimed costs to the New Mexico field office. As also indicated above, Quivira did not subsequently revise its records to allocate the claimed costs to the New Mexico field office. Thus, contemporaneous records are available and do not support the claimed costs.

Quivira has not demonstrated that a departure from its contemporaneous records in appropriate. Quivira does not challenge the appropriateness of allocating home office expenses based on the time devoted to each field office. Instead, Quivira argues that its contemporaneous estimates of that time were incorrect.

We are simply not persuaded that we should disregard the estimates used in Quivira's contemporaneous records in favor of the current recollections of Quivira employees. It is not clear to us that the latter are more accurate, particularly given the potential for bias. More importantly, we are not convinced that reimbursement for the reallocated home office expenses will result in a more accurate overall statement of costs. It may be correct that the "estimated time to be spent" methodology was based on an erroneous assumption that a construction project would begin on the Wyoming site, and that various other methodologies, if applied at the time, would have resulted in an allocation of a greater proportion of home office expenses to the New Mexico field office. Nonetheless, there may well be other instances in which the methodologies utilized by Quivira were to its advantage. Based on the foregoing, we do not believe that Environmental Restoration abused its discretion in determining that the reallocated costs were not supported by "reasonable documentation" within the meaning of the EPACT.

We recognize that Quivira has argued that a "double standard" exists, i.e, that Environmental Restoration will challenge contemporaneous records when it believes they result in inflated costs, but that Quivira is not entitled to challenge its contemporaneous records when it believes they result in understated costs. Quivira cites the fact that Environmental Restoration did not permit Quivira to record the purchase price of capital equipment as an expense in the year of purchase, even though Quivira had done so in its contemporaneous records.

Quivira's argument ignores the fact that Environmental Restoration undoubtedly relies in numerous instances on the licensee's records and that Environmental Restoration has accepted some of Quivira's requested departures from its records. There is no doubt, however, that Environmental Restoration has the right to disallow a cost when it determines that the licensee has not demonstrated that it is entitled to reimbursement under the EPACT. Thus, in the particular example cited by Quivira, i.e., Environmental Restoration's refusal to allow Quivira to rely on its records showing the cost of equipment as an expense in the year of purchase, Environmental Restoration correctly determined that the cost of equipment should be determined through amortization and depreciation and, therefore, it was entirely appropriate to require that claimed equipment costs be presented in that manner.

V. Conclusion

For the reasons set forth above, we find that the Quivira has not demonstrated that Environmental Restoration incorrectly disallowed the costs at issue. Quivira will, however, be permitted to file an amended claim concerning depreciation for equipment purchased in 1987 and 1988, to be the subject of a further determination by Environmental Restoration.

It Is Therefore Ordered That:

(1) The Appeal filed by Quivira Mining Company, VEA-0007, on October 12, 1995, is hereby granted in part. Quivira may amend its 1989-1993 claim to request depreciation for equipment purchased in 1987 and 1988 and used on the reclamation project. In all other respects, the Appeal is denied.

(2) This is a Final Order of the Department of Energy.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 13, 1997

(1)59 Fed. Reg. 26714 (May 24, 1994). The promulgation of these rules followed a proposed notice of rulemaking issued in August 1993. 58 Fed. Reg. 42450 (August 9, 1993).

Case No. VEA-0010

July 6, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Chevron USA Production Company

Date of Filing: October 26, 1998

Case Number: VEA-0010

In 1996, the Department of Energy (DOE) sold the federal government's interest in the Elk Hills oil field (Naval Petroleum Reserve No. 1) (the Reserve). Prior to the sale DOE and Chevron USA Production Company (Chevron) each owned parcels of oil and gas producing properties within the Reserve, most of which were operated as a unit (the Unit) pursuant to a 1944 unit plan contract (the UPC). The UPC provided for periodic redetermination of each owner's equity interest in the oil and gas produced from the Unit, based on the estimated production allocated to each interest owner.

With the DOE's sale of its interest in the Elk Hills field, the DOE and Chevron agreed to a final redetermination of their equity interests for the period leading up to the sale. Under this agreement, the Assistant Secretary for Fossil Energy (the Assistant Secretary) issues a final equity determination for each of the four producing zones in the Unit. Chevron can appeal such a determination to the Office of Hearings and Appeals (OHA), which renders a decision that is final and not subject to judicial review.

The instant appeal concerns the participating percentages for the Carneros Zone. In 1976, the Carneros Zone was recognized as commercially productive and the participating percentages established as: DOE, 100 percent; Chevron, 0 percent. In May 1998, the Assistant Secretary finalized those percentages, on the ground that the Unit did not include any portion of the Carneros Zone underlying Chevron's property. Chevron appeals that determination. As explained below, we have determined that Chevron's appeal should be denied.

I. Background

A detailed history of the Reserve is set forth in United States v. Standard Oil of Cal., 545 F.2d 624 (9th Cir. 1976). For the purposes of this decision, a brief history will suffice.

The Reserve was established in 1912 and was comprised of parcels of land owned by the United States Government and Chevron's predecessor, Standard Oil of California. The purpose of the Reserve was to conserve oil for the national defense. In contrast, owners of oil producing properties like Chevron are interested in maximizing the economic benefit from those properties.

In 1942, the United States Navy, which was responsible for the Reserve at the time, and Chevron agreed to a unit plan contract for the management of the Reserve. After the Attorney General expressed concerns about the legality of the agreement, the parties terminated the agreement and sought approval for a unit plan contract from Congress. Congress held hearings and, in 1944, authorized a plan. 10 U.S.C. § 7426

(1994). The UPC was executed several days later.

The UPC differed, however, from a typical unit plan contract. Because the purpose of the Reserve was to conserve oil for national defense, the UPC provided for ultimate Navy control over decisions related to the Unit.

The UPC provided a method for determining each party's equity interest in the Unit's production. A party's equity interest in a given producing zone was equal to the acre feet of oil in that zone underlying the party's property in the Unit in 1942 divided by the total acre feet of oil in that zone underlying all Unit property in 1942. The UPC provided for redetermination of equity interests as the parties gained additional knowledge of the underlying geology.

The UPC referred to three commercially productive zones. Those zones, from shallowest to deepest were: the Dry Gas Zone, the Shallow Oil Zone, and the Stevens Zone. The UPC set forth the initially established participating percentages for the three zones.

In 1948, the parties entered into a second contract, which amended and supplemented the UPC (the 1948 A&S Agreement). The parties again amended the UPC in 1966 and 1976.

In 1976, the Unit recognized a fourth zone as commercially productive. That zone - the Carneros Zone - lies below the Stevens Zone and is the zone at issue in this appeal. The Assistant Secretary determined the equity interests as: DOE, 100 percent; Chevron, 0 percent. Accordingly, the Unit allocated to the Navy 100 percent of the costs of producing from that zone, as well as 100 percent of the resulting revenues.

In 1977, Congress transferred jurisdiction over the Reserve from the Navy to the newly established DOE. The Assistant Secretary is responsible for decisions related to the Reserve.

In 1980, the Engineering Committee for the Unit was in the process of making a third equity redetermination for the Stevens Zone. As part of this process, the Engineering Committee recommended that the equity redetermination take into account oil in the Stevens Zone underlying portions of various parcels of land (Sections 9R, 14Z, 23Z, and 25Z) that were not part of the Unit. As a result, the Assistant Secretary added those areas "down to and including the Stevens Zone." See DOE Response Brief, Ex. U (Assistant Secretary Letters dated May 20, 1980 (Section 9R); June 25, 1980 (Section 25Z); September 16, 1980 (Sections 14Z and 23Z)); Map Showing Unit Additions (DOE Response Brief, Ex. K), submitted at January 26, 2000 Hearing. One of the areas - the Section 25Z addition - is the area at issue in this appeal.

The Engineering Committee made its determination concerning Section 25Z in its May 1980 meeting. In that meeting, the Engineering Committee determined that the Stevens Zone underlying a northeast portion of Chevron's Section 25Z should be added to the Unit. The Engineering Committee stated:

> Structure maps and gross oil sand isochore maps were presented by the Geological Subcommittee for the A and for the B intervals. Portions of these intervals extend into Section 25Z which lie outside the Unit. The Engineering Committee unanimously recommended that the Stevens Zone in the N-1/2 of the NE-1/4 and the N-1/2 of the SE-1/4 of the NE-1/4 of Section 25Z (containing approximately 100 acres) be expeditiously included within the Unit for purpose of revision of percentage participation.

Minutes of the One Hundred Fortieth Meeting of the Engineering Committee at 3-4, Chevron Opening Brief, Ex. 8. In its June 4, 1980 meeting, the Engineering Committee revised this recommendation to include another 2 ½ acres. Minutes of the One Hundred Forty- First Meeting of the Engineering Committee at 3, DOE Response Brief, Ex. M.

In a June 25, 1980 letter, the Assistant Secretary adopted the Engineering Committee's recommendation concerning Section 25Z. Pursuant to her authority under Section 15(b) of UPC, the Assistant Secretary

added the northeast portion of "Section 25Z down to and including the Stevens Zone." The Assistant Secretary directed the Director of Naval Petroleum and Oil Shale Reserves to negotiate the terms and conditions of the inclusion. The Assistant Secretary's June 25, 1980 letter is appended to this Decision and Order and hereinafter is referred to as the June 1980 determination.

In November 1980, the Engineering Committee determined revised equity percentages for the Stevens Zone. The Engineering Committee's report is captioned as "Stevens Zone - Estimated Recoverable Oil and Third Revision of Participating Percentages as of November 20, 1942" (hereinafter the November 1980 Stevens Zone Equity Redetermination). The November 1980 Stevens Zone Equity Redetermination increased Chevron's equity percentage in the Stevens Zone from 16 to 20 percent, retroactive to November 20, 1942, the date of the original unit plan contract.

In 1995, Congress was considering legislation requiring the sale of the United States' interest in the Reserve. In anticipation of the sale, the DOE and Chevron undertook to agree to a final determination of their equity interests in the Unit's production. In a November 1995 letter to the DOE, Chevron set forth the progress of the Engineering Committee and identified, as one of the areas of agreement, equity percentages for the Carneros Zone as: DOE, 100 percent; Chevron, 0 percent.(1)

Later that year, Chevron asserted, for the first time, that it was entitled to a participating percentage of the Unit's Carneros Zone production, based its ownership of Section 25Z. The DOE responded that the Section 25Z inclusion did not include the underlying Carneros Zone. The DOE maintained that the June 1980 determination limited the inclusion to zones above the Carneros Zone.

In 1997, the DOE and Chevron agreed to a process for determining their final equity interests in the Unit's production. See May 1997 Agreement Regarding Equity Redetermination Process. Under that agreement, the Assistant Secretary for Fossil Energy (the Assistant Secretary) issues a final equity determination for each zone from which the Unit produced crude oil, and Chevron has the right to appeal to the OHA. Under this agreement, the OHA's decision is final and not subject to judicial review.

In February 1998, the United States sold its interest in the Reserve. With the sale, the UPC was terminated.

In May 1998, the Assistant Secretary issued her final equity determination for the Carneros Zone. The Assistant Secretary determined that the June 1980 determination was expressly limited to zones above the Carneros Zone and, therefore, did not bring the Carneros Zone underlying Section 25Z into the Unit. Accordingly, the Assistant Secretary determined that the participating percentages for the Carneros zone as: DOE, 100 percent; Chevron 0 percent.

Chevron appeals from the Assistant Secretary's May 1998 determination. Chevron contends that the June 1980 determination did include the Carneros Zone and, therefore, that Chevron is entitled to a portion of the Unit's Carneros revenues.

In a February 1999 letter, the OHA addressed the scope of the appeal. The OHA stated that the appeal was limited to the legal issue of whether the Assistant Secretary included the Carneros Zone underlying a portion of Section 25Z in the Unit.

II. Standard of Review

Under the May 1997 agreement with the parties, the issue whether the Carneros Zone underlying Section 25Z was part of the Unit is a legal issue that OHA considers de novo. See May 1997 Agreement § B.11.(2) Accordingly, the OHA does not give any deference to the Assistant Secretary's position on that issue.

III. Analysis

It is undisputed that, prior to the June 1980 determination, Section 25Z was not part of the Unit. It is also undisputed that the June 1980 determination added a northeast portion of Section 25Z to the Unit. The only dispute is whether the Section 25Z inclusion had a zonal limitation. The Assistant Secretary argues that the Section 25Z inclusion was limited to zones "down to and including the Stevens Zone" and, therefore, did not include the lower Carneros Zone; Chevron argues that the Section 25Z inclusion had no zonal limitation and, therefore, did include the Carneros Zone.

A. Section 15(b) of the UPC

The Assistant Secretary issued the June 1980 determination pursuant to Section 15(b) of the UPC. Section 15(b) of the UPC gives the Assistant Secretary unilateral authority to include additional lands in the Unit. Under the UPC, the Assistant Secretary can add lands to the Unit by finding that the lands lie on the same geologic structure as the 1944 limits of the Reserve and that it is desirable to include the lands. The Assistant Secretary then directs the negotiation of the terms and conditions of the inclusion; if negotiations fail, the Assistant Secretary decides the terms and conditions upon a fair and equitable basis.

B. The June 1980 Determination

On its face, the June 1980 determination added Section 25Z subject to a zonal limitation. As discussed below, the determination uses the phrase "Section 25Z down to and including the Stevens Zone" twice in the relevant letter, both in the paragraph concerning the Assistant Secretary's finding that the property to be included lies on the same geologic structure as the 1944 limits of the Reserve and in the paragraph concerning the Assistant Secretary's finding that the inclusion of the property is desirable.

The June 1980 determination consists of three paragraphs. In the first paragraph, the Assistant Secretary makes her finding concerning geologic structure. The first paragraph provides in full:

> Geologic and engineering data have been obtained which show that the following portion of Chevron's Section 25Z down to and including the Stevens Zone is on the same geologic structure underlying the present (1944) limits of Naval Petroleum Reserve No. 1. The specific area is the N ½ of the NE 1/4, the N ½ of the SE 1/4 of the NE 1/4 and the NE 1/4 of the SE 1/4 of the SE 1/4 of the NE 1/4 of Section 25, T.30 S., R.22 E., M.D.B.&M, consisting of approximately 102.5 acres. I have examined the geologic and engineering data and have determined that the above portions of Section 25Z are, in fact, on the same geologic structure underlying the 1944 limits of the Reserve.

June 1980 determination, 1st ¶ (emphasis added). In the second paragraph, the Assistant Secretary makes her finding that it is desirable to include "Section 25Z down to and including the Stevens Zone" in the Unit. The second paragraph provides in full:

> Section 15(b) of the Unit Plan Contract provides that if the Secretary finds that lands outside the Unit are on the same geologic structure underlying the present limits of the Reserve, the Secretary has the unilateral right to determine whether it is desirable to include such lands under the terms of the Unit Plan Contract. In accordance with this section and pursuant to the delegation of authority to me from the Secretary of Energy, I find that, in order to secure the benefits of unit operations of separately-owned lands overlying a common pool or reservoir, it is desirable to include the above-noted portion of the northeast quarter of Section 25Z down to and including the Stevens Zone, as defined in Section 2(c) of the Unit Plan Contract, under the terms and conditions of that contract. This determination is effective as of this date.

Id., 2nd ¶ (emphasis added). Finally, in the third paragraph, the Assistant Secretary directs the relevant official to enter into negotiations to arrive at terms and conditions for "this inclusion." The third paragraph provides in full:

> I am requesting that the Director, Naval Petroleum and Oil Shale Reserves, enter into negotiations with Chevron to arrive at terms and conditions for this inclusion.

Id., 3d ¶. As the foregoing indicates, the first two paragraphs contain the requisite findings for making the inclusion, and the third paragraph contains a directive to negotiate the terms and conditions of the inclusion.

C. The Plain Meaning of the June 1980 Determination

The plain meaning of the June 1980 determination is that the inclusion did not encompass the Carneros Zone.

The June 1980 determination describes the area to be included as a portion of "Section 25Z down to and including the Stevens Zone." The first two paragraphs - making the requisite findings for the inclusion - both use that phrase.

The plain meaning of the phrase "Section 25Z down to and including the Stevens Zone" is that any lower zone is not included. The words "down to and including ?X'" do not encompass anything lower than ? X.'" Thus, the words "down to and including the Stevens Zone" do not include the lower Carneros Zone.

As the foregoing indicates, the June 1980 determination limits the Section 25Z inclusion to "down to and including the Stevens Zone," and the plain meaning of that phrase excludes the lower Carneros Zone. Accordingly, Chevron's assertion that the June 1980 determination included the Carneros Zone is simply inconsistent with the clear language of that determination.

Despite the clear language of the determination, Chevron argues that the June 1980 determination included the Carneros Zone. As explained below, we have considered and rejected these various arguments.

D. Chevron's Arguments

Chevron argues that the plain meaning of the June 1980 determination is that the Carneros Zone was included in the Unit. In the alternative, Chevron argues that the June 1980 determination should be interpreted to include the Carneros Zone because an exclusion of the Carneros Zone would violate Section 15(b) of the UPC.

1. The Sentence in the Determination Referring to the Coordinates of the Northeast Portion of Section 25Z

First, Chevron notes that the second sentence of the first paragraph - which defines the coordinates of the northeast portion of Section 25Z - does not contain a zonal limitation. Chevron argues that the lack of a zonal limitation in that sentence is significant.

Chevron's reliance on the sentence containing the coordinates is unwarranted. The coordinates merely define the specific portion of Section 25Z at issue, i.e., the northeast portion. The two sentences in question provide:

> Geologic and engineering data have been obtained which show that the following portion of

> Chevron's Section 25Z down to and including the Stevens Zone is on the same geologic structure underlying the present (1944) limits of Naval Petroleum Reserve No. 1. The specific area is the N ½ of the NE 1/4, the N ½ of the SE 1/4 of the NE 1/4 and the NE 1/4 of the SE 1/4 of the SE 1/4 of the NE 1/4 of Section 25, T.30 S., R.22 E., M.D.B.&M, consisting of approximately 102.5 acres.

June 1980 determination, 1st ¶ (emphasis added). The first sentence refers to the "following portion" of Section 25Z; the second sentence provides the coordinates for that "portion" of Section 25Z. Thus, the coordinates in the second sentence do not modify, let alone negate, the phrase "down to and including the Stevens Zone."

Aside from the fact that the reference to the coordinates does not modify or negate the zonal limitation in the Assistant Secretary's finding concerning the geologic structure, Chevron's reliance on the reference to coordinates ignores the fact that the Assistant Secretary's desirability finding contained the language "down to and including the Stevens Zone." The operative sentence - the third sentence in the second paragraph - states:

> In accordance with [section 15(b) of the UPC] and pursuant to the delegation of authority to me from the Secretary of Energy, I find that, in order to secure the benefits of unit operations of separately-owned lands overlying a common pool or reservoir, it is desirable to include the above-noted portion of the northeast quarter of Section 25Z down to and including the Stevens Zone, as defined in Section 2(c) of the Unit Plan Contract, under the terms and conditions of that contract.

Id. 2d ¶ (emphasis added). Accordingly, when the June 1980 determination is viewed in its entirety, there is no basis for Chevron's argument that the sentence specifying the coordinates for the included portion of Section 25Z evidences an intent to include that area without zonal limitations.

2. The Absence of the Words "Excluding the Carneros Zone"

Second, Chevron appears to argue that the plain meaning of the phrase "Section 25Z down to and including the Stevens Zone" does not exclude the lower Carneros Zone. Chevron reasons that the phrase "down to and including the Stevens Zone" is merely "inclusive" and does not purport to exclude the Carneros Zone.

This argument is unpersuasive. Chevron's argument would make the phrase "down to and including the Stevens Zone" superfluous, an interpretation to be avoided. See Restatement (Second) of Contracts § 203 (1981); Corbin on Contracts, § 549 (interpretation of a contract as a whole) & § 549 n.26 (every word and phrase should be given some effect if reasonably possible) (rev. ed. 1960). The simple fact is that both of the requisite findings - that the inclusion lie on the same geologic structure and that it be desirable - were limited to a portion of "Section 25Z down to and including the Stevens Zone." The Assistant Secretary's failure to add "and excluding the Carneros Zone" did not bring the Carneros Zone within the language "down to and including the Stevens Zone," nor did the Assistant Secretary make any supplementary findings concerning the geology of, or desirability of including, the Carneros Zone. Accordingly, the lack of the words "excluding the Carneros Zone" did not bootstrap the Carneros Zone, or any lower zone for that matter, into the requisite geological and desirability findings.

3. The June 1980 Determination Must be Interpreted to Include the Carneros Zone in Order to Comply with the UPC

Third, Chevron argues that, regardless of what the June 1980 determination states or the parties' subsequent conduct indicates, the June 1980 determination should be interpreted as adding a portion of Section 25Z without zonal limitations. Chevron contends that under the UPC the exclusion of a zone is a

"term or condition" and thus must be (i) agreed to by the parties or (ii) the subject of a separate determination by the Assistant Secretary that the exclusion is fair and equitable. Both parties agree that the Carneros Zone was not excluded through the terms and conditions process.

In support of its position that a zone cannot be excluded from the inclusion determination, Chevron notes that UPC Section 15(b) authorizes the Assistant Secretary to add "lands." Chevron argues that under the UPC "lands" are two dimensional, and Chevron cites various portions of the UPC, particularly Sections 2(b) and 2(e) which state that the parties share in the production from each commercially productive zone underlying the Reserve. Accordingly, Chevron argues that once the Assistant Secretary adds lands, all commercially productive underlying zones are brought into the Unit pursuant to Sections 2(b) and 2(e) of the UPC. Based on that premise, Chevron reasons that the exclusion of a zone can occur only through the terms and conditions process.

The UPC unquestionably bound the Secretary of Energy and Assistant Secretary. Were Chevron's reading of the UPC correct, this would be a telling argument.(3) However, the Chevron reading is not correct. Chevron's argument is inconsistent with Section 15(b)'s distinction between the process for including lands and the process for determining the terms and conditions of such inclusion.

Section 15(b) of the UPC provides for a two-step process: the first, consisting of the inclusion or addition of lands; the second, consisting of the determination of the terms and conditions of such addition. Section 15(b) provides in full:

> It is contemplated that it may hereafter be desirable to include under the terms of this contract other lands located outside of the present limits of the Reserve but which lie on the same geologic structure underlying the present limits of the Reserve. If and when any such situation shall arise, Navy and Standard will endeavor to agree upon the terms and conditions on which such additional lands may be included under this contract upon the basis of the estimated acre-feet of commercially productive formations in each commercially productive zone underlying such additional lands. If Navy and Standard shall be unable to agree upon the terms and conditions on which such additional lands may be included, the Secretary of the Navy shall decide such terms and conditions upon a fair and equitable basis, and such decision in each such instance shall be final and shall be binding upon Navy and Standard. In determining the estimated acre-feet of commercially productive formation underlying such additional lands, the Secretary shall, at Standard's request or on his own initiative, secure and consider an advisory report from an independent petroleum engineer in the manner provided in paragraph (b) of Section 9.

UPC § 15(b) (emphasis added). Thus, the first sentence concerns the inclusion of lands and the next three sentences concern the terms and conditions of such inclusion.

The Ninth Circuit has recognized that the inclusion determination and the terms and conditions determination are two independent determinations. In United States v. Standard Oil Co. of Cal., 618 F.2d 511 (9th Cir. 1980) (Chevron), the Acting Secretary of the Navy determined that it was desirable to add Section 7R. The parties then entered into negotiations for the terms and conditions of compensation to Chevron. They could not agree, and the Acting Secretary made a unilateral decision regarding "fair and equitable" terms of compensation. The court described Chevron's challenge as follows:

> [T]he issues of material fact tendered by Standard implicated both the "inclusion" and the "fair and equitable" terms and conditions issues, although the government's motion for summary judgment sought summary judgment only as to "inclusion." Standard sought to link the two issues. It claimed that the district court could not, as the government's motion requested, grant partial summary judgment on the inclusion issue and then later decide, at trial,

> whether the Acting Secretary's terms and conditions determination was "fair and equitable." Standard argued that the "desirability" of including section 7R in the Unit could not be determined without also deciding the cost - i.e., the terms and conditions - of such inclusion.

Chevron at 514-15. The lower court rejected Chevron's contention that the inclusion and terms and conditions determinations were linked, and Chevron did not appeal that ruling. Id. at 515 n.6. On appeal, Chevron separately challenged the inclusion and terms and conditions determinations. The Ninth Circuit upheld the lower court on the inclusion determination, but remanded the terms and conditions determination. The Ninth Circuit noted the different standards of review for the two determinations - de novo review for inclusion determinations, Wunderlich Act review for terms and conditions determinations. Id. at 518-19. Finally, the Ninth Circuit decision discussed the terms and conditions determination as relating to the compensation resulting from an inclusion, not the inclusion itself. Id. at 514, 515.

Chevron's argument that a zonal limitation is a term or condition does not comport with the plain meaning of Section 15(b). A zonal limitation concerns what is included in the Unit and, therefore, is part of an "inclusion" determination. A zonal limitation does not relate to the compensation for an inclusion and, therefore, is not a term or condition of an inclusion.

Moreover, Chevron's argument that a zonal limitation is a term or condition is inconsistent with Section 15(b)'s different treatment of inclusion determinations and terms and conditions determinations. First, Chevron's argument is inconsistent with the different standards of review applicable to inclusion determinations and terms and conditions determinations: inclusion determinatons are reviewed de novo, terms and conditions determinations are reviewed under the Wunderlich Act. Chevron, 618 F.2d at 518-19. If Chevron's argument were correct, a court would review the surface area of an inclusion under the de novo standard but the zonal limitation under the Wunderlich Act standard. There is nothing in the UPC to indicate that such a problematic review was intended, and such a review is inconsistent with Chevron's agreement that we review this case under the de novo standard. Second, Chevron's argument is inconsistent with the Assistant Secretary's unilateral authority under Section 15(b) to determine what is included in the Unit. If Chevron's argument were correct, the Assistant Secretary's inclusion of lands could be partially reversed through the negotiation process in which lower level government employees and Chevron could agree to exclude certain zones. This is a novel idea and has never occurred historically. There is nothing in the UPC to indicate that the Assistant Secretary's unilateral authority was subject to such reversal. Finally, Chevron's argument that the UPC required that zonal limitations be made through the terms and conditions process is inconsistent with the Section 15(b) requirement that the Assistant Secretary find that the land in question is on the "same geologic structure" as the 1944 limits of the Reserve. The phrase "same geologic structure" refers to oil pools and reservoirs, see UPC §2(a)(5), extending within the 1944 limits of the Reserve, and it is possible that some, but not all, of the pools and reservoirs underlying a specific area of land, extend within the 1944 limits of the Reserve. See, e.g., A&S § 5(b) (recognizing that newly discovered formation underlying a Section 15(b) addition could be added if it "extends within the [1944] boundaries of the Reserve"). Nonetheless, under Chevron's view, an underlying formation would automatically be included regardless of whether it extended within the 1944 boundaries of the Unit, a result clearly contrary to the requirement in Section 15(b) that the formation be on the same geologic structure.

As the foregoing indicates, Chevron's contention that zonal limitations could be made only through the terms and conditions process is inconsistent with Section 15(b). For that reason, we reject Chevron's contention that, to be consistent with the UPC, the June 1980 determination should be interpreted as adding a portion of Section 25Z without zonal limitations.

4. The Parties' Post June 1980 Conduct

Fourth, Chevron argues that the parties' post June 1980 conduct is consistent with its interpretation of the June 1980 determination. Chevron cites various documents and conduct.

As indicated above, the language in the June 1980 determination is clear, and none of the parties' post June 1980 conduct can change that meaning. See, e.g., Chevron, 618 F.2d at 518 (citing Corbin on Contracts § 1294, at 1065 (one volume ed. 1952); see also John D. Calamari & Joseph M. Perillo, Contracts § 167 (3d ed. 1987) (plain meaning rule "still employed frequently or on occasion by the great majority of the jurisdictions in this country"). In any event, if we were to consider the parties' post June 1980 conduct, Chevron's examples are unpersuasive. Although Chevron cites geological maps and discussions, geological information does not define the Unit. Moreover, the Assistant Secretary has offered her own documents which support a contrary position - her nearly contemporaneous July 1980 letter to the California Division of Oil and Gas describing the Section 25Z addition to the Unit with the zonal limitation, DOE Answer, Ex. P, and Chevron's 1995 letter to the DOE noting agreement among the Engineering Committee that Chevron did not have an equity interest in the Carneros Zone, DOE Answer, Ex. W. Accordingly, post June 1980 documents support the Assistant Secretary's position, rather than Chevron's position.(4) Finally, although Chevron cites its failure to drill offset wells in the Section 25Z area as indicative of its belief that the Unit included the Section 25Z Carneros Zone, the DOE cites, inter alia, the Unit's failure to drill wells into the Section 25Z Carneros Zone as indicative of the parties' belief that the zone was not part of the Unit. We simply do not believe that there is adequate evidence of the geology of the zone and the movement of oil within to rely on either argument. In this regard, we note that May and June 1980 meetings of the Engineering Committee - which prompted the June 1980 determination - did not discuss the geology of the Carneros Zone or movement of oil within, let alone make any recommendations concerning it. Accordingly, we decline to accord any significance to either party's argument about its well drilling activity.

5. Equity

Chevron contends that equity requires that it receive a portion of the Unit's production from the Carneros Zone. As the parties are aware, this appeal is limited to the issue whether the Assistant Secretary's June 1980 determination included the Carneros Zone underlying Section 25Z in the Unit. Arguments concerning equity are relevant only insofar as they are used to assess and interpret the June 1980 determination.

Chevron does not contend that the Unit was operated to produce crude oil from the Carneros Zone underlying Section 25Z. Although Chevron intimated that the Unit drained oil from Chevron's lands, Chevron did not pursue that argument and preliminary engineering studies undertaken by the parties do not support such an argument.

In essence, Chevron's equity argument is based on its position that the June 1980 determination had to include the Carneros Zone in order to be consistent with the UPC. As explained above, we have rejected the argument that the June 1980 determination had to include the Carneros Zone in order to be consistent with the UPC. Accordingly, Chevron has not presented any equity argument bearing on the effect or interpretation of the June 1980 determination.

III. Conclusion

As the foregoing indicates, we have determined that the Assistant Secretary did not include the Carneros Zone underlying Section 25Z in the Unit. Accordingly, the Assistant Secretary correctly determined that the participating percentages for the Carneros Zone as: DOE, 100 percent; Chevron 0 percent.(5)

It Is Therefore Ordered That:

(1) The Appeal filed by Chevron USA Production Co. on October 26, 1998 be and hereby is denied.

(2) This is a final agency Order that is not subject to judicial review.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 6, 2000

(1)The letter identified, as the second area of agreement, equity percentages for the Dry Gas Zone, and as the third area of agreement, a procedure for finalizing the equity percentages for the Shallow Oil Zone. The letter then identified, as the two areas of disagreement - the equity finalization for the Stevens Zone, and the methodology for final settlement, once the final zone equities were established.

(2)Section B.ll of the May 1997 agreement provides that "Chevron and DOE agree that any challenge by Chevron to the [Assistant Secretary's] decision regarding the ?25Z area' legal issue (which affects only the Carneros Zone) shall be reviewed ?de novo' by OHA and that any OHA determination of the matter shall be final and binding on the parties."

(3)If Chevron's argument were correct, (i) we would have to interpret the June 1980 determination as not intending a zonal limitation or, if the express zonal limitation did not permit such an interpretation, (ii) we would have to consider the legal effect of a determination with a zonal limitation, i.e., whether the determination operated to include all the zones or whether the zonal limitation rendered the determination void.

(4)We have also considered and rejected Chevron's argument that the 1948 A&S Agreement supports its position that Section 15(b) does not permit zonal limitations in the inclusion process. A provision in that agreement - later eliminated - provided for the inclusion of all commercially productive zones underlying an area. The presence of that language - and its absence in Section 15(b) - indicates, if anything, that Section 15(b) did not have such a requirement.

(5)Given this conclusion, we need not consider the Assistant Secretary's argument that Chevron's claim in this appeal is barred by the statute of limitations.

Case No. VEA-0014

September 5, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Atlas Corporation

Date of Filing: February 28, 2000

Case Number: VEA-0014

Atlas Corporation (Atlas) appeals a determination by the DOE's Albuquerque Operations Office (the DOE office) that disallowed $1,010,711 in costs claimed pursuant to 10 C.F.R. Part 765. Atlas claims that the $1,010,711 represents the value of salvage transferred to a contractor in exchange for demolition, decontamination, and disposal of a uranium mill and equipment. As explained below, the DOE office correctly disallowed the claimed costs.

I. Background

In 1978, Congress enacted the Uranium Mill Tailings Radiation Control Act of 1978, which requires that mill owners remediate the contamination caused by uranium tailings and other by-product material.(1) In 1980, Congress directed the DOE to develop a plan for assisting mill owners for the portion of the work attributable to the processing of uranium sold to the federal government.(2) Congress directed that DOE, in developing the plan, study the amount of contamination attributable to such processing, as well as different methodologies for determining the costs of remediating the contamination.(3) Finally, Congress directed the DOE to consult with the mill owners in connection with its development of a plan.(4)

In 1982, the cognizant DOE office issued a report setting forth the results of its visits to mill sites and consultation with mill site owners.(5) The 1982 report includes the results of a site visit to Atlas' mill near Moab, Utah (hereinafter the Moab mill site),(6) including Atlas' comments on the various suggested methodologies for determining the federal portion of the remediation costs.(7)

In 1992, Congress enacted the Energy Policy Act of 1992 (the 1992 cost reimbursement statute), which requires that licensees be reimbursed for the portion of their total remedial action costs that is attributable to the processing of uranium sold to the federal government.(8) Pursuant to the statute's direction to issue implementing regulations,(9) the DOE published proposed regulations in August 1993 and final regulations in May 1994.(10) In conjunction with the final regulations, the DOE published a "Draft DOE Guidance" for the preparation of claims,(11) which was finalized in April 1995.

The 1992 cost reimbursement statute provides for reimbursement for costs "incurred.(12) The statute also requires that claims for reimbursement be accompanied by "reasonable documentation.(13)

The implementing regulations require that costs be "incurred" and that the licensee "utilize generally accepted accounting principles consistently throughout the claim." 10 C.F.R. § 765.20(f). With respect to the statutory requirement that the licensee submit "reasonable documentation," the regulations require that

the licensee use documentation contemporaneous to the time the cost was incurred "when available." The regulations limit the use of non- contemporaneous documentation to situations when it is the "only means available" to document the claimed costs. 10 C.F.R. § 765.20(d)(2).

Under the regulations, a licensee submits its claimed total remedial action costs to the DOE. The DOE then reviews those costs and issues a determination, either allowing or disallowing the claimed costs. The licensee is entitled to reimbursement for the federal portion of those costs. The federal portion is based on the mill's federal reimbursement ratio, i.e., the mill's by-product material attributable to processing of uranium sold to the federal government divided by the licensee's total by-product material as of October 24, 1992. The reimbursable amount is determined by multiplying the federal reimbursement ratio by the firm's total approved remedial action costs.

This case concerns Atlas' remediation of its Moab mill site. Atlas has a federal reimbursement ratio of .561, which is not in dispute.

In 1994, Atlas submitted a claim for its remediation work for June 1987 through June 1994.(14) The DOE allowed $4.5 million of the claim, but did not allow the $500,000 that Atlas claimed represented the value of salvage transferred to a contractor in exchange for its demolition, dismantling, decontamination, and disposal of the mill and equipment.(15) Atlas resubmitted the claim, which it had upwardly revised to $1 million, and the DOE disallowed the revised claim in the January 2000 determination that is the subject of this appeal.(16) During the course of the appeal, Atlas upwardly revised its claim again, to $1.3 million (hereinafter referred to as the $1 million salvage value claim or the salvage value claim).

The salvage value claim concerns Atlas' contract with American Reclamation and Disposal (ARD). In 1992, Atlas contracted with ARD to "decommission, demolish, and dispose" of the mill and equipment.(17) The contract provided that ARD's compensation for this work would be $315,000 plus the "amounts, if any" that Atlas received for salvage.(18) Thus, the contract gave ARD an incentive to maximum the amount of salvage that it produced while minimizing the associated costs.

ARD's subcontractor did not adequately decontaminate some of the salvage, and a subsequent Nuclear Regulatory Commission (NRC) investigation confirmed that contaminated salvage had left the site, the most notable being two ball mills sold and transported to a firm located in Washington state.(19) The NRC fined Atlas $5,000 and required that it arrange for the decontamination of such salvage and that Atlas adopt sufficient procedures to avoid any more such releases.(20)

Recognizing ARD's incentive to minimize decontamination costs,(21) Atlas terminated the ARD contract and hired a new contractor. At that time, Atlas had paid ARD $30,000, and ARD had removed a significant amount of salvage from the site. Atlas paid the successor contractor approximately $1 million to complete the work. The DOE allowed the $30,000 and $1 million payments as costs; the disallowed claim for the salvage value of material that ARD removed from the site is the only matter at issue in this appeal.

Atlas originally did not provide any documentation of the salvage claim. After the DOE questioned the claim, Atlas submitted undated and unsigned ARD "purchase order" forms, which form the basis of its salvage claim. These forms were not prepared during the decommissioning work but rather during the pendency of the instant claim. During the decommissioning work, Atlas used "bills of sale" to transfer the salvage to ARD. Atlas maintains that, in connection with its claim, it furnished the bills of sale to ARD and requested that ARD assign a value to the property listed. Atlas further maintains that, in response, ARD produced the "purchase orders."

After consulting with the Department of Defense Contract Audit Agency (the DCAA), the DOE office denied Atlas' salvage claim. The DOE office maintains that the claimed costs were not incurred, not computed in accordance with generally accepted accounting principles, and not supported by reasonable documentation.

Atlas appealed the denial of its claim. During our consideration of the appeal, we accepted pre-hearing and post-hearing briefs. An interdisciplinary panel, including an economist, heard oral argument. See June 29, 2000 Hearing Transcript (hereinafter Tr.). In May 2001, Atlas filed its final brief.

Atlas disagrees with each of DOE's grounds for disallowing the costs. Atlas contends that the Atlas/ARD contract was a nonmonetary exchange in which Atlas gave up the salvage in exchange for ARD's decommissioning work. Atlas argues that it could have sold the salvage for $1 million, used the $1 million to pay a contractor to perform the decommissioning work, and then requested reimbursement for the $1 million payment. Accordingly, Atlas argues, failure to recognize the claimed salvage value as an incurred cost elevates form over substance. Further, Atlas contends, it has provided reasonable documentation of the $1 million salvage value. Atlas argues that the total of the values shown on the ARD forms is consistent with various bids and estimates that Atlas received for the decommissioning work. In addition, Atlas argues that the total of the values shown on these forms is consistent with an appraisal by an independent accounting firm that Atlas retained during the course of this appeal.

As explained below, Atlas has not demonstrated that it incurred costs equal to the claimed salvage value. Atlas has not demonstrated that the potential salvage had any value, let alone the claimed value.

II. Analysis

A. Whether the Salvage Value Is an Incurred Cost

The value of salvage which is produced by a decommissioning project is an offset to the cost of the project. This is true, regardless whether a licensee performs its decommissioning work in-house or contracts with another firm to do the work. If a licensee performs the decommissioning work in-house, and the licensee incurs $1 million in costs and receives $50,000 for resulting salvage, the licensee has incurred a net cost of $950,000. Similarly, if a licensee contracts with an outside party to perform the work in exchange for the material salvaged in that work, the cost of decommissioning work is zero. In the latter case, the contractor, not the licensee, incurs the costs of the demolition and dismantling that produces the salvage, as well the costs of decontaminating, organizing, transporting, and marketing the salvage. Without the contractor's decommissioning efforts, there is mere potential salvage value. For this reason, viewing salvage as independent of the decommissioning effort overstates salvage value.(22)

The failure to reduce the cost of the decommissioning project by the value of the salvage produced by the project would encourage licensees to incur excessive costs to produce salvage, uneconomic behavior that would inflate reimbursable costs. A licensee with a .5 reimbursement ratio, such as Atlas, would have an incentive to incur incremental costs up to two times the amount realized for the salvage, because until that point the licensee's out-of-pocket costs would be less than the resulting salvage. Accordingly, we reject any argument that a licensee's costs are its total costs, without an offset for the value of salvage produced.

Indeed, we question whether giving up the right to salvage produced by a decommissioning project would ever give rise to an incurred cost. As indicated above, the value of salvage produced by a decommissioning project is an integral part of the project and thus is an offset to the cost of the project. If the right to the salvage of a portion of the facility is so valuable that a third party would pay the licensee for the right to perform the decommissioning work and retain the salvage, then the licensee would not have incurred a decommissioning cost but rather profited from the decommissioning project. We recognize that prior to the decommissioning project some items from the plant may have been sold by Atlas. These are examples of items where the cost of salvaging the item was less than the price that the item could be sold for. The DOE has not suggested that that benefit be used to offset the $1,030,000 in costs that the DOE approved.

We recognize that Atlas has argued that its arrangement with ARD was a nonmonetary exchange. Accounting rules recognize that the value of an item given up in an exchange for services can constitute

the cost of those services. In this case, however, Atlas did not give up material with independent value in exchange for ARD's work. Instead, Atlas gave up the right to potential salvage that only would be realized during the salvage process. Indeed, a review of the ARD "purchase orders" indicates that almost half of Atlas' original claim is attributable to "scrap steel.(23) Thus, at the time that Atlas entered into the agreement with ARD, Atlas had only potential salvage. Atlas had not incurred the demolition and dismantling costs necessary to produce the salvage, let alone the decontamination, transportation, and marketing costs necessary to sell the salvage. The value of the salvage, if any, would have been the estimated market value of the salvage minus (i) the estimated costs of demolition and dismantling necessary to produce the salvage, (ii) the estimated costs of decontamination, transportation, and marketing of the salvage, and (iii) an estimated profit margin that took into account the risks associated with salvaging contaminated material. Thus, what Atlas gave up -- the right to potential salvage -- was worth, if anything, significantly less than the salvaged material.

We also recognize that a licensee might argue that it had equipment or materials that it could have excluded from the decommissioning project, i.e., equipment or material that could be easily marketed without any demolition, dismantling, decontamination or other expenses. The licensee might argue that, in that case, the licensee could sell the equipment and material and pocket the proceeds, while making a larger cash payment to the decommissioning contractor, which would in turn be reimbursable under Part 765.

The foregoing argument would raise an issue of the extent to which a licensee could structure its decommissioning effort in order to maximize its reimbursement. We need not address that issue here, however, because Atlas has failed to present reasonable documentation that any of the items that were sold as salvage could have been sold independent of the decommissioning project.

B. Whether Atlas Has Provided Reasonable Documentation That It Incurred a Cost

The reimbursement regulations and DOE Guidance address the issue of what constitutes reasonable documentation. The reimbursement regulations provide that contemporaneous documentation should be used if available and that non-contemporaneous documentation should be used only if it is the only documentation available. The DOE Guidance states that when a firm's contemporaneous accounting records reflect a zero book value for property, the firm cannot incur a reimbursable cost in connection with that property. We applied that principle in Quivira Mining Co., 26 DOE ¶ 80,167 (1997). In that case, we held that the licensee did not incur a reimbursable cost for the use of equipment that had already been fully depreciated on the licensee's books.

This case is similar to Quivira, because Atlas' contemporaneous accounting records did not show any value for the mill and equipment. Atlas' actual accounting records for the years 1992 to 1994 do not show any value for the mill and equipment.(24) Atlas argues, however, that one can infer from a comparison of its Securities and Exchange Commission filings that Atlas assigned a market value to the salvage. As we discussed above, the supposed market value of the salvage does not represent the value of the potential salvage. Accordingly, Atlas' strained reading of its SEC filings, even if accepted, does not contradict the fact that its books indicate that the value of the potential salvage, i.e., the value of the mill and equipment independent of a decommissioning effort and its associated costs, was zero. As we stated in Quivira, allowing costs for property with a zero book value would be contrary to the 1992 cost reimbursement statute, because the net effect would be to shift previously reported capital costs forward to the claim period, thereby creating the potential for reimbursement for capital costs not attributable to the reclamation effort. 26 DOE at 80,718.

As just indicated, we find that Atlas' contemporaneous accounting records, showing no value for the mill and equipment, are dispositive of the appeal. Nonetheless, we recognize that Atlas points to other contemporaneous and non-contemporaneous documentation to support its claim and, therefore, we will address that documentation.

Atlas' documentation is designed to support Atlas' claim that the value of the salvage transferred to ARD was $1 million. The documentation consists of (i) ARD's "purchase orders," (ii) sample bills of sales ranging from June 1993 to August 1994, (iii) an independent appraisal, (iv) 1981 and 1987 estimates of decommissioning costs prepared by an independent firm, (v) various bids for the decommissioning work, (vi) the cost of completing the decommissioning after ARD's default, and (vii) before and after pictures of the site. Atlas argues that the ARD valuation and independent appraisal are consistent with the other documents, which show the cost of the work and the amount of demolition.

Atlas' documentation is inadequate for a number of reasons. First, the independent appraisal is based on the descriptions of salvage in the ARD "purchase orders," which are in turn supposed to be based on the descriptions of salvage in the bills of sale. However, as the DOE office points out, the bills of sale are lacking in specificity. For example, the sample bills of sale do not list specific quantities for scrap steel that was salvaged. Instead, they refer to a "load" of scrap steel or, in one case, an approximate amount.(25) Accordingly, the record does not support the descriptions of the property upon which the valuations by ARD and the independent appraiser are based. Second, although Atlas maintains that the valuations take into account the costs associated with producing, decontaminating and marketing the salvage, the record does not support that claim. Instead, the record indicates that the valuations do not adequately consider those costs, particularly the costs and risks associated with the need to decontaminate the equipment. This is amply illustrated in the case of the ball mills, in which Atlas became involved in a contracted dispute over Atlas' liability for its failure to adequately decontaminate. Accordingly, Atlas' documentation does not establish the value of the salvage, either before, or after, decommissioning. In any event, however, as explained above, such documentation would simply not be sufficient to overcome the fact that the most relevant contemporaneous records, i.e., Atlas' accounting records, accorded no value to the mill and equipment.

III. Conclusion

For the reasons set forth above, we find that Atlas has not demonstrated that the DOE incorrectly disallowed the costs at issue. Accordingly, Atlas' appeal is denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Atlas Corporation, VEA-0014, on February 28, 2000, is hereby denied.

(2) This is a Final Order of the Department of Energy.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 5, 2001

(1)42 U.S.C. § 7901 et seq.

(2)Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1981, Pub. L. No. 96-540, § 213, 94 Stat. 3197.

(3)Id.

(4)Id.

(5)U.S. Dep't of Energy Grand Junction Area Office, Commingled Uranium-Tailings Study, DOE/DP-

0011 (June 30, 1982).

(6)Id., pt. 2, A-95 to A-104.

(7)Id. at 103-04.

(8)42 U.S.C. § 2296a(b)(1).

(9)Id. § 2296a-1.

(10)See 58 Fed. Reg. 42450 (August 9, 1993) (proposed regulations); 59 Fed. Reg. 26726 (May 23, 1994) (final regulations, codified at 10 C.F.R. Part 765).

(11)59 Fed. Reg. 26714 (May 23, 1994).

(12)"42 U.S.C. § 2296a(b)(1).

(13)"Id. § 2296a-1.

(14)Atlas Appeal, Exs. 1, 2.

(15)Id., Exs. 3, 5.

(16)Id., Ex. 22.

(17)DOE Brief, Ex. B, at 1.

(18)Id.

(19)DOE Final Brief, Exs. 13-20.

(20)Id., Exs. 20, 21.

(21)Id., Ex. 21.

(22)See DOE Brief, Ex. C (affidavit of DCAA auditor); Transcript of Hearing at 88-94, 107-14.

(23)"See Atlas Brief, Ex. 7, Att. D (ARD "purchase orders").

(24)See DOE Brief, Ex. C (affidavit of Defense Contract Audit Agency auditor).

(25)See Atlas Reply Brief, Ex. 2 (sample bills of sale).

Case No. VED-0001

May 12, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Interlocutory Order

Name of Case: State of Washington

Date of Filing: May 5, 2000

Case Number: VED-0001

This decision will consider a Motion to Conduct Depositions that the Department of Energy (DOE) Office of Civilian Radioactive Waste Management (OCRWM) filed with the Office of Hearings and Appeals (OHA) on February 3, 2000, in connection with an appeal that the State of Washington Department of Revenue (DOR) filed on April 26, 1999.

Procedural Background

The underlying appeal, OHA Case No. VPA-0001, was filed under the Notice of Interpretation and Procedures (NOIP) implementing the "payments-equal-to-taxes" (PETT) provisions of the Nuclear Waste Policy Act of 1982, as amended (NWPA), 42 U.S.C. § 10101 *et seq*. Under the NOIP, the Department of Energy will grant, to a local jurisdiction in which a candidate site for a high-level nuclear waste repository is located, a payment equal to the amount that jurisdiction would receive if it were authorized to tax site characterization activities at that site. *See* 56 Fed. Reg. 42314 (August 27, 1991). The payment authorized by the NWPA is known as a "PETT grant." The history of the PETT program and the Basalt Waste Isolation Project (BWIP) at the Hanford site is described at length in Benton County, Washington, 26 DOE ¶ 80,145 (1996), and will not be repeated here.

By letter dated March 23, 1999, DOE denied the State's application for a PETT grant based on Washington's Business and Occupation ("B&O") Tax. The amount in controversy is substantial; with interest through September 30, 1998, the State calculated the value of its claim as $13,083,694. The fundamental dispute between the State and OCRWM can be summarized as follows for purposes of the present decision. The B&O tax is based on the taxpayer's gross income. Since the BWIP did not have any gross income, the State based its PETT claim on "the most comparable surrogate, the amount of expenditures associated with site characterization at Hanford." Petitioner's Statement of Position at 7. OCRWM maintains that since the BWIP had no gross income, its site characterization activities cannot form the basis for taxation under the Washington B&O tax, and no PETT is due under the theory advanced by the State. The present appeal challenges OCRWM's denial of the State's PETT claim based on the B&O tax.

After the appeal was filed, OHA and the parties held an initial conference on procedures, and agreed that each party would file a "statement of position" by July 15, 1999. Next, OCRWM suggested and the State agreed that the parties pursue discovery through two rounds of requests for admissions, the second of which was completed in December 1999. Based on our experience in the Benton County PETT case, which involved many of the same lawyers and OHA officials, all wanted to minimize the time and

expense of extensive deposition discovery, and to obviate the need for an evidentiary hearing if possible.

During the next two conferences, which took place on January 7 and 21, 2000, OCRWM indicated that it was still not satisfied with the State's answers to its requests for admissions, and asked to take oral depositions of four named current or former employees of the Washington DOR to question them about "dissenting views" at the DOR on the application of the B&O tax to the BWIP in connection with the State's PETT request. The State opposed this request on the grounds that "probing the mind of the decision maker" should not be done, and expressed frustration that so much time had been spent trying to do discovery by the admission requests, apparently without satisfying OCRWM. As an alternative, the State offered to designate some witnesses to be deposed under the type of procedure in Rule 30(b)(6) of the Federal Rules of Civil Procedure (FRCP). OCRWM declined to accept the State's offer. The OCRWM counsel explained that "DOE doesn't know what it doesn't know," and that the DOE had an obligation to build a good factual record before approving a PETT payment, which is in the nature of a grant from the Nuclear Waste Fund. That fund has the money contributed on behalf of the nation's electric utility ratepayers for establishing a nuclear waste repository. He maintained that only the State of Washington has expertise on its own tax laws, regulations and cases, and indicated that OCRWM wants to take Rule 26(b)(4) wide-ranging depositions to probe what he called "inconsistencies" in the State's "Statement of Position" paper. The parties agreed that OCRWM would file the present discovery motion, and that OHA would resolve the dispute after the State filed a reply to the request. This exchange of pleadings was completed when OCRWM filed a response to the DOR's submission on February 18, 2000. We now turn to the motion.

OCRWM's Motion for Depositions and the State's Reply

In its motion OCRWM seeks to depose "four individuals who have been identified as Washington State B&O tax experts in the employ of the State and other State tax law experts who may be identified as State B&O tax experts by these deponents." Motion at 1. The named individuals and their 1993 job titles are: Frank Ackerly, Revenue Auditor; David Wiest, Revenue Auditor; Don Taylor, Tax Research Program Manager; and Don Rankin, Regional Audit Supervisor.

According to OCRWM, it not only needs to clarify the State's positions, but "also to explore alternative tax theories, and DOR customs and procedures that may be relevant." *Id*. at 2. OCRWM asserts that since these alternative theories may imply a smaller PETT grant, the State cannot be relied upon to come forward with witnesses and information that may support them. OCRWM also claims that it has "no expertise in these matters, and requires the expert views of [the State's] experts in the B&O tax area." *Id*. In addition, OCRWM argues that expertise regarding the B&O tax is rare, and primarily confined to a very small group of current and former employees of the Washington DOR, and that the named deponents will assist it in locating other witnesses with relevant expertise. Finally, OCRWM points to evidence in papers it has already obtained from the State that there was some internal debate in the DOR concerning the soundness of the State's PETT claim, and OCRWM asserts that it needs to explore this area to determine whether the debate was "based upon a lack of consistency between [the State's] PETT calculations and calculation methods applied to private taxpayers." *Id*.

The OHA Procedural Regulations governing Appeals, in 10 CFR Part 1003, Subpart C, contain no specific provision for discovery, but a motion for discovery will be granted by OHA if it is concluded that discovery is necessary for a party to obtain relevant and material evidence, and that discovery will not unduly delay the proceedings. Benton County, Washington, 26 DOE ¶ 80,145 (1996). Further, the requested discovery would be authorized under the FRCP and Washington State tax procedures, and the State does not dispute that OCRWM is entitled to discovery through depositions in this case.

The State's objections are based instead on its concerns for administrative efficiency. The State asserts that the principal issues separating the parties "are legal in nature and can likely be resolved on summary judgment motions." Petitioner's Reply to Respondent's Motion to Conduct Depositions at 1. The State

maintains that the parties already "charted a discovery course using requests for admission that was designed to clear away expeditiously any factual issues." *Id*. According to the State, OCRWM's motion fails to show how the selected discovery course has proved to be insufficient. *Id*. at 2. To prove its point, the State has attached copies of its answers to both sets of the OCRWM's requests for admissions. The State claims that they show its candor in answering the requests. While the State concedes it once suggested during an early stage of the PETT process that OCRWM would have the opportunity to depose some of the four named individuals if an appeal were filed, it now implies that would be inefficient, given the prior decision to pursue discovery through requests for admissions. *Id*. at 4-5. Finally, the State argues that one of the reasons cited by OCRWM for deposing the named witnesses, i.e. to delve into "Mr. Wiest's objections [questioning the soundness of Petitioner's claim.]," *id*. at 4, *n*. 3., is not proper since it would entail probing the mental processes utilized by an administrative decision maker, contrary to the principle recognized by the Supreme Court in United States v. Morgan, 313 U.S., 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429 (1941), and adopted by the Washington Supreme Court in Ledgering v. State, 63 Wn. 2d 94, 101, 385 P.2d 522 (1963).

Analysis

Although the background of this case is complicated, the resolution of the pending motion is a simple matter. After considering the arguments for and against the requested depositions, we have determined that OCRWM's present motion should be granted. We are persuaded that the admissions process, while helpful to a certain extent, did not answer enough questions about the application of the B&O tax, and thus failed to obviate OCRWM's need for further discovery. We find that deposing the named witnesses and perhaps others whose identities may be uncovered is likely to lead to relevant and material evidence, and that it will not unduly delay the proceedings. As in the prior PETT appeal, the parties have staked out extreme positions. A limited amount of additional discovery may help to narrow that chasm. The amount at stake is not trivial–now roughly $15 million including interest–and if a PETT grant is made as a result of this appeal or a negotiated settlement, it must be paid from the Nuclear Waste Fund. OCRWM argues convincingly that given its responsibilities for the Nuclear Waste Fund under the NWPA, it is vitally important to have as well-developed a factual record as possible to form a proper basis for final action on the State's PETT claim for the B&O tax. I take note of the State's desire to proceed directly to cross motions for summary judgment and a decision on the merits. Nevertheless, OCRWM has the right to pursue limited additional discovery. Thus we will grant the motion and the parties should proceed with the deposition process.

That being determined, we also note our agreement with the point raised by the State that under the Morgan case, "probing the mind" of an administrative decision maker is not proper evidence in an appeal of a final agency action. Agency action must stand on its own as the final word. As an administrative decision maker, the OHA understands and has applied this principle. *See, e.g.,* Atlantic Richfield Co., 5 DOE ¶ 82,521 (1980) (standards for granting "contemporaneous construction discovery" of agency officials' interpretations of the regulatory scheme) and cases and authorities cited therein. Thus, the parties should keep this principle in mind during the course of the discovery process and in all subsequent substantive pleadings.

IT IS THEREFORE ORDERED THAT:

(1) The Motion to Conduct Depositions filed by the Office of Civilian Radioactive Waste Management is hereby granted.

(2) This is an interlocutory order of the Department of Energy.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 12, 2000

Case No. VEF-0011

September 6, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Implementation of Special Refund Procedures

Name of Firm: Hudson Oil Company, Inc.

Date of Filing: March 20, 1995

Case Number: VEF-0011

On March 20, 1995, the Economic Regulatory Administration (ERA) of the Department of Energy (DOE) filed a Petition for the Implementation of Special Refund Procedures with the Office of Hearings and Appeals (OHA), to distribute the funds received pursuant to an OHA Remedial Order issued to Hudson Oil Company, Inc. (Hudson) and Hudson Refining Company, Inc. (Hudson Refining). *See Hudson Oil Company, Inc.*, 12 DOE ¶ 83,035 (1985). In accordance with the provisions of the procedural regulations at 10 C.F.R. Part 205, Subpart V (Subpart V), the ERA requests in its Petition that the OHA establish special procedures to make refunds in order to remedy the effects of regulatory violations set forth in the Remedial Order.

I. Background

ERA audits of Hudson, a retailer with headquarters in Kansas City, Kansas and Hudson Refining, a refiner located in Cushing, Oklahoma, revealed possible violations of the Mandatory Petroleum Price Regulations in Hudson's sales of gasoline during the period of price controls. (1) Subsequently, ERA issued a proposed remedial order (PRO) alleging that Hudson and its affiliated firms had violated the petroleum price regulations. Hudson challenged the PRO before OHA. In our March 15, 1985 Remedial Order, we found that Hudson had violated the price regulations and had overcharged its motor gasoline customers by $10,670,000 during the period June 1979 through August 1979 (refund period). *See Hudson*, 12 DOE at 86,479. Hudson and its affiliates were found to be jointly and severally liable for the overcharge amount. (2) *Id.* at 86,481. On March 20, 1995, the Office of General Counsel filed a Petition for the Implementation of Special Refund Proceeding for the $6,672,934 in funds Hudson has remitted to the DOE. (3)

II. Jurisdiction and Authority

The Subpart V regulations set forth general guidelines which may be used by the OHA in formulating and implementing a plan of distribution of funds received as a result of an enforcement proceeding. The DOE policy is to use the Subpart V process to distribute such funds. For a more detailed discussion of Subpart V and the authority of the OHA to fashion procedures to distribute refunds, *see Office of Enforcement*, 9 DOE ¶ 82,508 (1981), and *Office of Enforcement*, 8 DOE ¶ 82,597 (1981) (*Vickers*).

On July 5, 2001, the OHA issued a Proposed Decision and Order (PD&O) establishing tentative procedures to distribute the Consent Order funds. That PD&O was published in the *Federal Register*, and

a 30-day period was provided for the submission of comments regarding our proposed refund plan. *See* 66 Fed. Reg. 36764 (July 13, 2001). More than 30 days have elapsed and OHA has received no comments concerning these proposed refund procedures. Consequently, the procedures will be adopted as proposed except for the deadline to submit applications for refund. The deadline will be extended to November 30, 2001.

III. Refund Procedures

A. Standards for the Evaluation of Claims

This section sets forth the standards to be used in evaluating refund claims in the Hudson refund proceeding. From our experience with Subpart V proceedings, we expect that refund applicants will fall into the following categories: (i) end-users; (ii) regulated entities, such as public utilities and cooperatives; (iii) refiners, resellers and retailers (collectively referred to as "resellers") and (iv) consignees.

In order to receive a refund, each claimant will be required to submit a schedule of its gasoline purchases from Hudson during the refund period. If the gasoline was not purchased directly from Hudson, the claimant must establish that the gasoline originated from Hudson.(4)

In addition, a reseller, except one who chooses to utilize the injury presumptions set forth below, will be required to make a detailed showing that it was injured by Hudson's regulatory violations. This showing will consist of two distinct elements. First, a reseller claimant will be required to show, through credible, firm-specific data, that it had "banks" of unrecouped increased product costs beginning in June 1979 through August 1979. In addition, such a claimant must demonstrate that market conditions would not have allowed those costs to be passed through to its customers. This showing may be made in a comparative disadvantage analysis, which compares the price paid by the applicant with the average price paid for the same product at the relevant level of distribution. *See, e.g.*, *Enron Corp./MAPCO, Inc.*, 27 DOE ¶ 85,018 (1998).

A claimant who attempts to make a detailed showing of injury in order to obtain 100 percent of its allocable share but, instead, provides evidence that leads us to conclude that it passed through all of the overcharges, or is eligible for a refund of less than the applicable presumption-level amount, will not then be eligible for a presumption-based refund. Instead, such a claimant will receive a refund which reflects the level of injury established in its Application. No refund will be approved if its submission indicates that it was not injured as a result of its gasoline purchases from Hudson.

1. Presumptions for Claims based upon Hudson Gasoline Purchases

Our general practice is to grant refund on a pro-rata or volumetric basis. In order to calculate the volumetric refund amount, the OHA divides the amount of money available for direct restitution by the number of gallons sold by the firm during the period covered by the consent order.

Based on the available ERA workpapers, we estimate that during the period June 1979 through August 1979 Hudson sold 80,207,000 gallons of gasoline. *See* Schedule II-Q - Summary of allowable cost recoveries at 3. Dividing the recovered overcharge amount of $6,672,934 by this estimated number of gallons sold by Hudson results in a volumetric refund amount (or allocable share) of $0.0832 per gallon. In addition, each successful applicant is entitled to receive a proportionate share of accrued interest.(5)

In order to expedite the processing of applications in this proceeding and to ensure that refund claims are evaluated in the most efficient and equitable manner possible, we will use the following presumptions in addition to the volumetric presumption described above.

a. End-users

End-users of Hudson gasoline, i.e., consumers, whose use of the gasoline was unrelated to the petroleum business are presumed injured and need only document their purchase volumes from Hudson during the refund period to be eligible to receive a full allocable share.

b. Refiners, Resellers and retailers seeking refunds of $10,000 or less

Any reseller claimant whose allocable share is $10,000 or less, i.e. who purchased 120,192 gallons or less of Hudson gasoline during the refund period will be presumed injured and therefore need not provide a further demonstration of injury, besides documentation of its volumes, to receive its full allocable share.

c. Medium-Range Refiners, Reseller and Retailer claimants

In lieu of making a detailed showing of injury, a reseller claimant whose allocable share exceeds $10,000 may elect to receive as its refund the larger of $10,000 or 40 percent of its allocable share up to $50,000. (6) An applicant in this group will only be required to provide documentation of its purchase volumes of Hudson gasoline during the refund period in order to receive a refund of 40 percent of its total volumetric share, or $10,000, whichever is greater.

d. Regulated Firms and Cooperatives

We have determined that, in order to receive a full volumetric refund, a claimant whose prices for goods and services are regulated by a governmental agency, *e.g.*, a public utility, or by the terms of a cooperative agreement, needs only to submit documentation of Hudson gasoline used by itself or, in the case of a cooperative, sold to its members. However, a regulated firm or cooperative whose allocable share is greater that $10,000 will also be required to certify that it will pass through any refund received to its customers or member-customers, provide us with a full explanation of how it plans to accomplish that restitution, and certify that it will notify the appropriate regulatory body or membership group of the receipt of the refund.

e. Spot Purchasers

We will establish a rebuttable presumption that a reseller that made only irregular or sporadic, *i.e.*, spot, gasoline purchases from Hudson did not suffer injury as a result of those purchases. Accordingly, a spot purchaser claimant must submit specific and detailed evidence to rebut the spot purchaser presumption and to establish the extent to which it was injured as a result of its spot purchases of Hudson gasoline. In prior proceedings, we have stated that refunds will be approved for spot purchasers who demonstrate that (i) they made the spot purchases for the purpose of ensuring a supply for their base period customers rather than in anticipation of financial advantage as a result of those purchases, and (ii) they were forced by market conditions to resell the product at a loss that was not sufficiently recouped through draw down of banks. *See Texaco*, 20 DOE at 88,320-21.

f. Consignees

Finally, as in previous cases, we will presume that consignees of Hudson gasoline, if any exist, were not injured by the Hudson overcharges. *See Atlantic Richfield Company*, 17 DOE ¶ 85,069 at 88,153 (1988). A consignee agent is an entity that distributed its products pursuant to an agreement whereby its supplier established the prices to be paid and charged by the consignee and compensated the consignee with a fixed commission based upon the volume of products distributed. This presumption may be rebutted by showing that the consignee's sales volumes and corresponding commission declined due to the alleged uncompetitiveness of Hudson's gasoline pricing practices. *See Gulf Oil Corporation/C.F. Canter Oil Company*, 13 DOE ¶ 85,388 at 88,962 (1986).

B. Refund Application Requirements

To apply for a refund from the Hudson monies paid to the DOE, a claimant should submit an Application for Refund containing the following information:

> (1) Identifying information including the claimant's name, current business address, business address during the refund period, taxpayer identification number, a statement indicating whether the claimant is an individual, corporation, partnership, sole proprietorship, or other business entity, the name, title, and telephone number of a person to contact for additional information, and the name and address of the person who should receive any refund check. (7)
>
> (2) A monthly purchase schedule covering the refund period. The applicant should specify the source of this gallonage information. In calculating its purchase volumes, an applicant should use actual records from the refund period, if available. If these records are not available, the applicant may submit estimates of its Hudson gasoline purchases, but the estimation method must be reasonable and must be explained;
>
> (3) A statement whether the applicant or a related firm has filed, or has authorized any individual to file on its behalf, any other application in the Hudson refund proceeding. If so, an explanation of the circumstances of the other filing or authorization should be submitted;
>
> (4) If the applicant is or was in any way affiliated with Hudson, it should explain this affiliation, including the time period in which it was affiliated; (8)
>
> (5) The statement listed below signed by the individual applicant or a responsible official of the firm filing the refund application:
>
> > I swear (or affirm) that the information contained in this application and its attachments is true to the best of my knowledge and belief. I understand that anyone who is convicted of providing false information to the federal government may be subject to a fine, a jail sentence, or both, pursuant to 18 U.S.C. § 1001. I understand that the information contained in this application is subject to public disclosure. I have enclosed a duplicate of this entire application which will be placed in the OHA Public Reference Room.

All applications should be either typed or printed and clearly labeled with Hudson Oil Company, Inc. and Case No. VEF-0011. Each applicant must submit an original and one copy of the application. If the applicant believes that any of the information in its application is confidential and does not wish for that information to be publicly disclosed, it must submit an original application, clearly designated "confidential," containing the confidential information, and two copies of the application with the confidential information deleted. All refund applications should be postmarked on or before November 30, 2001 (9) , and sent to:

> Office of Hearings and Appeals
>
> Department of Energy
>
> 1000 Independence Ave., S.W.
>
> Washington, D.C. 20585

We will adopt the standard OHA procedures relating to refund applications filed on behalf of applicants by "representatives," including refund filing services, consulting firms, accountants, and attorneys. *See, e.g., Texaco*; *Starks Shell Service*, 23 DOE ¶ 85,017 (1993); *Shell Oil Co.*, 18 DOE ¶ 85,492 (1989). We will

also require strict compliance with the filing requirements as specified in 10 C.F.R. § 205.283, particularly the requirement that applications and the accompanying certification statement be signed by the applicant. The OHA reiterates its policy to scrutinize applications filed by filing services closely. Applications submitted by a filing service should contain all of the information indicated above.

Additionally, the OHA reserves the authority to require additional information to be submitted before granting any particular refund in the Hudson proceeding.

C. Impact of the Petroleum Overcharge Distribution and Restitution Act of 1986 (PODRA) Amendments on Hudson Refund Claims

The Interior and Related Agencies Appropriations Act for FY 1999 amended certain provisions of the Petroleum Overcharge and Distribution and Restitution Act of 1986 (PODRA). These amendments extinguished rights that refund applicants had under PODRA to refunds for overcharges on the purchases of refined petroleum products. They also identified and appropriated a substantial portion of the funds being held by the DOE to pay refund claims (including the funds paid by Hudson). Congress specified that these funds were to be used to fund other DOE programs. As a result, the petroleum overcharge escrow accounts in the refined product area contain substantially less money than before. In fact they may not contain sufficient funds to pay in full all pending and future refund claims (including those in litigation) if they should all be found to be meritorious. *See* *Enron Corp./Shelia S. Brown*, 27 DOE ¶ 85, 036 at 88,244 (2000) (*Brown*). Congress directed OHA to "assure the amount remaining in escrow to satisfy refined petroleum product claims for direct restitution is allocated equitably among all claimants."*Omnibus Consolidated and Emergency Supplemental Appropriation Act, 1999*, Pub. L. No. 105-277 § 337, 112 Stat 2681, 2681-295 (1998) (language added to PODRA); *Brown*, 27 DOE at 88,244. In view of this Congressional directive and the limited amount of funds available, it may become necessary to prorate the funds available among the meritorious Hudson claims. However, it could be several years before we know the full value of the meritorious claims and the precise total amount available for distribution. It will be some time before we are able to determine the amount that is available for distribution for each claimant.

In light of the considerations described above, we will pay successful claimants using the following mechanism. All successful small claimants (refunds under $10,000) will be paid in full. To require small claimants to wait several more years for their refunds would constitute an inordinate burden and would be inequitable. *See Brown*, 27 DOE at 88,244. For all others granted refunds, including reseller claimants who have elected to take presumption refunds, we will immediately pay the larger of $10,000 or 50 percent of the refund granted. Once the other pending refund claims have been resolved, the remainder of the Hudson claims will be paid to the extent that it is possible through an equitable distribution of the funds remaining in the petroleum overcharge escrow account.

It Is Therefore Ordered That:

(1) The payments remitted to the Department of Energy by Hudson Oil Company, Inc., pursuant to the remedial order issued on March 15, 1985, will be distributed in accordance with the forgoing Decision.

(2) Applications for Refund in the Hudson Oil Company, Inc. Refund Proceeding, Case No. VEF- 0011, must be postmarked no later than November 30, 2001.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 6, 2001

(1)Hudson and its affiliates operated a widespread retail operation. While information in the available files is incomplete, Hudson gasoline may have been sold by retailers in Virginia, Florida, Pennsylvania, Maryland, New York, West Virginia and Georgia.

(2)The Remedial Order references Hudson Van Oil Company, Hudson Van Oil Company of Kansas City, Inc., Hudson Van Oil Company of Florida, Inc., Hudson Van Oil Company of California, Inc., Hudson Stations, Inc., Wind Stations, Inc., News, Inc. and Hudson Petroleum, Inc. as Hudson affiliates covered in ERA's PRO. *See Hudson,* 12 DOE at 86,483 n.1.

(3)Hudson and Hudson Refining filed for bankruptcy in 1984. In addition to the March 1985 Remedial Order discussed above OHA issued another Remedial Order to Hudson on July 1, 1985, finding that Hudson had violated the price regulations concerning sales of crude oil and was liable for overcharges of $6,380,506. *See Hudson Oil Company*, 13 DOE ¶ 83,022 (1985). ERA's petition requests that we institute a refund proceeding covering both Remedial Orders. However, since Husdon has failed to remit sufficient money to fully comply with the March 1985 Remedial Order, and this Remedial Order was first in time, we will institute a refund proceeding that covers only Hudson's violation of price regulations concerning its sales of motor gasoline detailed in the March 1985 Remedial Order.

(4)Indirect purchasers who establish that their gasoline purchases originated with Hudson will be eligible for a refund unless the direct purchaser has filed a refund claim and established that it did not pass through the Hudson overcharges to its customers. *See Texaco*, 20 DOE ¶ 85,147 at 88,319 n. 39 (1990) (*Texaco*). As a result, applications from indirect purchasers will generally be considered only after evaluating the applications of their suppliers.

(5)The minimum refund amount that will be paid to an claimant is $15.00. We have found through our experience that the cost of processing claims for less than $15.00 outweighs the benefits of restitution in these cases. *See, e.g.*, *Texaco*, 20 DOE at 88,320 n. 43.

(6)That is, claimants who purchased between 120,192 gallons and 1,502,404 gallons of Hudson gasoline during the refund period may elect to utilize the presumption. Claimants who purchased more than 1,502,404 gallons from Hudson may elect to limit their claims to $50,000.

(7)Under the Privacy Act of 1974, the submission of a social security number by an individual applicant is voluntary. An applicant that does not submit a social security number must submit an employer identification number if one exists. This information will be used in processing refund applications, and is requested pursuant to our authority under the regulations codified at 10 C.F.R. Part 205, Subpart V. The information may be shared with other Federal agencies for statistical, auditing or archiving purposes, and with law enforcement agencies when they are investigating a potential violation of civil or criminal law. Unless an applicant claims confidentiality, this information will be available to the public in the Public Reference Room of the Office of Hearings and Appeals.

(8)As in other refund proceedings involving alleged refined product violations, the DOE will presume that affiliates of Hudson were not injured by the firm's overcharges. *See*, *e.g.*, *Marathon Petroleum Co./EMRO Propane Co.*, 15 DOE ¶ 85,288 (1987). This is because Hudson presumably would not have sold petroleum products to an affiliate if such a sale would have placed the purchaser at a competitive disadvantage. *See Marathon Petroleum Co./Pilot Oil Corp.*, 16 DOE ¶ 85,611 (1987), *amended claim denied*, 17 DOE ¶ 85,291 (1988), *reconsideration denied*, 20 DOE ¶ 85,236 (1990). Furthermore, if an affiliate of Hudson were granted a refund, Hudson would be indirectly compensated from a remedial order fund remitted to settle its own alleged violations.

(9)We originally proposed a deadline of October 31, 2001. Given the date of our final decision establishing the Hudson refund proceeding, we will extend this deadline to November 30, 2001.

Case No. VEF-0031

March 28, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Implementation of Special Refund Procedures

Name of Firm: ARGO Petroleum Corp., et al.

Date of Filing: October 19, 1999

Case Number: VEF-0031, et al.

On October 29, 1999, the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE)issued a Proposed Decision and Order (PDO) concerning a Petition for Implementation of Special Refund Procedures filed by the DOE's Office of General Counsel for Federal Litigation. The PDO is issued as Appendix B to the present determination.

In the PDO, we invited comments regarding a proposal to disburse $9,126,580.83 plus interest, received from 17 firms that sold crude oil during the period August 17, 1973 through January 1981. The names of the firms and the amounts received from each are set forth in Appendix A to this determination. The funds were remitted in order to settle actual or alleged violations of the DOE's mandatory petroleum price and allocation regulations. 10 C.F.R. Parts 211 and 212. We allowed a 30-day period in which to provide comments regarding the manner in which these funds would be disbursed. The comment period is now closed. We received no comments regarding our proposal. We are therefore issuing final procedures for disbursing the funds.

The monies, including all additional interest that has accrued since the issuance of the October 29 PDO, will be disbursed as set forth in the appended PDO. As the PDO states, the funds will be disbursed as provided for in the DOE's Statement of Modified Restitutionary Policy in Crude Oil Cases. 51 Fed. Reg. 27899 (August 4, 1986) (the SMRP). Therefore, the funds will be divided as follows: 20 percent will be reserved for direct restitution to injured parties; the remaining 80 percent will be disbursed in equal shares to the states and the federal government for indirect restitution. As stated above, in this case, the total amount available for disbursement, not including interest, is $9,126,580.83. This fund shall be disbursed as follows: $1,825,316.16 plus 20 percent of all accrued interest as of the date of the funds transfer shall be deposited into the DOE interest-bearing account for crude oil overcharge refund claimants; $3,650,632.33 plus 40 percent of all accrued interest as of the date of the funds transfer shall be deposited into the DOE interest bearing escrow account for the states; $3,650,632.33, plus 40 percent of all accrued interest as of the date of the funds transfer shall be deposited into the DOE interest bearing account for the federal government.

As we indicated in the PDO, the refund period for filing claims for these crude oil overcharge funds is closed. THEREFORE, NO APPLICATIONS FOR REFUND FOR THESE FUNDS MAY BE FILED. This final Decision and Order simply provides for the appropriate disposition of funds that have recently become available. It will affect only refund applications that have already been timely filed with the OHA. Accordingly, the Proposed Decision and Order, Appendix B to this determination, is hereby issued as a final Decision and Order of the Department of Energy.

It Is Therefore Ordered That:

(1) The Director of Special Accounts and Payroll, Office of Departmental Accounting and Financial Systems Development, Office of the Controller of the Department of Energy shall take all steps necessary to transfer the funds remitted by the 17 firms listed in Appendix A to this determination, plus accrued interest, pursuant to Paragraphs (2), (3), and (4) below.

(2) The Director of Special Accounts and Payroll shall transfer $3,650,632.33, plus 40 percent of all accrued interest on the funds referenced in Paragraph (1) above, into the subaccount denominated "Crude Tracking-States," Number 999DOE003W.

(3) The Director of Special Accounts and Payroll shall transfer $3,650,632.33, plus 40 percent of all accrued interest on the funds referenced in Paragraph (1) above, into the subaccount denominated "Crude Tracking-Federal," Number 999DOE002W.

(4) The Director of Special Accounts and Payroll shall transfer $1,825,316.16, plus 20 percent of all accrued interest on the funds referenced in Paragraph (1) above, into the subaccount denominated "Crude Tracking-Claimants 4," Number 999DOE010Z.

(5) No Applications for Refund may be submitted in connection with this Decision and Order.

(6) This is a final Order of the Department of Energy.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 28, 2000

APPENDIX B

October 29, 1999

PROPOSED

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Implementation of Special Refund Procedures

Name of Firm: ARGO Petroleum Corp., et al.

Date of Filing: October 19, 1999

Case Number: VEF-0031, et al.

In accordance with the procedural regulation of the Department of Energy (DOE), a DOE enforcement official may file a request that the Office of Hearings and Appeals (OHA) formulate and implement special refund procedures. 10 C.F.R. §205.281. These procedures are used to refund monies to those injured by actual or alleged violations of the DOE price regulations.

In this Decision and Order, we consider a Petition for Implementation of Special Refund Procedures filed by the DOE's Office of General Counsel for Federal Litigation (OGC) on October 19, 1999. The funds at

issue in this case were obtained from 17 firms that sold crude oil during the period August 1973 through January 1981. These firms remitted moneys to the DOE to settle actual or alleged violations of the DOE's mandatory petroleum price and allocation regulations set forth at 10 C.F.R. Parts 211 and 212. The sums submitted by each firm, including accrued interest are set forth in the Appendix to this Decision. The total amount remitted, including interest through September 30, 1999, is $12,660,998.58. This Decision and Order sets out the OHA's proposed procedures to distribute those funds.

The general guidelines which the OHA may use to formulate and implement a plan to distribute refunds are set forth in 10 C.F.R. Part 205, Subpart V. The Subpart V process may be used in situations where the DOE cannot readily identify the persons who may have been injured as a result of actual or alleged violations of the regulations or ascertain the amount of the refund each person should receive. For a more detailed discussion of Subpart V and the authority of the OHA to fashion procedures to distribute refunds, see Office of Enforcement, 9 DOE ¶ 82,508 (1981), and Office of Enforcement, 8 DOE ¶ 82,597 (1981). We have considered the OGC's request to implement Subpart V procedures with respect to the monies received from the 17 firms named in the Appendix and have determined that such procedures are appropriate.

On July 28, 1986, the DOE issued a Statement of Modified Restitutionary Policy in Crude Oil Cases, 51 Fed. Reg. 27899 (August 4, 1986) (the SMRP). The SMRP, issued as a result of a court-approved Settlement Agreement In re: The Department of Energy Stripper Well Exemption Litigation, M.D.L. No. 378 (D. Kan. 1986), reprinted in 6 Fed. Energy Guidelines ¶ 90,501 (The Stripper Well Agreement), provides that crude oil overcharge funds will be divided among the states, the federal government, and injured purchasers of refined petroleum products. Eighty percent of the funds, and any monies remaining after all valid claims are paid, are to be disbursed equally to the states and federal government for indirect restitution. Twenty percent of the funds will be used for direct restitution to claimants who were injured by actual or alleged crude oil violations.

The OHA has applied these procedures in numerous cases. E.g., New York Petroleum, Inc., 18 DOE ¶ 85,435 (1988); Shell Oil Co., 17 DOE ¶ 85,204 (1988); Ernest A. Allerkamp, 17 DOE ¶ 85,079 (1988). The procedures have been approved by the United States District Court for the District of Kansas, as well as the Temporary Emergency Court of Appeals. We will not reiterate those procedures here. They are by now well known and, further, the period for filing refund claims for crude oil overcharge funds closed on June 30, 1995. 60 Fed. Reg. 19914-15 (April 21, 1995).

Accordingly, we propose to reserve the full twenty percent of the available alleged crude oil violation amounts, $2,532,199.72, for direct refunds to claimants, in order to ensure that sufficient funds will be available for refunds to injured parties. As stated above, no new applications for refund for those monies will be accepted, since the claims period has closed. The funds will be added to the general crude oil overcharge pool available for direct restitution.

Under the terms of the SMRP, we propose that the remaining eighty percent of the alleged crude oil violation amounts subject to this Decision, or $10,128,798.86, should be disbursed in equal shares to the states and federal government for indirect restitution. The share or ratio of the funds which each state will receive is contained in Exhibit H of the Stripper Well Agreement. When disbursed, these funds will be subject to the same limitations and reporting requirements as all other crude oil monies received by the states under the Stripper Well Agreement.

It Is Therefore Ordered That:

The refund amounts remitted to the Department of Energy by the firms listed in the Appendix to this Decision and Order will be distributed in accordance with the foregoing Decision.

APPENDIX

CONSENT ORDER AMOUNT

TRACKING With Interest

NAME OF FIRM OHA CASE NO. SYSTEM NO. (COTS) Principal Through 9/30/99

ARGO Petroleum Corp. VEF-0031 940C0089W $ 60,835.18 $ 86,841.36

Don E. Pratt Oil Co. VEF-0036 740C01204W 235,000.00 394,878.05

Beta Energy Corp. VEF-0034 6C0X00260W 32,818.34 45,037.34

AWECO, Inc. &

Hargis, Billy K. VEF-0032 6A0X00231W 665,908.68 968,874.23

B.M. Hester VEF-0033 660C00647W 25,000.00 36,649.53

General Atlantic Petrl.

& General Klotz VEF-0038 650X00359W 107,790.21 123,262.93

Glen A. Martin VEF-0039 610C000478W 13,583.80 18,560.48

Intercoastal Operating

Co. & L.E. Lewis VEF-0041 600C20082W 95,000.00 159,348.46

Kelly Trading Co.

& Reed, M.L. VEF-0043 650X00350W 182,000.00 265,665.83

Martin Exploration Co. VEF-0044 640C00406W 3,917.32 5,989.39

Pel-Star Energy VEF-0047 6A0X00277W 30,263.70 51,178.22

Petro-Thermo VEF-0048 6A0X00301W 42,772.32 75,698.67

Petroleum Mgmt., Inc. VEF-0049 422C00066W 71,319.67 117,570.09

Polaris Production Co. VEF-0050 670C00229W 71,726.16 109,151.96

Road Oil Sales VEF-0051 N00S98090W 6,950.58 15,485.49

Tomlinson Petrl., Inc. VEF-0054 650X00318W 7,406,694.87 10,027,185.48

United Independent Oil

Co. & Peter Hirshburg VEF-0055 N00S90461W 75,000.00 159,621.07

TOTAL $9,126,580.83 $12,660,998.58

Case No. VEF-0035

March 28, 2000

DECISION AND ORDER

DEPARTMENT OF ENERGY

Implementation of Special Refund Procedures

Names of Firms:Bi-Petro Refining Co., Inc., et al.

Dates of Filing: October 19, 1999, et al.

Case Numbers:VEF-0035, et al.

On October 19, 1999, the Office of General Counsel (OGC) of the Department of Energy (DOE) filed a Petition requesting that the Office of Hearings and Appeals (OHA) formulate and implement Subpart V special refund proceedings. Under the procedural regulations of the DOE, special refund proceedings may be implemented to refund monies to persons injured by violations of the DOE petroleum price regulations, provided DOE is unable to readily identify such persons or to ascertain the amount of any refund. 10 C.F.R. § 205.280. We have considered OGC's request to formulate refund procedures for the disbursement of monies remitted by Bi-Petro Refining Co., Inc. and eight other firms pursuant to Remedial Orders and Consent Orders (Remedial Order and Consent Order funds), and have determined that such procedures are appropriate. Each firm's name, case number and amount of money remitted to remedy its pricing violations has been set out in the Appendix immediately following this Decision.

Under the terms of the Remedial Orders and Consent Orders, a total of $1,369,404.60 has been remitted to DOE to remedy pricing violations which occurred during the relevant audit periods. These funds are being held in an escrow account established with the United States Treasury pending a determination of their proper distribution. This Decision sets forth OHA's plan to distribute those funds. The specific application requirements appear in Section III of this Decision.

I. Jurisdiction and Authority

The general guidelines that govern OHA's ability to formulate and implement a plan to distribute refunds are set forth at 10 C.F.R. Part 205, Subpart V. These procedures apply in situations where the DOE cannot readily identify the persons who were injured as a result of actual or alleged violations of the regulations or ascertain the amount of the refund each person should receive. For a more detailed discussion of Subpart V and the authority of the OHA to fashion procedures to distribute refunds, see Office of Enforcement, 9 DOE ¶ 82,508 (1981) and Office of Enforcement, 8 DOE ¶ 82,597 (1981).

II. Background

On January 21, 2000, we issued a Proposed Decision and Order (PDO) establishing tentative procedures to distribute the funds that each firm remitted to DOE. We proposed implementing a two-stage refund proceeding and we stated that applicants who purchased certain covered petroleum products from any one of the retailers identified in the Appendix to the PDO would be provided an opportunity to submit refund applications in the first stage. In the event funds remained after all first stage claims had been considered,

we stated that the remaining funds would be disbursed in the second stage in accordance with the provisions of the Petroleum Overcharge Distribution and Restitution Act of 1986 (15 U.S.C. § 4501) (PODRA).

We provided a 30-day period for the submission of comments concerning the proposed procedures. However, we have received no comments since the PDO was published in the Federal Register more than 30 days ago. The proposed procedures will therefore be adopted in the same form in which they were originally outlined. Immediately set forth below are the specific considerations that will guide our evaluation of refund applications during the first stage.

III. The First-Stage Refund Procedures

Refund applications submitted in these special refund proceedings will be evaluated in exactly the same manner as applications submitted in other refined product proceedings. In those proceedings, we have frequently chosen to adopt a number of rebuttable presumptions relating to pricing violations and injury. Such a policy reflects our belief that adoption of certain presumptions (1) permits applicants to participate in refund proceedings in larger numbers by avoiding the need to incur inordinate expense; and (2) facilitates our consideration of first stage refund applications. 10 C.F.R. § 205.282(e). For those reasons, we have adopted similar presumptions in the present proceeding.

A. Calculating the Refund

We have presumed that the pricing violations were dispersed equally throughout each firm's refined petroleum product sales during the relevant audit period. We therefore proposed that each applicant's potential refund should be calculated on a volumetric basis. Under the volumetric approach, refunds are calculated by multiplying the gallons of refined product each applicant purchased by the per gallon refund amount, multiplied by the percentage of funds DOE succeeded in collecting (volumetric). Applicants believing they were disproportionately overcharged by the pricing violations may present documentation which supports that claim. Those who succeed in showing they were disproportionately overcharged will be eligible to receive refunds calculated at a higher volumetric.

We have established a volumetric for each of the firms whose name appears in the Appendix accompanying this Decision. The precise volumetric for each firm can be found in the Appendix. Each volumetric was obtained by multiplying $.0004 by the collection percentage.(1) This percentage was calculated by dividing the amount collected (with interest accrued by the DOE as of the date of issuance of this final implementation order) by the amount the firm was either ordered to pay in a Remedial Order or agreed to pay in a Consent Order. (2)

B. Eligibility for a Refund

In order to be eligible to receive a refund in this proceeding, each applicant must 1) document the volume of certain petroleum products listed in the Appendix that it purchased during the relevant period; and 2) demonstrate that it was injured by the overcharges. The threshold requirement for any applicant is documenting the volume of product it purchased. This requirement is typically satisfied when the applicant successfully demonstrates ownership of the business for which the refund is sought and submits documentation which supports the volume claimed in its refund application.

The injury showing, however, is a potentially more difficult requirement for applicants to satisfy, especially those seeking smaller refund amounts. This is true because an applicant must demonstrate that it was forced to absorb the overcharges. Our cases have often stated that an applicant accomplishes this by demonstrating that it maintained a "bank" of unrecovered product costs and showing that market conditions would not permit them to pass through those increased costs. See, Quintana Energy Corp., 21 DOE ¶ 85,032 at 88,117 (1991).

We recognized that the cost to the applicant of gathering evidence of injury to support a relatively small refund claim could exceed the expected refund and thereby cause some injured parties to forego an opportunity to obtain a refund. In view of these difficulties, we proposed adopting a number of injury presumptions which simplify and streamline the refund process. The simplified procedures reduce the burden that would have been placed on this Office had we required detailed injury showings for relatively small refund applications.

C. Presumptions of Injury

Set forth below are the presumptions of injury that have been adopted for each class of applicant likely to submit refund applications in this proceeding. These presumptions are not unlike injury presumptions adopted by OHA in many other refined product proceedings. Each presumption turns on the category of applicant.

Small-claim Presumption

We have adopted a small claim presumption of injury for resellers, retailers and refiners whose claim is $10,000 or less. Such an applicant need only document the volume of certain covered petroleum products listed in the Appendix he or she purchased during the audit period from one or more of the firms named in the Appendix to be eligible to receive a full refund. See Enron Corporation, 21 DOE ¶ 85,323 at 88,957 (1991).

Medium Range Presumption

Medium range applicants; that is, applicants seeking refunds in excess of $10,000 but less than $50,000, are eligible to receive 40 percent of their allocable share without proving injury. Like small-claim applicants, these applicants will only be required to document the volume of certain covered petroleum products listed in the Appendix they purchased during the audit period from any one of the firms named in the Appendix to be eligible to receive a refund. See Shell, 17 DOE at 88,406.

End-user Presumption

We have presumed that end-users of petroleum products whose businesses were unrelated to the petroleum industry and were not subject to the regulations promulgated under the Emergency Petroleum Price and Allocation Act of 1973 (EPAA), 15 U.S.C. §§ 751-760h, were injured by each of the firm's pricing violations. Unlike regulated firms, end-users were not subject to price controls during the audit period. Moreover, these firms were not required to keep records that justified selling price increases by reference to cost increases. An analysis of the impact of the alleged overcharges on the final prices of non-petroleum goods and services is beyond the scope of a special refund proceeding. See American Pacific International, Inc., 14 DOE ¶ 85,158 at 88,294 (1986). End-users seeking refunds in this proceeding will therefore be presumed to have been injured. In order to receive a refund, end-user applicants need only document the volume of certain refined petroleum products they purchased during the relevant audit period from any of the nine firms whose name appears in the Appendix following this Decision. Meritorious applicants are eligible to receive their full allocable share. See Shell, 17 DOE at 88,406.

Refunds in Excess of $50,000 and Other Applicants

Applicants seeking refunds in excess of $50,000, excluding interest, will be required to submit detailed evidence of injury. These applicants must show that the overcharges were absorbed, not passed through to their customers. They will therefore be unable to rely upon injury presumptions utilized in many refined product refund cases. Id.

Regulated Firms and Cooperatives

Regulated firms (such as public utilities) and agricultural cooperatives, which are required to pass on to their customers the benefit of any refund received, are exempted from the requirement that they make a detailed showing of injury. Marathon Petroleum Co., 14 DOE ¶ 85,269 at 88,515 (1986); see also Office of Special Counsel, 9 DOE ¶ 82,538 at 85,203 (1982). We require a regulated firm or cooperative to establish that it was a customer of one of the firms or a successor thereto. In addition, we require each such claimant to certify that it will pass any refund received through to its customers, to provide us with a full explanation of the manner in which it plans to accomplish this restitution to its customers and to notify the appropriate regulatory or membership body of the receipt of the refund money. If a regulated firm or cooperative meets these requirements, it will receive a refund equal to its full pro-rata share. However, any public utility claiming a refund of $10,000 or less, or accepting the medium-range presumption of injury, will not be required to submit the above referenced certifications and explanation. A cooperative's sales of covered petroleum products to non-members will be treated in the same manner as sales by other resellers or retailers.

Indirect Purchasers

Firms which made indirect purchases of covered petroleum products from one of the firms during the relevant period may also apply for refunds. If an applicant did not purchase directly from one of the firms, but believes that the covered petroleum products it purchased from another firm were originally purchased from the firms at issue, the applicant must establish the basis for its belief and identify the reseller from whom the covered petroleum products were purchased. Indirect purchasers who either fall within a class of applicant whose injury is presumed, or who can prove injury, may be eligible for a refund if the reseller of one of the nine firms' products passed through these firms' alleged overcharges to its own customers. E.g., Dorchester Gas Corp., 14 DOE ¶ 85,240 at 88,451- 52 (1986).

Spot Purchasers

We adopt the rebuttable presumption that a claimant who made only spot purchases from one of the firms was not injured as a result of those purchases. A claimant is a spot purchaser if it made only sporadic purchases of significant volumes of covered petroleum products from one of the firms. Accordingly, a spot purchaser claimant must submit specific and detailed evidence to rebut the spot purchaser presumption and to establish the extent to which it was injured as a result of its spot purchases from one of these firms. E.g., Office of Enforcement, 8 DOE ¶ 82,597 at 85,396-97 (1981).

Applicants Seeking Refunds Based on Allocation Claims

We also recognize that we may receive claims alleging these firms' failure to furnish petroleum products that they were obliged to supply under the DOE allocation regulations that became effective in January 1974. See 10 C.F.R. Part 211. Any such application will be evaluated with reference to the standards we set forth in Subpart V implementation decisions such as Office of Special Counsel, 10 DOE ¶ 85,048 at 88,220 (1982), and refund application cases such as Mobil Oil Corp./Reynold Industries, Inc., 17 DOE ¶ 85,608 (1988). These standards generally require an allocation claimant to demonstrate the existence of a supplier/purchaser relationship with the firm at issue and the likelihood that the firm at issue failed to furnish petroleum products that it was obliged to supply to the claimant under 10 C.F.R. Part 211. In addition, the claimant should provide evidence that it sought redress from the alleged allocation violation. Finally, the claimant must establish that it was injured and document the extent of the injury.

In our evaluation of whether allocation claims meet these standards, we will consider various factors. For example, we will seek to obtain as much information as possible about the DOE's (or its predecessors') treatment of complaints made to it by the claimant. We will also look at any affirmative defenses that the

firm may have had to the alleged allocation violation. In assessing an allocation claimant's injury, we will evaluate the effect of the alleged allocation violation on its entire business operations with particular reference to the amount of product that it received from suppliers other than the firm at issue. In determining the amount of an allocation refund, we will utilize any information that may be available regarding the amount of the firm's allocation violations in general and regarding the specific allocation violation alleged by the claimants. We will also pro rate any allocation refunds that would otherwise be disproportionately large in relation to the funds collected. cf. Amtel, Inc./Whitco, Inc., 19 DOE ¶ 85,319 (1989).

Consignees

We adopt a rebuttable level of injury presumption of 10 percent for all consignees of the instant firms during the relevant periods. See Gulf Oil Corp., 16 DOE ¶ 85,381 (1987). Accordingly, a consignee may elect to receive a refund based on 10 percent of its total allocable share. Any consignee applicant will be free to rebut this presumption and prove a greater injury in order to receive a larger refund.

D. How to Apply for a Refund

To apply for a refund from one or more of the firms' remitted funds, an applicant should submit an Application for Refund containing all of the following information:

1) The applicant's name; the current name and address of the business for which the refund is sought; the name and address during the refund period of the business for which the refund is sought; the taxpayer identification number; a statement specifying whether the applicant is an individual, corporation, partnership, sole proprietorship or other business entity; the name, title, and telephone number of a person to contact for additional information; and the name and address of the person who should receive any refund check.(3)If the applicant operated under more than one name or under a different name during the price control period, the applicant should specify those names.

2) The applicant should specify the source of its gallonage information. In calculating its purchase volumes, an applicant should use actual records from the relevant period of purchase, if available. If these records are not available, the applicant may submit estimates of its relevant refined petroleum product purchases, but the estimation methodology must be reasonable and must be explained.

3) A statement indicating whether the applicant or a related firm has filed, or has been authorized to file on its behalf, any other application in this refund proceeding. If so, an explanation of the circumstances of the other filing or authorization should be submitted;

4) If the applicant is or was in any way affiliated with the firm from whom it purchased covered petroleum products and is consequently is filing its present application, the applicant should explain this affiliation, including the time period in which it was affiliated. If not, a statement that the applicant was not affiliated with that firm.

5) The statement listed below, provided it has been signed by the applicant or a responsible official of the firm filing the refund application:

I swear (or affirm) that the information contained in this application and its attachments is true and correct to the best of my knowledge and belief. I understand that anyone who is convicted of providing false information to the Federal government may be subject to a fine, a jail sentence, or both, pursuant to 18 U.S.C. § 1001. I understand that the information contained in this application is subject to public disclosure. I have enclosed a duplicate of this entire application which will be placed in the OHA Public Reference Room.

All applications should be either typed or printed and should clearly refer to the entity from whom it

bought the relevant covered petroleum products and its respective case number as listed in the Appendix. Each applicant must submit an original and one copy of the application. If the applicant believes that any of the information in its application is confidential and does not wish this information to be publicly disclosed, the applicant must submit an original application, clearly designated "confidential", containing the confidential information, and two copies of the application with the confidential information deleted. All refund applications should be postmarked no later than September 30, 2000, and sent to:

Bi-Petro Refining Co, Inc., et al., VEF-0035, et al.

Office of Hearings and Appeals

Department of Energy

1000 Independence Avenue, S.W.

Washington, D.C. 20585-0107

E. Minimal Amount Requirement

Only claims for at least $15 will be processed. This minimum has been adopted in refined product refund proceedings because the cost of processing claims for refunds of less than $15 outweighs the benefits of restitution in those instances. See Mobil Oil Corporation, 13 DOE ¶ 85,339 (1985).

F. Additional Information

OHA reserves the authority to require additional information before granting any refund in these proceedings. Applications lacking the required information may be dismissed or denied.

G. Refund Applications filed by Representatives

OHA reiterates its policy to closely scrutinize applications filed by filing services. Applications submitted by a filing service should contain all of the information indicated in this final Decision and Order. Strict compliance with the filing requirement as specified in 10 C.F.R. § 205.283, particularly the requirement that applications and the accompanying certification statement be signed by the applicant, will be required.

H. Filing Deadline

The deadline for filing an Application for Refund is September 30, 2000. We are not anticipating extending this deadline for any reason.

IV. Second-Stage Refund Procedures

Any funds that remain after all first-stage claims have been decided will be distributed in accordance with the provisions of the Petroleum Overcharge Distribution and Restitution Act of 1986 (PODRA), 15 U.S.C. §§ 4501-07. PODRA requires that the Secretary of Energy determine annually the amount of oil overcharge funds that will not be required to refund monies to injured parties in Subpart V proceedings and make those funds available to state governments for use in four energy conservation programs. The Secretary has delegated these responsibilities to OHA, and any funds that OHA determines will not be needed to effect direct restitution to injured customers will be distributed in accordance with the provisions of PODRA.

It Is Therefore Ordered That:

Applications for Refund from the funds remitted to the Department of Energy by any one of the firms named in the Appendix to this Decision may now be filed.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 28, 2000

(1)However, if the collection percentage is 100 percent or greater, the volumetric was not reduced.

(2)Nevertheless, we realize that the impact on an individual claimant may have been greater than the volumetric amount. We therefore propose that the volumetric presumption will be rebuttable, and we will allow a claimant to submit evidence detailing the specific overcharges that it incurred in order to be eligible for a larger refund. E.g., Standard Oil Co./Army and Air Force Exchange Service, 12 DOE ¶ 85,015 (1984). In addition, we note that we may need to lower the volumetric for a particular proceeding, if the volume claimed by applicants multiplied by the volumetric indicates that if all volume were claimed, the fund would be exhausted or insufficient to satisfy all claims. We may also need to lower a particular volumetric if it appears inappropriate, based on our experience in these cases.

(3) Under the Privacy Act of 1974, the submission of a social security number by an individual applicant is voluntary. An applicant who does not wish to submit a social security number must submit an employer identification number if one exists. This information will be used in processing refund applications. It is requested pursuant to our authority under the Petroleum Overcharge Distribution and Restitution Act of 1986 and the regulations codified at 10 C.F.R. Part 205, Subpart V. The information may be shared with other Federal agencies for statistical, auditing or archiving purposes, and with law enforcement agencies when they are investigating a potential violation of civil or criminal law. Unless an applicant claims confidentiality, this information will be available to the public in the Public Reference Room of the Office of Hearings and Appeals.

Case No. VEG-0007

June 15, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Petition for Special Redress

Name of Case: Philip P. Kalodner

Date of Filing: May 25, 2000

Case Number: VEG-0007

Philip P. Kalodner, on behalf of his clients, the "Participant End Users," which consists of Utilities, Transporters, and Manufacturers (hereinafter collectively UTM), filed an "Application of Participant End Users for Distribution to Them and Their Counsel From Funds Awarded to Refiner Cooperatives." UTM seeks $89,000 out of the $1.7 million (plus interest) that has been awarded to the Refiner Cooperatives in connection with the Citronelle Settlement Agreement. See The 341 Tract Unit of the Citronelle Field/National Cooperative Refinery Assoc., et al., 26 DOE ¶ 85,014 (1996). The Refiner Cooperatives filed a response on June 1, 2000.

UTM bases its request on Section III.K. of the underlying Citronelle Settlement Agreement and upon its purported contributions in negotiating the final settlement in the Citronelle case.

Section III.K. of the Citronelle Settlement Agreement provides for the distribution of funds from the "End User" account. These funds are specifically reserved for distribution to "End Users" and "Participant End Users." On the other hand, the money available to fund the Refiner Cooperatives' refunds is drawn from the "Post- Apportionment Citronelle Escrow Account" which is outside the scope of the provisions of Section III.K.

As is the case with all signers of the Citronelle Settlement, UTM has agreed to "... compromise and settle all of their actual and potential claims arising out of the granting or termination of the Citronelle exception relief or to the funds in the Citronelle escrow account." Settlement Agreement at 7. This language clearly bars the relief UTM is seeking. Moreover, UTM's assertion that its efforts benefited the Refiner Cooperatives ignores the fact that UTM consistently opposed and challenged the refund awards to the Refiner Cooperatives as upheld by the a United States District Court. Consolidated Edison v. O'Leary, 3 Fed. Energy Guidelines (CCH) ¶¶ 26,724; 26,726 (D. D.C., 1998); aff'd. sub nom. Consolidated Edison v. Richardson, 3 Fed. Energy Guidelines (CCH), ¶ 26,731 (Fed. Cir. 1999). Simply put, there is no statutory, regulatory, or logical basis whatsoever that would support an award of attorney's fees to UTM for efforts expended in unsuccessful opposition to the Refiner Cooperatives' refund awards. Accordingly, UTM's application for an award of $89,000 from the Refiner Cooperatives' escrow fund will be denied.

Further, because UTM's application is wholly unsupported, we decline UTM'S request to delay distribution to the Refiner Cooperatives of the amount in question here pending any "appeals" by UTM of this decision. UTM's prior challenges have delayed the Refiner Cooperative awards for nearly a four year period. There is simply no legal or equitable basis to support a further delay in providing these awards to their rightful recipients. Accordingly, we shall order that disbursement of these awards be made in accordance with the provisions of the October 10, 1996 Decision and Order authorizing payment of the

Refiner Cooperatives' refunds.

It Is Therefore Ordered That:

The Application for attorney fees and other fees filed by Philip P. Kalodner (Case No. VEG-0007) be and hereby is denied.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 15, 2000

Case No. VEG-0009

June 11, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Petition for Special Redress

Name of Case: Philip P. Kalodner

Date of Filing: March 14, 2001

Case Number: VEG-0009

Philip P. Kalodner, on behalf of his clients, the "Participant End Users," which consists of a group of Utilities, Transporters, and Manufacturers (hereinafter collectively UTM), filed an "Application of Participant End Users for Distribution to Them and Their Counsel From Funds Awarded to Airlines and Farmer Cooperatives as Compensation for the Creation of a Common Fund for Them." UTM seeks $126,500 out of the $1,716,784 that has been awarded to 11 Agricultural Cooperatives and 14 Airlines in connection with the Citronelle Settlement Agreement (CSA). See The 341 Tract Unit of the Citronelle Field/National Cooperative Refinery Assoc., et al., 27 DOE ¶ 82,501 (1998). The Agricultural Cooperatives filed a response on March 20, 2001.

UTM claims that it has created a "common fund" from which it should receive additional compensation beyond that provided in the CSA. This contention is without merit. First, UTM along with all other signatories of the CSA waived any further right to the funds covered by the settlement. Second, UTM simply did not "create, preserve or increase" the value of the Citronelle escrow account. The account was already established as a result of regulatory actions and UTM was just one group of many claimants that negotiated a distribution of the assets of that account. Third, there is no other legal or equitable basis that would support UTM's bid for fees from the funds reserved to the Agricultural Cooperatives and Airlines whose claims UTM opposed both administratively and in unsuccessful judicial litigation.

A. UTM Has Waived any Further Claim Outside the Four Corners of the Settlement.

The first sentence of paragraph III.A of the CSA states that "[t]he parties agree to compromise and settle all of their actual and potential claims arising out of the granting or termination of the Citronelle exception relief or to funds in the Citronelle escrow account." (emphasis added). This language expressly precludes UTM's claims. It provides that in exchange for obtaining whatever funds were provided in the agreement, the signatories waived any further claim against the Citronelle escrow account. UTM's claim for additional benefits in the form of fees is flatly inconsistent with these terms.

The CSA provides that the funds from which the Agricultural Cooperatives and Airlines may draw any benefit are denominated as the "Post-Apportionment Citronelle Escrow Account" escrow account. UTM's counsel contributed nothing to the creation of this separate account. The CSA provides that UTM and its counsel shall only be rewarded under the provisions of Section III.K of the agreement.

UTM's theory appears to be that the funds which have been awarded to the Agricultural Cooperatives and

Airlines should be treated in the same manner as if they had been distributed from the funds apportioned to the "End User" account referenced in Section III.K. However, the term "End User" in the CSA is a term of art that does not apply to the "Agricultural Cooperatives" or "Airlines." The term "End-User" refers to any purchasers of refined petroleum products who are not otherwise described in Part II(B) of the CSA. Quite simply, the Agricultural Cooperatives and Airlines are not End Users and the "benefit" ascribed by the CSA to Participant End Users on behalf of End Users does not apply to the Agricultural Cooperatives and Airlines. See CSA at 16. Their refunds do not originate from the End User account, but from the "Post- Apportionment Citronelle Account," to which the Participant End Users have no claim. If the parties had intended to provide the UTM and its counsel any awards from the "Post-Apportionment Citronelle Escrow Account," they surely knew how to draft language to accomplish that objective as they did in Section III.K of the CSA. In this instance, they did not.

B. The Common Fund Theory Is Inapplicable to the Instant Situation.

Even were UTM's claims not precluded by the waiver contained in Section III.A of the CSA, its claims are not of a nature that would make it eligible under the "common fund" doctrine as it has been interpreted by the courts.

In the leading case on the subject in the District of Columbia Circuit, Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261 (D.C. Cir. 1993), the court stated that "... the 'common fund' doctrine [is] typically applied in class actions ...." and "that doctrine allows a party who creates, preserves, or increases the value of the fund in which others have an ownership interest to be reimbursed from that fund for litigation expenses incurred, including counsel fees." Id. at 1265 (emphasis added).

Here, UTM simply did not "create, preserve, or increase" the "Post- Apportionment Citronelle Escrow Account." In fact, as is reflected in the introduction to the CSA, the funds arose from agency regulatory action and were not increased or preserved by any of UTM's actions. As is also reflected in the signatures to the CSA, many parties were involved in this litigation and it is disingenuous for UTM to claim a reward for the jointly agreed resolution of years of litigation among the various parties. Like the other parties to the settlement negotiations, the UTM settled its claims and simply failed to provide for any additional payments to its counsel from the "Post-Apportionment Citronelle Escrow Account".

C. There is No Other Legal or Equitable Basis for a Fee Award

As the foregoing makes clear, UTM waived any further claim to Citronelle funds, and the common fund theory is inapplicable. UTM cites no other legal authority that would support an award. As a result, there is simply no legal authority to support UTM's request.

The Agricultural Cooperatives in their submission have made these same basic points, and further point out even if UTM had not waived any further claim to fees, the equities would weigh against any additional recovery by UTM. The Agricultural Cooperatives maintain that:

1. UTM has at every step of the administrative and judicial process resisted (unsuccessfully) any award to the cooperatives and airlines.

2. This opposition has delayed the distribution to those entities for more than three years.

3. Since UTM opposed the cooperatives' participation in the administrative and judicial process leading to the Citronelle settlement, it seems contradictory and disingenuous for UTM to now claim that the cooperatives did not participate in that process.

Agricultural Cooperatives' Submission at 4.

We agree that taken together these factors weigh heavily against any award of additional fees to UTM and its counsel. Simply put, in signing the CSA, the parties did not contemplate or agree to any payments to UTM beyond those specified in the agreement. The terms of the CSA were carefully negotiated by the parties with each compromising its potential claim in return for the certainty of payments specified in the CSA. Consequently, UTM's attempt to rewrite the terms of the CSA to provide it additional fees is rejected and its petition for additional fees based upon a "common fund" theory should be denied.

Further, because UTM's application is wholly unsupported, we reject UTM'S request to delay distribution to the Agricultural Cooperatives and Airlines of the amount in question here pending any "appeals" by UTM of this decision. There is simply no legal or equitable basis to support a further delay in providing these refunds to their rightful recipients.

UTM's instant filing, like several others that it has submitted in Office of Hearings and Appeals refund proceedings, raises arguments with little, if any, likelihood of success. The main purpose of UTM's claims seems to be to stall disbursement of refunds. This cannot be tolerated. The time is long overdue to provide the Agricultural Cooperatives and Airlines with the refunds that they have been rightfully anticipating for more than three years. Accordingly, we will countenance no further UTM pleadings, and will order that disbursement of these awards be made in accordance with the provisions of the March 25, 1998 Decision and Order authorizing payments of the Agricultural Cooperative' and Airlines' refunds.

It Is Therefore Ordered That:

The Application filed by Philip P. Kalodner for compensation from the Agricultural Cooperatives' and Airlines' escrow fund established in connection with the Citronelle Settlement Agreement (Case No. VEG-0009) be and hereby is denied.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 11, 2001

March 10, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Petition for Special Redress

Name of Case: Philip P. Kalodner

Date of Filing: July 23, 2002

Case Number: VEG-0010

Philip P. Kalodner, attorney for a group of utilities and manufacturers (hereinafter "Utilities and Manufacturers"), filed an application for "a common fund fee." Mr. Kalodner seeks a fee of $60,000 "for his effort in creating [a] $361,040 addition to" crude oil overcharge funds collected by the DOE. Application at 3. For the reasons set forth below, Mr. Kalodner's application will be denied.

I. Background

Pursuant to Department of Energy (DOE) policy, purchasers of refined petroleum products could apply to the OHA for a refund from crude oil overcharge funds collected by the DOE. Statement of Modified Restitutionary Policy in Crude Oil Cases, 51 Fed. Reg. 27899 (August 4, 1986) (the MSRP). We established refund procedures for these funds, which were made available through court approved settlements, remedial orders and consent orders entered into by the DOE and numerous firms that sold crude oil during the period of price controls. See, e.g., New York Petroleum, Inc., 18 DOE ¶ 85,435 (1988); Ernest A. Allerkamp, 17 DOE ¶ 85,079 (1988); A. Tarricone, Inc., 15 DOE ¶ 85,495 (1987).

On August 3, 2001, we issued a Proposed Decision and Order (PDO) in which we tentatively decided, in the absence of an objection, to grant a refund of $1,098,911 to Hercules Incorporated (Hercules), a firm that purchased refined petroleum products during the crude oil price control period. A copy of the PDO was provided to Hercules and to Mr. Kalodner, whose clients Utilities and Manufacturers were identified as potentially interested parties. Utilities and Manufacturers filed an objection to the PDO, and subsequent to that objection, we received additional arguments from both Hercules and Mr. Kalodner. On June 5, 2002, we issued a Decision and Order in which we granted a refund of $737,871 to Hercules (Case No. RR272-204).

II. Analysis

In his present submission, Mr. Kalodner notes that because the refund granted to Hercules "was $361,040 less than the proposed award, . . . the funds in the U.S. Treasury Crude Tracking Claimants

accounts will be depleted by $361,000 less that they would have been by virtue of the PDO." Application at 3. "A fee of 16 and 2/3% (one-sixth) of the amount saved by Kalodner's efforts is properly awarded to him for his effort in creating the $361,040 addition to the Crude Tracking-Claimants account." Id.

Subsequent to the filing of Mr. Kalodner's present application, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision regarding a previous request for fees, based on the same common fund theory, that was filed by Kalodner and rejected by the DOE and a federal district court. Kalodner v. Abraham, 310 F.3d 767 (D.C. Cir. 2002). In that case, "Kalodner alleges that his work on behalf of his clients benefitted the entire class of end users, entitling him to still more fees. Expressly disclaiming that he qualifies as a Subpart V claimant, . . . Kalodner argues that he is entitled to an award pursuant to the common fund fee doctrine." Id. at 769. The appellate court declined to rule on the "merits of Kalodner's common fund claim" because it found that "Kalodner's suit is barred by sovereign immunity." Id.

> Although arguing that this action "is against the United States only in its capacity as escrowee of funds belonging to end users found entitled to restitution," Appellant's Reply Br. at 16-17, Kalodner's common fund fee claim nevertheless implicates federal sovereign immunity for a simple reason: He seeks funds in the United States Treasury.
>
> . . . .
>
> [T]he sine qua non of federal sovereign immunity is the federal government's possession of the money in question. The government need not have an actual interest in the funds in order to invoke the defense.
>
> . . . .
>
> Kalodner has also failed to identify a statutory waiver of immunity that would allow him to bring his common fund fee claim. Congress has waived sovereign immunity for Subpart V claimants--parties actually injured by violations of the EPAA--by authorizing them to seek refunds from escrow accounts held by the United States Treasury and to challenge awards to other claimants. See Goodyear Tire & Rubber Co. v. Dep't of Energy, 118 F.3d 1531 (Fed. Cir. 1997) (party allegedly injured by EPAA violation challenged DOE's denial of its claims for price refunds); Consol.. Edison Co. v. Richardson, 233 F.3d 1376 (holding that Subpart V claimants have standing to challenge awards to other claimants). But as Kalodner concedes, he is not a Subpart V claimant nor was he injured by a violation of the EPAA. Appellant's Reply Br. at 21.

Id. at 769-70.

In all relevant respects, Mr. Kalodner's present claim is indistinguishable from that rejected by the court in Kalodner v. Abraham. Relying on the same "common fund fee" theory, he "seeks funds in the United States Treasury" and "has also failed to identify a statutory waiver of immunity that would allow him to bring his common fund fee claim." Accordingly, Mr. Kalodner's claim is barred by sovereign immunity and will be denied.

It Is Therefore Ordered That:

The Application filed by Philip P. Kalodner for a common fund fee (Case No. VEG-0010) is hereby denied.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 10, 2003

June 25, 2002

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: State of Washington

Date of Filing: April 26, 1999

Case Number: VPA-0001

This determination will consider an Appeal filed with the Office of Hearings and Appeals (OHA) on April 26, 1999, by the State of Washington's Department of Revenue under the Notice of Interpretation and Procedures (NOIP) implementing the "payments-equal-to-taxes" (PETT) provision in section 116(c)(3) of the Nuclear Waste Policy Act of 1982, (NWPA), 42 U.S.C. § 10101 *et seq*. Under the NOIP, the Department of Energy (DOE) will grant, to a State in which a candidate site for a high-level nuclear waste repository is located, a payment equal to the amount that State would receive if it were authorized to tax site characterization activities at that site. *See* 56 Fed. Reg. 42314 (August 27, 1991). The payment authorized by the NWPA is known as a "PETT grant." The history of the PETT program and the Basalt Waste Isolation Project and Near Surface Test Facility (collectively referred to as the BWIP) for characterization of a candidate site for a repository on the Hanford reservation in Washington State is described at length in Benton County, Washington, 26 DOE ¶ 80,145 (1996), http://www.oha.doe.gov/cases/pett/lpa0001.htm.

On February 24, 1993, the State submitted a formal claim to the DOE's Richland Operations Office for a PETT grant equal to the taxes it would have levied for site characterization activities at Hanford. By letter dated March 23, 1999, DOE's Office of Civilian Radioactive Waste Management (RW) denied the State's claim for a PETT grant based on Washington's Business and Occupation ("B&O") Tax. The amount in controversy is substantial; with interest through March 30, 2001, the State calculated the value of its claim as $14,096,589. State's Hearing Exhibit 6.

The fundamental dispute between the State and RW can be summarized as follows: According to the State, the B&O tax is Washington's principal tax on business activities. It is based on a taxpayer's gross income, and it is intended to reach all business activity within Washington State. Since the BWIP was a Federal project funded through the DOE, it did not have any gross income, and the State based its PETT claim on "the most comparable surrogate, the amount of expenditures associated with site characterization at Hanford." Petitioner's Statement of Position at 7. The State asserts that unless the BWIP is analogized to a private firm performing site characterization activities for hire, the PETT provision in section 116(c)(3) is rendered meaningless. RW maintains that since the BWIP had no gross income, its site characterization activities could not form the basis for taxation under the Washington B&O tax, and no PETT grant is due. RW also contends that the State cannot use the BWIP budget expenditures as a surrogate for gross income because that is not normally done under Washington tax practice. RW further contends that it is more appropriate to analogize the BWIP expenditures to "interdepartmental charges," in the nature of purely financial transfers from one branch of a hypothetical foreign corporation to another branch doing site characterization "in its own backyard" on land owned by the parent in Washington State. According to RW, such interdepartmental charges would be exempt from the B&O tax under Washington State law, and no PETT would be due.

I. Background

A. The Nuclear Waste Policy Act of 1982, as amended

A principal purpose of the NWPA was to provide for the development of a geologic repository for the permanent storage of high-level radioactive waste and spent nuclear fuel. As originally enacted, section 112(b) of the NWPA directed the Secretary of Energy to recommend three candidate sites for the repository to the President. Section 112(c) required approval by the President of these sites. Under these provisions, the Secretary recommended sites in Washington State (BWIP), Nevada (Yucca Mountain), and Texas (Deaf Smith County). On May 28, 1986, the President accepted the Secretary's recommendation and approved these sites. Section 113(a) directed the Secretary to carry out site characterization "beginning with the candidate sites that have been approved under section 112." Section 116(c)(3) of the NWPA directed the DOE to make PETT grants to the state and local governments in which potential repository sites were located:

> The Secretary shall also grant to each State and unit of general local government in which a site for a repository is approved under section 112(c) an amount each fiscal year equal to the amount such State and unit of general local government, respectively, would receive were they authorized to tax such site characterization activities at such site, and the development and operation of such repository, as such State and unit of general local government tax other real property and industrial activities occurring with such State and unit of general local government. Such grants shall continue until such time as all such activities, development, and operation are terminated at such site.

42 U.S.C. § 10136(c)(3) (emphasis added). PETT grants were to be paid from the Nuclear Waste Fund. 42 U.S.C. § 10136(c)(5).

Only 18 months after the President approved the BWIP as a candidate site for the repository, Congress enacted the NWPA Amendments of 1987 in Title V of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203. This legislation narrowed the search for a repository site by designating the Yucca Mountain site under section 112 of the NWPA as the sole candidate for characterization in accordance with section 113, 42 U.S.C. § 10133. DOE was directed to terminate all site characterization activities at the BWIP within 90 days after December 22, 1987, the date on which the NWPA Amendments of 1987 were signed into law. 42 U.S.C. § 10172.

The 1987 amendments made other, conforming changes in the NWPA that are relevant to a contested issue in the present appeal, namely the termination date for Washington's PETT eligibility. As originally enacted, section 116 provided for participation of "States with one or more potentially acceptable sites for a repository" in a public process leading to the final selection of a repository site. Sections 116(c)(1) and (c)(2) provided for "financial assistance" grants to enable the States to participate in the selection process. 42 U.S.C. § 10136. Those financial assistance grants to the States were distinct from PETT grants and had a different purpose from the PETT grants contemplated by section 116(c)(3), and the statute as originally enacted stated that payments equal to taxes were *in addition to* financial assistance grants by beginning the PETT provision with the phrase "The Secretary shall also grant to each State...." When the 1987 amendments limited site characterization to Yucca Mountain, the language of section 116 was modified by deleting the general references to "States" and substituting specific references to "the State of Nevada." That word change recognized that henceforth, Nevada would be the only State entitled to receive financial assistance grants for participating in the repository selection process, and PETT grants for site characterization activities (and the possible development and operation of a repository). The PETT provision in section 116(c)(3)(A) of the amended statute begins with the phrase, "In addition to the financial assistance grants under paragraphs (1) and (2), the Secretary shall grant to the State of Nevada...." Finally, a new paragraph (6) was added to section 116(c) which provides that "No State, other than the State of Nevada, may receive financial assistance under this subsection after December 22, 1987." 42 U.S.C. § 10136(c)(6)(emphasis added).

B. DOE's Notice of Interpretation and Procedures

In August 1991, RW issued a final Notice of Interpretation and Procedures (NOIP) for administering the PETT provisions of the NWPA, as amended. 56 Fed. Reg. 42314 (August 27, 1991). The final NOIP addressed comments received in response to a Proposed Notice issued on March 7, 1990. Several of the changes adopted in response to those comments are relevant to the present case. First, the interpretation of "site" was expanded to include all site characterization activities associated with a candidate site coextensive with the taxing jurisdiction's taxing authority, whether or not those activities are conducted on the physical site. In the present case this means that all site characterization-related activities subject to taxation by the State of Washington are eligible for inclusion in the State's PETT claim, no matter where those activities occurred. *Id*. at 42316. Second, the NOIP provided for an appeal process through the OHA for those jurisdictions having disputes with RW regarding PETT, and stated that OHA's decision on an appeal will serve as the final DOE action with respect to PETT. *Id*. at 42317. Finally, the NOIP considered comments about the commencement and termination of PETT eligibility. The NOIP determined that the State's eligibility for PETT would begin on May 28, 1986, the date on which the President approved the three candidate sites, and end on December 22, 1987, the date of enactment for the NWPA Amendments of 1987. In addition, the NOIP established the administrative procedures for considering PETT claims. *See* 56 Fed. Reg. 42318-20.

In setting the time limits for the State's PETT eligibility, the NOIP considered comments submitted by the State of Washington and the Mid-Columbia Consortium of Governments. These commenters claimed that DOE's proposed selection of May 28, 1986 as the commencement date for PETT eligibility was unreasonable, since site characterization activities were underway at the BWIP before it was formally recommended for site characterization under the NWPA procedures. After considering these comments, DOE determined that the preliminary activities undertaken before any site was designated as a "candidate site" under the NWPA did not constitute "site characterization" within the meaning of section 2(21) of the NWPA. In reaching that determination, DOE pointed out that the term "site characterization" is defined as:

> (A) siting research activities with respect to a test and evaluation facility at a candidate site; and
>
> (B) activities, whether in the laboratory or in the field, undertaken to establish the geologic condition and the ranges of the parameters of a candidate site relevant to the location of a repository, including borings, surface excavations, excavations of exploratory shafts, limited subsurface lateral excavations and borings, and in situ testing needed to evaluate the suitability of a candidate site for the location of a repository, but not including preliminary borings and geophysical testing needed to assess whether site characterization should be undertaken.

42 U.S.C. § 101(21). The NOIP explained that although various laboratory and field activities may have been underway at the sites prior to May 28, 1986, "these activities were neither related to a test and evaluation facility nor were they undertaken to establish the geologic condition or ranges of the parameters relevant to the location of repository." 56 Fed. Reg. at 42318. The NOIP goes on to state that "[e]ven if some of the data collected before the May 28, 1986 date were relevant to the overall characterization of the site, that fact alone would not qualify the data collection process as ?site characterization' for purposes of the NWPA." *Id*.

In addition to setting the time limits that apply to the State, the NOIP specified the following general requirements for a jurisdiction to be eligible to receive PETT payments for site characterization activities: (i) the jurisdiction must have the requisite taxing authority, and (ii) the jurisdiction must levy taxes applicable to non-Federal activities that are similar to the site characterization activities conducted by the Federal Government. *Id*. at 42318.

Based on the definition of site characterization in section 2(21) of the NWPA, the NOIP determined that the following types of activities would be eligible for PETT: (i) activities that impact the assessed value of real property; (ii) activities carried out prior to May 28, 1986, but only to the extent that the residual value of these activities after May 28, 1986 is treated as improvements to real property, used in support of site characterization for purposes of assessment valuation; (iii) ownership or possessory use of personal property; (iv) purchase or transfer of personal property acquired in one State for use in an eligible State; (v) use of motor vehicles; (vi) use of special fuels; (vii) payment of salaries to Federal employees; and (viii) activities subject to business or income taxes. The preceding list is not exclusive, and the NOIP recognized that other activities undertaken by DOE to evaluate the geologic suitability of the site that an eligible jurisdiction is authorized to tax may also be considered in the calculation of PETT. *Id*.

The "Administrative Procedures" section of the NOIP described the "estimated PETT analysis" that the eligible jurisdictions should submit to the DOE. For the period concerned in the present Appeal, only two state governments were eligible to submit estimates for PETT payments: Nevada, for the Yucca Mountain site, and Washington, for the Hanford site. According to the NOIP, the estimated PETT analysis should include the following:

> 1. Basis for eligibility showing how the jurisdiction meets the requirement for eligibility as set forth in this Notice. 2. Citations of relevant tax rules, regulations, rates, and bases for applying the rates. 3. Lists of Federal site characterization activities considered in estimating the PETT. 4. Calculations supporting the estimates in sufficient detail to allow DOE to verify the estimates. 5. Estimate of PETT liability for each tax type to which DOE's site characterization activities are subject and estimates of PETT liability for each tax type in accordance with the appropriate tax laws.

Id. at 42319. The NOIP states that DOE will review these analyses to verify that they are complete and correct regarding DOE's site characterization activities, the assessed value of DOE's property used to support its site characterization activities, DOE's operational activities subject to tax, and the tax laws of the eligible jurisdiction. The Notice provides that "late payments shall include interest, if appropriate, in accordance with applicable requirements of the taxing jurisdiction." *Id*.

II. Positions of the Parties

A. The State's PETT Estimate

The State submitted its PETT claim to DOE/RL on February 24, 1993. The claim was based on several types of taxes that Washington collects. At this point, RW has granted the claim in part and paid Washington a PETT grant based on all applicable taxes but one, the B&O tax, which is the focus of the present appeal. The claim stated that the B&O tax is Washington's principal tax upon business activities, citing Revised Code of Washington (Wash. Rev. Code) 82.04.220, and noted that the tax is based on "the gross income of the business,"as that term is defined in Wash. Rev. Code 82.04.280. The claim continued that "for PETT purposes there are no ?sales' or ?income' comparable to the private sector meaning of gross receipts." The State determined that the closest approximation of gross income is the amount of expenditures associated with the BWIP site characterization, and used these amounts as a measure of the B&O tax liability for PETT purposes. The State separated its PETT claim into two periods. The first period was for January 7, 1983 until May 28, 1986. For this period, the State sought B&O tax of $3,330,520, plus interest through December 31, 1992. The second period covered by the State's claim was for May 28, 1986 until December 22, 1987. For that period, the State sought B&O tax of $2,895,227, plus interest through December 31, 1992. The updated amounts for the two periods claimed by the State, including interest through September 30, 1998, were $7,321,166 (for the period January 7, 1983 to May 28, 1986) and $5,672,528 (for the period May 28, 1986 though December 22, 1987).

B. RW's Determination

On March 23, 1999, RW issued a determination denying the State's claim for a PETT grant based on the B&O tax. This determination rejected the State's PETT estimate for several reasons. First, RW read Wash. Rev. Code 82.04.290 as suggesting that an ordinary Washington business with "no gross income" would pay zero B&O tax. Determination at 4. Second, RW found no legal authority for the State's substitution of its own "approximation" for gross income in cases where gross income is zero, noting that the State's PETT estimate had submitted no examples of other taxpayers who paid B&O tax on the basis of an approximation of gross income. *Id*. Third, RW determined that the DOE's BWIP budget was the equivalent of an interdepartmental charge, furnished by one branch of a business organization to another department or branch. Under Washington Administrative Code (WAC) 458-20-201, amounts representing interdepartmental charges are excluded in computing the amount due for B&O tax. RW observed that Washington could have subjected interdepartmental charges to the B&O tax, but the legislature deliberately determined not to subject a purely financial transaction, such as the transfer of funds from one corporate department to another, to the B&O tax, *citing* Washington Excise Tax Bulletin 86.04.201.203 issued July 22, 1986. RW's determination reasoned that:

> Since Section 116(c)(3) requires that site characterization activities be subject to the same taxation rules as are all Washington businesses, the interdepartmental charge exemption to the B&O tax must also be applied to site characterization activities. Accordingly, a simple allocation of funds from one branch or department of the Federal government to another, i.e. from President and Congress to the [DOE] and the BWIP project, is not the type of transaction that would be taxed under Washington law, and thus may not form the basis for a PETT grant.

Determination at 5.

RW's determination then summarized its fundamental reasons for rejecting the claim:

> In order to establish a basis for the B&O tax, the [State] would postulate a fictional transaction in place of the transaction which actually occurred, and then apply the B&O tax to the fictional transaction. However, we have found no basis in Washington tax law for the use of legal fictions of this nature in determinating the amount of B&O tax due. Such a legal fiction could well form the basis for a PETT grant if it were shown to be a regular part of Washington tax practice, applicable to all industrial taxpayers. However, our study of Washington tax law indicates that the term "gross income" is construed strictly in accordance with the statutory definitions. Since Congress requires that PETT be determined in accordance with the same rules applicable to all taxpayers, we must use the standard definition of gross income.

Id. The determination also addressed two other issues that the State raised: an issue concerning RW's characterization of the BWIP budget as an "interdepartmental charge," and an issue concerning the "pyramiding" of the B&O tax. The State had argued that "to conclude that DOE was merely a department of a larger corporation would render the grant language of Section 116(c)(3) virtually meaningless, if not entirely meaningless." *Id*. at 6, *quoting* the State's July 27, 1998 letter. RW asserted that the State's foregoing argument "would have more weight if the B&O tax were the only one which could support a PETT grant." However, RW noted that it had previously determined that the State was eligible for PETT concerning the Tax for Common Schools, and also the State Use Tax, and that "these determinations give substantial meaning to Section 116(c)(3)." RW reiterated that departments of larger corporations in Washington State regularly receive transfers of money from corporate treasuries without the payment of B&O taxes on these transfers, and that the State "would have us render ?entirely meaningless' the fundamental congressional intent underlying Section 116(c)(3): the concept that payments are to be ?equal' to taxes." *Id*.

The RW determination noted that the PETT grant claimed by the State would be "pyramided" upon the B&O taxes already collected from BWIP contractors who did the bulk of project work. Since the State has already collected "a full portion of B&O tax from this source," RW "saw no need to adopt a strained reading of Section 116(c)(3) merely to add ?meaning' to this provision." According to RW, "the best interpretation of Section 116(c)(3) would have us calculate the B&O tax for PETT purposes exactly as [the State] would apply the tax to private, industrial taxpayers." *Id*.

In view of RW's decision to reject the B&O tax claim since the BWIP had no gross income, and in view of its characterization of the BWIP budget as purely financial interdepartmental charges exempted by the legislature from the B&O tax, the Determination declined to consider various other issues, such as the exact calculation of such a tax, and the particular tax rate that should be applied. *Id*. Finally, the Determination did not address the issue of the time periods for which Washington State would be eligible for PETT. However, RW has argued in the present appeal that the State's PETT eligibility, if any, ran from May 28, 1986 (when the President designated the BWIP as a candidate site) through December 22, 1987 (when the NWPA amendments were signed into law).

C. Washington State's Contentions on Appeal

The State contends that RW's Determination erred in denying its PETT claim for B&O tax. The State begins by describing what it characterizes as the "pervasive"nature of the B&O tax. In response to RW's Determination, the State gives examples of nonprofit associations and municipal governmental entities that have been assessed B&O tax on activities undertaken for public benefits other than profits, and examples of private firms that have been assessed B&O tax based on their actual costs, even when their accounting systems did not yield gross receipts, or gross income in the usual sense. Then the State goes on to explain why it believes that section 116(c)(3) must be read in conjunction with the Washington taxation scheme to authorize a PETT grant based on the B&O tax. The State rejects RW's alternative theory that analogizes the BWIP budget expenditures to "interdepartmental charges" transferred from one branch of a hypothetical foreign corporation to fund site characterization activities by its Washington State branch on its own land. Finally, the

State addresses the rate of taxation that it contends is appropriate for the BWIP site characterization, and the time periods for which it contends PETT should be granted. Each of these arguments is addressed below.

The State contends that making a profit is not required before the B&O tax is imposed, and notes that the Washington Supreme Court has rejected arguments made by nonprofit associations and municipal governments that they were not engaged in business because their activities did not benefit themselves or their members monetarily. Petitioner's Statement of Position at 4, *citing Young Men's Christian Ass'n v. State*, 62 Wash.2d 504, 508, 383 P.2d 497 (1963) (the B&O tax applies to all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly), *Seattle v. State*, 59 Wash.2d 150, 367 P.2d 123 (1961) (the legislature did not intend to restrict meaning of the term "business" to those activities engaged in solely for profit), and *Tacoma v. State Tax Comm'n*, 177 Wash. 604, 33 P.2d 899 (1934) (the legislature intended to tax activities engaged in with the object of nonmonetary benefit).

The State further argues that the mere fact that the amount received by a taxpayer only equals its costs is not controlling for B&O tax purposes. Petitioner's Statement of Position at 4. In support of this point, the State cites the case of *Pullman Co. v. State*, 65 Wash.2d 860, 400 P.2d 91 (1965), in which the Washington Supreme Court held that even though the payments Pullman received for repairing and maintaining railroad cars owned by other entities were intended to represent a reimbursement for the actual costs and yielded no profit to Pullman under its accounting scheme, they became taxable as part of the gross income derived from "retailing" under the B&O tax. In addition, the State cites Washington court decisions holding that deductions, exemptions, and even the terminology used by the legislature in

the B&O tax statutes are to be narrowly construed to fulfill the legislative intent to make it a pervasive tax.

In its Answers to RW's Requests for Admission, the State also cited a case decided by the Washington Board of Tax Appeals in which the Department of Revenue (DOR) was required to determine a taxable value for products for which there was no "sale" or "income." *Shell Oil Co. v. State of Washington, Dep't of Rev.*, BTA No. 93-28 (May 23, 1997) (*Shell*). The primary issue in that case was how to value exchanged petroleum products for purposes of the B&O tax. During the tax years at issue, the taxpayer participated in large volume exchanges with other refiners. This practice involves a transaction where one party delivers barrels of product to the exchange partner and receives back a like amount of barrels at another place and time. In Shell's case, generally no money changes hands in these exchanges, but the value of the exchanged products is fully taxable under the B&O tax unless the exchange qualifies as an exempt accommodation sale under Wash. Rev. Code § 82.04.425. Shell's exchanges did not qualify for that exemption, and they were subject to B&O tax on the market value of the products given up in the exchange as the DOR determined by reference to *Platt's*, an industry standard oil price reporting service. *Shell, supra*. That valuation is similar to imputing a total revenue to the value of the exchange at the time the products were made available to the exchange partner.

The State also argues that the language of section 116(c)(3) provides a basis for the granting of PETT. According to the State, the PETT statute "further provides that the amount to be paid shall be equivalent to what the State would receive from a taxable entity engaging in industrial activity within the State." In the State's view,

> the appropriate analogy, therefore, is to liken USDOE to a general contractor performing work for the federal government which is paid a given amount for work it will perform itself, with or without the assistant of subcontractors. To analogize USDOE to an independent contractor gives meaning to § 116(c)(3). Otherwise, the language granting PETT to states in the amount they would receive were they authorized to tax site characterization activities at the federal site really is meaningless.

Petitioner's Statement of Position at 7. The State also asserts that under Wash. Rev. Code 82.04.290, such site characterization activities would be subject to the "catch-all" rate of tax for "other business and service activities." *Id*. The State asserts that "pyramiding" of tax burdens is a significant feature of the B&O tax, so that even if the BWIP subcontractors have already paid B&O tax on the amounts they received from DOE, the BWIP itself as the general contractor in the State's analogy, would have to pay B&O tax based on its gross income. *Id*. at 2, 3.

III. OHA Procedural History

After the present Appeal was filed on April 26, 1999, OHA requested that each party submit a statement setting forth its position in detail. Following the exchange of these Statements of Position, a series of status conferences were held by telephone during the next several months, and the parties conducted discovery. OHA issued one interlocutory decision to resolve discovery issues. *State of Washington*, 27 DOE ¶ 82,503 (200). We explored the possibility of avoiding an evidentiary hearing and proceeding directly to decide the case on cross motions for summary judgment. However, we ultimately determined that since certain fundamental facts remained in dispute, it would be necessary to hold an evidentiary hearing in order to develop a complete record.

Shortly before the evidentiary hearing, OHA issued a second interlocutory decision in which we denied two motions for partial summary judgment that were filed by RW. *State of Washington*, 28 DOE ¶ 82,501 (2001). The first motion sought partial summary judgment on the following legal proposition: "that a private taxpayer, operating in a similar factual context, would not be subject to B&O tax under Washington law." *Motion* at 1. RW's motion was based on the responses of two State witnesses, David J. Wiest and Kenneth Capek, to hypothetical questions posed to them in depositions by RW's counsel, and

the State's answers to RW's requests for admissions. The State disputed RW's characterization of the BWIP project in those hypothetical questions as "a private taxpayer in Washington, who, on its own behalf and using its own money, does site characterization work in its own backyard to determine the yard's suitability for some future purpose." 28 DOE ¶ 82,501 at 85,002. According to the State, "under an equally plausible characterization of the BWIP, gross revenues derived by a company performing site characterization activities for another are indisputably subject to B&O tax" under Washington law. *Id*. The State argued that RW's interpretation of the NWPA's PETT provision would produce a result (no PETT grant for B&O tax on industrial activities at the BWIP during site characterization) that is inconsistent with both Congressional intent and RW's own interpretation of the NWPA in the NOIP. We indicated that we agreed with the State that RW postulated an analogy that would yield the result which it advocates, but that RW's analogy does not comport exactly with the facts. We therefore denied the first motion for partial summary judgment based on our finding that there is a material dispute about which party's characterization of the BWIP is more appropriate under the circumstances of this case.

RW's second motion sought partial summary judgment on the following proposition: "that the time period for measuring the Petitioner's entitlement for payments equal to taxes (PETT) under section 116(c)(3) of the Nuclear Waste Policy Act (NWPA) commenced on May 28, 1986, and ended on December 22, 1987." *Motion* at 1. RW pointed out that in the *Benton County* decision, OHA had determined that PETT eligibility did not begin until May 28, 1986 when the BWIP was approved as a candidate site under section 112(b) of the NWPA. *See* 26 DOE ¶ 80,145 at 80,618. OHA agreed with RW's position on the start date for PETT eligibility, but we disagreed with RW on the termination date. OHA ruled in the *Benton County* decision that the termination date for PETT eligibility should be March 21, 1988, the effective termination date for BWIP site characterization activities according to the NWPA amendments of 1987. That statute, codified at 42 U.S.C. § 10172, directed DOE to terminate all site characterization activities at the BWIP 90 days after December 22, 1987. Section 116(c)(3) of the NWPA as originally enacted specifies that PETT grants "shall continue until such time as all [site characterization] activities are terminated at such site." 26 DOE ¶ 80,145 at 80,619. Based on our determination that the premise of the second motion was half right and half wrong, we denied that motion as well. 28 DOE ¶ 82,501 at 85,003. RW moved for reconsideration of our decision denying the second motion for partial summary judgment, arguing that section 116(c)(6), which was added by the 1987 NWPA amendments, precluded further "financial assistance" to any State "other than the State of Nevada." We declined to consider the request on the eve of the evidentiary hearing. However, we will consider RW's argument based on the language of section 116(c)(6) later in the present decision.

An evidentiary hearing was held in Seattle on March 28 and 29, 2001. Post-hearing briefs were submitted in August 2001, and reply briefs were submitted in October 2001. In November 2001, after reviewing the entire record, OHA informed the parties that we were prepared to issue a decision without oral argument. This determination was based on our observation that after preliminary briefing, a lengthy discovery process, expert witness statements, a two-day evidentiary hearing, post hearing submissions, and two rounds of post-hearing briefs, the dispute in this case was clearly delineated, and both parties had repeated opportunities to state their respective positions and to challenge each other's theory of the case. RW requested leave to file a rejoinder brief, and the State opposed this request. In December 2001, OHA denied RW's request to file a rejoinder brief, and we took the case under advisement.

IV. Analysis

Under the NOIP, the burden of proof in this case is on Washington State as the applicant for a PETT grant. To prevail in this appeal, the State must show that RW's Determination was erroneous. In that regard, we will begin by considering whether RW erred in its application of the PETT statute to the facts of this case by determining that the State should receive no PETT for the B&O tax. In the papers it filed before the hearing, RW gave two alternative reasons to justify its denial of PETT for the B&O tax: (1) the BWIP had no gross income, or (2) the BWIP should be analogized to a division of a foreign (i.e. out-of-

state) corporation performing site characterization on land owned by its parent in Washington, funded by an interdepartmental transfer payment, which would be exempt from the B&O tax. Both RW and the State have extensively briefed their respective positions on how the PETT grant provision should be applied to the BWIP.

If we find that RW erred in denying the State's PETT claim, we will then consider whether and to what extent we agree with the State that section 116(c)(3) requires RW to analogize the BWIP to a private general contractor performing site characterization for profit, and that the State's use of the BWIP budget expenditures as a surrogate for the gross income of the BWIP is appropriate for PETT purposes. In reaching an answer to the latter questions, we will utilize the expert testimony and documentary evidence submitted at the evidentiary hearing in this matter.

A. Whether RW erred in its application of the PETT statute to the facts of this case

We start from the proposition that RW's views will be sustained unless the State shows that RW's legal fictions and its position are erroneous. After considering the record, we conclude the State has met its burden by showing that RW erred in its application of the PETT statute to the facts of this case. As explained below, we find that the statutory language and the legislative history of the NWPA's PETT provision, RW's interpretation in the NOIP of the PETT provision, the principles established in our *Benton County* decision regarding RW's PETT obligation, and RW's favorable treatment of the State of Nevada's PETT claim, when taken together, support the State's position and compel the conclusion that the State should receive a PETT grant. (The appropriate amount of the grant will be considered below in Sections IV.B. and IV.C. of this opinion.)

1. The NWPA and the legislative history of the PETT provision, while sparse, tend to favor approval of PETT grants to the affected jurisdictions

The Department of Energy is uniquely responsible under the law for conducting site characterization of potential high level radioactive waste repositories. Section 113(a) of the NWPA, as originally enacted, directed the Secretary to carry out site characterization of the candidate sites approved under section 112. Site characterization of candidate sites is an end in and of itself in the first stage of the repository selection process envisioned in the NWPA. The money to fund site characterization comes from the Nuclear Waste Fund established under section 302 of the NWPA, and it is appropriated by the Congress based on budget requests submitted by the Secretary. Under the aspects of this legislative scheme that are relevant to the present PETT appeal, it is more accurate to analogize DOE's activities at Hanford to a private general contractor performing site characterization for hire than to say that DOE is performing site characterization on its own land with its own people as a prelude to performing a service contract for waste disposal at some time in the future. Later in this Decision, it becomes evident that RW's focus on the standard contract for waste disposal as the basis for an alternative legal fiction supporting its denial of PETT for the B&O tax does not comport with the legal reality established by the NWPA.

The language of section 116(c)(3) is general, and the legislative history of the PETT provision is scanty. The Congress did not consider the fine details of State law, and obviously did not anticipate that the application of the Washington B&O tax would be problematical in the way we find in this case. The only mention of site characterization in the legislative history concerns what we dubbed the Hanford "grandfather clause," which was inserted in the NWPA by former Congressman Sid Morrison, whose District then included the BWIP. *Benton County,* 26 DOE ¶ 80,145 at 80,618. That provision has no special relevance to the main issue in this appeal, whether the State should receive PETT for the B&O tax. (However, it is relevant to another issue, discussed later in this decision, whether the State should receive any PETT for the period before May 28, 1986.)

The only mention of PETT in the legislative history is a statement by former Senator J. Bennett Johnston, ranking minority member of the Senate Energy and Natural Resources Committee and one of the sponsors of the legislation, at the time the NWPA was originally being considered for passage. Senator Johnston stated, in relevant part, "that a State should not be worse off by virtue of having one of these facilities in their State than they would be in terms of taxes, at least." See NOIP, RW's Hearing Exhibit 14 at 6, *citing* 128 Cong. Rec. S4132 (April 28, 1982). Neither of these historical references sheds any light on the specific B&O tax issue. However, the grandfather clause shows the Congress knew that preliminary geological studies of the Hanford site were ongoing when the NWPA was enacted. Sen. Johnston's statement offers insight into the policy underlying the PETT provision, and it weighs in favor of the State's position, since the State would clearly be worse off if it were unable to receive PETT for the B&O tax. In quoting the Senator's remark in the NOIP, RW adopted a policy in favor of granting PETT to eligible jurisdictions.

While the statute's legislative history is sparse, there are a number of documents that may be used in reaching a proper interpretation of section 116(c)(3). Those are the NOIP, the *Benton County* appeal decision, and the PETT grants to Nevada. We will discuss each of these in turn.

2. RW's interpretation of the PETT provision in the NOIP

The NOIP carries out the policy objective of section 116(c)(3) by enumerating several categories of activities that qualify for PETT. For purposes of the present appeal, it is most significant that one of the specific categories mentioned is "activities subject to business or income taxes." We take notice of the fact that business or income taxes are usually based on some measure of a taxpayer's sales or revenues, and the Washington B&O tax is a typical business tax in this respect. While RW knew that Washington was one of the two States that would be eligible to receive PETT when it formulated the NOIP through a notice and comment process, RW, like the Congress, did not deal with any issues that could arise in applying the Washington B&O tax. Nor did Washington State raise any questions about the specific application of its B&O tax during the notice and comment process that preceded issuance of the NOIP, even though we learned during the hearing held on this appeal that Department of Revenue officials had earlier recognized that "this could be a real can of worms, as we've never had to determine B&O tax on nonproprietary governmental activities." RW's Hearing Exhibit 3, at 4. Thus, the NOIP does not address the specific issue before us. However, when we consider the implication of the specific phrase "activities subject to business or income taxes," and look carefully at the other types of activities that were deemed eligible for PETT, we find below that the NOIP is another piece of evidence that supports the State's position.

Following the principle that affected jurisdictions should receive "compensation coextensive with the amounts the taxing jurisdictions otherwise could collect as taxes if site characterization activities were carried on by private parties," the NOIP determined that the following types of activities would be eligible for PETT:

> (i) activities that impact the assessed value of real property; (ii) activities carried out prior to May 28, 1986, but only to the extent that the residual value of these activities after May 28, 1986 are treated as improvements to real property, used in support of site characterization for purposes of assessment valuation; (iii) ownership or possessory use of personal property; (iv) purchase or transfer of personal property acquired in one State for use in an eligible State; (v) use of motor vehicles; (vi) use of special fuels; (vii) payment of salaries to Federal employees; and (viii) activities subject to business or income taxes.

NOIP at 42318. The preceding list is not exclusive, and the NOIP recognized that other taxable activities undertaken by DOE to evaluate the geologic suitability of a site may also be considered in the calculation of PETT.

Since activities subject to business or income taxes are eligible for PETT, it is reasonable under the

NWPA and the NOIP to use the specific amount of funds expended by the DOE for the BWIP site characterization as a surrogate for gross income to determine the PETT grant to Washington State for the B&O tax. As the State points out, RW's argument that there was no gross income generated by the BWIP activities is purely tautological, and at odds with the NOIP's mandate. Section 116(c)(3) requires the DOE to determine the amount of PETT by viewing site characterization activities carried out by a Federal project using Federal money on Federal land as if they had been performed by a private entity subject to taxation. Given the scope of that mandate, DOE should take the small step of using a legal fiction purely for the purposes of measurement. This compensates Washington for the business tax revenues it could have realized had the site characterization activities been carried out by a private firm.

The State's position is reasonable because without some way of making "business taxes" eligible for PETT notwithstanding the lack of any gross income for DOE's characterization of candidate sites, the provision in section 116(c)(3) would be a nullity. Indeed, no activities conducted by the DOE under the NWPA would be expected to earn income, but this is not an insuperable problem since there are ways of coming up with alternative methods of measuring their value for PETT purposes. If we assume the State is right in its interpretation of the legislative intent of the PETT provision in section 116(c)(3), then it is necessary to analogize the BWIP to a private entity subject to taxation and create a surrogate for gross income.

3. The principles established in the Benton County appeal require an interpretation of section 116(c)(3) that favors PETT grants

To the extent possible, this case should be decided in a manner that is consistent with the agency's decision on the *Benton County* PETT appeal. In that case, we rejected a similar, extreme position taken by RW which would have resulted in a virtual denial of the County's PETT claim for real and personal property taxes. We held that the statute had to be construed in such a way as to give effect to the principle that Congress intended local jurisdictions to receive PETT grants for site characterization activities that would be subject to taxation if undertaken by private entities.

In *Benton County*, RW did not resist the basic legal fiction required by the statute—viewing the Hanford site characterization as a private activity subject to taxation—as it has done in this case. The principal issue in *Benton County* involved the application of the PETT statute to an ad valorem property tax on the land occupied by the BWIP. RW accepted the idea inherent in the PETT statute of the BWIP's fictional conversion from a Federal project, exempt from taxation under the doctrine of sovereign immunity, to a private entity subject to taxation. Instead, RW's opposition to the Benton County PETT claim mainly took the form of minimizing the assessed value of the BWIP land by viewing the project several years after the improvements had been removed and the site restored to a relatively pristine state. After reviewing the historical context and the legislative history of the PETT provision, we found RW's restrictive treatment of the County's PETT claim was inconsistent with the policy underlying the PETT provision of the NWPA, as interpreted by DOE in the NOIP, which states that:

> the Congress intended to provide a level of compensation for the affected jurisdictions that would be coextensive with the amounts the taxing jurisdictions otherwise could collect as taxes if site characterization activities were carried on by private parties.

26 DOE ¶ 80,145 at 80,627, *citing* NOIP, 56 FR at 42317.

In the present case, RW seems to have retreated one step. In effect, it is taking the position that section 116(c)(3) does not require treating the BWIP as if it were a private entity subject to taxation. RW has done this indirectly, by rejecting the State's argument that it is necessary to use the BWIP budget expenditures as a surrogate for gross income in order to effectuate the legislative objective in section 116(c)(3). RW has taken an equally restrictive approach in its alternative reasons for rejecting the State's PETT claim. RW has formulated a hypothetical situation in which the BWIP is considered a branch of a foreign corporation that would not be required under Washington law to pay B&O tax on its site characterization activities. At the hearing held on this appeal, RW also postulated a series of "alternative fictional tax theories" that

analogize DOE's role in the Hanford site characterization to a managing agent or a construction manager rather than a general contractor. In addition, as another argument RW would have us focus entirely on the ultimate goal of future waste disposal. Since disposal has not yet occurred, RW argues that no taxation is appropriate. RW would thereby have us disregard the express statutory mandate in NWPA section 113(a), namely, that the Secretary perform site characterization at "candidate sites," and grant PETT under section 116(c)(3) to affected jurisdictions "were they authorized to tax such site characterization activities" (emphasis added). All of RW's analogies and its reasons for denying the PETT claim ignore the express statutory language of the NWPA and the pervasive nature of the B&O tax, which is designed to reach all business activity in Washington State.

4. The Washington PETT claim should be treated the same as the Nevada PETT claim

To the fullest extent possible, the Washington PETT claim should be treated in a manner consistent with the Nevada PETT claim. Since two States were eligible initially under the NOIP to submit PETT estimates, it is relevant for purposes of Washington's appeal to consider the manner in which DOE handled the PETT process with Nevada. As we noted in *Benton County*, there is nothing in the NWPA statute that would warrant treating Washington differently than Nevada, for the period before the termination of Washington's PETT eligibility mandated in the 1987 NWPA amendments. The PETT claim of Nevada based upon site characterization activities at Yucca Mountain was resolved through a negotiated settlement. OHA has no information about whether RW gave Nevada PETT for any business taxes. However, the fact that the matter was settled makes it seem likely that RW paid at least some business taxes to Nevada. In order to ensure that Washington is being treated the same as Nevada, and thus help resolve the present case, RW will be required to submit a report to OHA within 30 days after it receives this decision, explaining how it treated Yucca Mountain's "activities subject to business or income taxes" for purposes of the Nevada PETT settlement.

5. We conclude that RW applied an erroneous interpretation of the NWPA to the Washington State PETT Claim

To summarize, it is our view that RW has adopted an overly narrow interpretation of section 116(c)(3) that is inconsistent with the statute. Its refusal to accept the State's use of the BWIP budget expenditures as a surrogate for gross income for purpose of the B&O tax ignores the policy underlying the PETT provision, the mandate of the NOIP, and common sense. In a series of alternative theories, RW has postulated a fictional corporate structure that it would impute to the BWIP, combined with a fictional role for the DOE in the Hanford site characterization project, all to reach the conclusion that the State would receive no PETT for the Washington B&O tax. This is an extreme position. Barring the State completely from getting any B&O tax revenue for a site characterization project located within Washington with extensive commercial aspects that constituted "industrial activities," is wrong because it frustrates the purpose of the statute, as interpreted by RW in the NOIP. It is also inconsistent with our Decision in the *Benton County* appeal, which considered many of the same fundamental issues. In *Benton County*, we described the historical context of the PETT provision, and concluded that the Congress intended the statute to be interpreted to favor approval of PETT grants. Finally, it is inconsistent with RW's treatment of Nevada's PETT claim, when there is no basis in the statute or NOIP for treating Washington differently from Nevada. We therefore conclude that the State has met its burden of proving that RW erred in its application of the PETT statute to the facts of the present case. We next consider the proper amount of Washington's PETT grant by reference to the extensive record developed in this appeal on the B&O tax.

B. Determining the proper amount of Washington's PETT grant

The State contends that section 116(c)(3) requires RW to analogize the BWIP to a private general contractor performing site characterization for profit, and to use the BWIP budget expenditures as a

surrogate for gross income to determine the amount of B&O tax for PETT purposes. RW has interposed a number of arguments, all of which would reduce the amount of B&O tax. We begin by describing the nature of the B&O tax itself.

1. The B&O tax is a pervasive tax on business activity in Washington and has been extended to cover for-profit entities with unusual accounting systems, to non-profits, municipal corporations, in-kind petroleum exchanges, and to cost-plus fee government contracts, by using "surrogates for gross income"

According to the NOIP, for a jurisdiction to be eligible to receive a PETT payment for site characterization activities: (i) the jurisdiction must have the requisite taxing authority, and (ii) the jurisdiction must levy taxes applicable to non-Federal activities that are similar to the site characterization activities conducted by the Federal Government. *Id*. at 42318. The State has met these requirements by showing that it has the authority to collect B&O tax:

> There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

Wash. Rev. Code § 82.04.220. The B&O tax is Washington's principal tax on business activities, and it is intended to reach all business activity within Washington State. See State's Hearing Exhibit 8. In keeping with the pervasive nature of the B&O tax, the terms "person," "business," and "gross income" are broadly defined. For example, the word "person" as defined for purposes of the B&O tax includes "the United States or any instrumentality thereof." Wash. Rev. Code § 82.04.030.

RW has not challenged the State's assertion that it has the general authority to collect the B&O tax. Instead, RW has argued that "a private entity with no gross income would pay no B&O tax." This argument is not supported by the evidence. As noted elsewhere in this Decision, the record reflects many instances in which Washington State's Department of Revenue, its Board of Tax Appeals, and its courts have applied the B&O tax to entities that did not have "gross income" within the conventional meaning of that term. These include nonprofit associations (the YMCA), and municipal governments (the cities of Seattle and Tacoma), private entities whose accounting systems recorded not profits but reimbursement for the cost of services (the Pullman Co.), refiners using in-kind petroleum product exchanges (Shell Oil Co.), and cost-plus fee contracts (the managing and operating (M&O) contractors at the Hanford Reservation). Thus, the weight of the evidence is that public and private entities with no gross income do pay B&O tax to the State of Washington. The situation presented in the instant case is unusual, but it is by no means unprecedented.

Not only does it lack factual support under Washington tax practice, but RW's position begs the question because it ignores the legal fiction required by the PETT statute and RW's own interpretation in the NOIP: the assumption that site characterization activities at a "candidate site" were performed by a private entity subject to business and income taxes. We agree with the State that merely assuming that the BWIP was a private entity does not go far enough to give meaning to section 116(c)(3). The only interpretation that achieves the purpose of the statute is to view the BWIP as a private entity like a general contractor performing site characterization for a fee, which can be measured by the amount of funds spent for the project. As explained below, the testimony of the expert witnesses at the hearing provided additional support for this interpretation of the PETT statute.

2. The expert opinion testimony and documentary evidence submitted at the hearing

A. The State's Witnesses

The hearing held in this case was useful since it provided a live forum for the expert witnesses called by the State and RW to debate their competing theories. All of the witnesses called by both parties had worked for the Washington Department of Revenue (DOR) at one time, all of them had expert knowledge about the B&O tax, and some had been directly involved in the audit that formed the basis for the State's PETT claim. The State's two principal witnesses, Frank Akerly and David Wiest, explained what the DOR actually did when faced with the task of submitting a PETT claim for the B&O tax. We found the DOR's application of the B&O tax to the Hanford site characterization activities to be reasonable and consistent with the NWPA. RW's two principal witnesses, Jerry Hammond and Les Jaster, were offered to second-guess the theory underlying the DOR's PETT claim, and to support RW's alternative theories that would either reduce the amount of PETT for the B&O tax for the Hanford site characterization, or eliminate the PETT obligation for that tax altogether. Ultimately, we found the factual and legal assumptions made by RW's witnesses to be unsupported by the record, and as a result, the positions they advocated were unconvincing.

The State's first witness, Frank Akerly, was the Washington Department of Revenue (DOR) auditor who examined the DOE's BWIP records and prepared the Audit Report that was used in formulating the State's PETT claim. Akerly described the essential features of the B&O tax as "a tax that's on every individual and business that has any business or industrial activity in the State of Washington, whatsoever. It's based on gross income without any deduction, and it pyramids." March 28-29, 2001 Hearing Transcript (hereinafter cited as "*Tr*.") at 39. He explained that under the pyramiding aspect of the B&O tax, if a general contractor hires a subcontractor who in turn hires a subcontractor, each one pays tax on the amount that it receives.

Akerly testified that there was a precedent for using DOE's costs as the basis for computing the B&O tax for the PETT claim, since the same approach–using cost information to come up with a B&O tax due–was used for taxing the M&O contractors at the Hanford Reservation. He explained that the Hanford prime contractors had no income other than fee, but "we tax the whole, their expenditures and the fee as a total to determine the tax." *Id*. at 43. (Akerly's account of how the B&O tax is applied to cost-plus fee contracts was later confirmed in the testimony of RW's witness Les Jaster.) Based on information provided by DOE, Akerly testified that at the time of termination, there were approximately 60 DOE employees, and over 800 contractor and subcontractor people working full time on the BWIP site characterization. *Id*. at 46-47; *see also* State's Hearing Exhibits 9 and 10. In addition, Akerly explained that the DOR examined the possible rates, and concluded that the "Service and Other Activities" classification was the most appropriate rate for the B&O tax on BWIP site characterization activities. Under Washington tax practice, according to Akerly, the DOR looks at the primary purpose of the contract when different types of activities are being performed under one contract, and based on that principle, it applied the Service and Other Activities rate. *Id*. at 47-49.

In its opening statement at the hearing, RW asserted that its consideration of the State's PETT claim for B&O tax began with a search for "an example of what [RW] felt was a comparable activity in the state." *Id*. at 21. According to RW, this was the Echo Bay Mining Company in Denver, which spent $45 million to characterize a site in Washington State, Kettle Falls, to determine if it was suitable for development as a new gold mine. On cross-examination, RW asked Akerly if the firm transferred that amount of money from its headquarters in Denver to its field office in Washington State without paying B&O tax, and Akerly stated that the firm could make the transfer without paying B&O tax "because they're the same entity." *Id*. at 57. Using RW's assumptions, Akerly conceded that since the DOE is part of the Federal government, if he had just applied state law to the BWIP, without considering section 116(c)(3), the situation would be the same as with the mining company. However, in response to a question from the OHA panel, Akerly stated that if someone else paid $45 million to the mining company to do site characterization on the Washington site, in exchange for buying any gold produced at a good price, the mining company would have to pay B&O tax on that $45 million amount. *Id*. at 59. It is the latter situation that most closely resembles the situation of the BWIP, where the Congress mandated in the NWPA that the DOE perform site characterization at candidate sites, and appropriated the money from the Nuclear Waste Fund to pay for it.

In response to a follow-up question from RW, Akerly emphasized that the DOR treated the BWIP site characterization as industrial activity subject to taxation under the B&O tax because the State believed that was required by section 116(c)(3). Aklery maintained that "there would be no allowability of payment[s] equal to taxes if [the BWIP] were considered a nontaxable entity," and he questioned why Congress would have even bothered including section 116(c)(3) in the NWPA if they did not expect the State to receive a PETT grant for the Hanford site characterization. *Id*. at 62. This colloquy with Akerly illustrates the stark difference between RW's scorched-earth approach to the B&O tax PETT claim, and the State's attempt to read meaning into section 116(c)(3). We agree with the State that unless the BWIP is viewed as a taxable private entity that performed site characterization at Hanford for hire, the statutory language would be rendered utterly meaningless.

Moreover, Akerly's testimony illustrates a fundamental flaw in RW's legal fiction. The gold mine example on which RW relies is not analogous to the BWIP situation under section 116(c)(3). In the case of the Denver-based mining company, the site characterization expenditure in Washington State is a pre-development cost undertaken with the firm's own money to decide whether to invest in a new mine. In the case of the BWIP, the site characterization expenditure is required by a Federal statute that also requires the DOE to grant the State PETT as if those activities were performed by a private entity subject to taxation. Moreover, the BWIP site characterization is not a speculative, pre-development cost as in the case of the potential gold mine, but an end it itself–i.e. a task that the Congress expressly directed DOE to perform in section 113(a) of the NWPA. In relying on this analogy, RW appears to have carried over an argument it raised in the *Benton County* case–that certain "soft costs" including pre-development site characterization expenditures–should not be included in the assessed value of a property until the activity projected for that property, whether operation of a gold mine or a nuclear waste repository, actually begins. We rejected that argument in *Benton County*, and we reject it here since section 116(c)(3) specifically authorizes PETT grants for site characterization by the DOE under section 113(a), regardless of whether a repository is ever built on that candidate site.

The State's next witness, David J. Wiest, was the DOR Field Audit Manager who approved the report prepared by Akerly that formed the basis for the B&O tax claim. Wiest confirmed the choice of the "Service and Other Activities" classification as most appropriate for the BWIP, since it was customarily used for site characterization. He explained that the legislature enacted the "Nonprofit Research and Development" B&O tax rate to be applied to a specific company, and that it could not work for the Hanford site characterization. *Id*. at 69-70; 75-76. He further explained how the pyramiding feature of the tax worked, so that each subcontractor in a chain of contractors would pay B&O tax on the amount they receive from the general or prime contractor, with the prime contractor at the base of the pyramid paying B&O tax on the entire amount it receives from the customer to do the project. Wiest maintained that the B&O tax situation would be the same even if the customer directed its bank to pay one of the subcontractors directly. According to Wiest, each subcontractor would pay B&O tax on the amount it receives and the prime contractor could not escape taxation on a portion of the entire amount just because the payment was made directly to a subcontractor. *Id*. at 77-81. He also confirmed Akerly's testimony that the DOR was required to look at the "overriding nature" of contracts and apply the one B&O tax rate that is appropriate, rather than "bifurcate contracts" and apply multiple tax rates to the different activities. *Id*. at 86-87. The State's attorneys indicated they would submit some cases to support their position on the bifurcation or apportionment of B&O taxes.

On cross-examination by RW, Wiest indicated that the State never considered that DOE was a "managing agent" for purposes of applying the B&O tax to the Hanford site characterization, as RW had proposed in an "alternative fictional tax theory" mentioned in its opening statement. RW Hearing Exhibit 2-E. According to Wiest, the State did not treat the BWIP as a managing agent, because a managing agent would usually have no employees on a project. Wiest added that the State "did not look at DOE as a contractor as such," but "just saw that there was a provision in 116(c) to, for a payment equal to taxes if we looked at a private industrial contractor doing the type of work that was done out there." *Id*. at 97-98. When pushed by RW to explain his thought process, Wiest, like Akerly, questioned why section 116(c)(3)

would even have been written if the DOE was not liable for a PETT grant for the B&O tax. *Id*. at 98-99. In response to another series of questions from RW, Wiest maintained that while the State would not impose a B&O tax on a private landowner doing site characterization on its own land with its own employees, section 116(c)(3) mandated a different result in the case of the BWIP, even though the Federal government owned the land on the Hanford Reservation. *Id*. at 108-110.

Wiest's cross-examination ended with a colloquy concerning a hypothetical question asked during Wiest's deposition by RW, known as "Hypothetical L," reproduced below:

> [Question by RW] One, assuming that it is the year 1980. Two, X Corporation is a corporation whose head office is located in New York state. Three, X Corporation employees operate a corporate branch office in Waco, Texas, another branch office in Reno, Nevada, and another branch office in Yakima, Washington. All three branch offices are investigating whether it might be possible to construct a landfill at their sites but, no decisions to construct have actually been made. Four, Y Corporation located in Ohio expects to generate 5 tons of trash per year for the next 20 years for a total of 100 tons. Y plans to accumulate the trash in storage until 100 tons have been accumulated in the year 2000. Five, in the year 1980, the X Corporation head office in New York contracts with Y to take the trash[, and] the contract expressly states no services shall be provided under the contract prior to the year 2000. And the question is the same, what are the Washington state B&O tax consequences to X as a result of the hypothetical L scenario?
>
> [Answer by the Witness] I think it would be real similar to the last example, where if no services, disposal services, actual disposal is provided, it doesn't look like you would have a B&O tax consequence.

November 16, 2000 Deposition of David J. Wiest, at 20-24.

RW has steadfastly maintained that the situation depicted in Hypothetical L is identical to the reality presented in this case, and that it proves that no B&O tax is owed on the BWIP. However, the State's attorneys, Wiest himself, and the OHA panel members, all pointed out the fatal flaw in Hypothetical L, that it fails to mention the existence of section 116(c)(3) so it is different from the real-world situation that we have in this case. *Tr*. at 113-126. Moreover, section 116(c)(3) does not use the term "investigate," as in the hypothetical; it speaks of "site characterization," a task specifically given to the DOE in section 113 of the NWPA. As noted above, site characterization is an end in and of itself that gives rise to PETT grants under section 116(c)(3), regardless of whether a repository is ever operated at a site and regardless of whether or when DOE takes title to, or disposes of, any waste. Contrary to its intended purpose, Hypothetical L proves only that RW has mischaracterized the facts in its legal fiction, and taken a position inconsistent with the law.

RW later recalled Wiest for additional cross-examination about the other hypothetical questions posed during his deposition on November 16, 2000. Specifically, RW asked Wiest if there was "a distinction in the tax treatment of a contract for waste disposal versus a contract for site characterization for hire." *Id*. at 164. Wiest explained that the "service and other activities" rate would apply to site characterization, and there was a different B&O tax rate specifically for waste disposal. In addition, Wiest testified that during the PETT audit, the State never looked at the "Standard Contract" which the nuclear utilities signed with the DOE that provided for waste disposal by the Department. *Id*.; see RW's Hearing Exhibit 10, 10 CFR Part 961. Wiest agreed with RW that there would be no B&O tax due on a contract for waste disposal made in New York unless the person receiving the waste put it in Washington State. In addition, Wiest agreed with RW that if someone in New Jersey contracted with another company to find a place in Washington and study that site in the hope of later sending waste there, there would be B&O tax due on the site characterization for hire. *Id*. at 169. Finally, RW asked Wiest if the State would have taken a different approach, instead of using the BWIP budget expenditures as the basis for its B&O tax PETT claim, had they found out that the money the DOE used for the BWIP site characterization was coming

from utility companies who were paying for waste disposal services. Wiest said that the State had never considered that point. *Id*. at 171.

RW's second round of questions for Wiest illustrates a consistent flaw in RW's theory of the case, namely, its notion that site characterization of the BWIP under section 116(c)(3) is not an end in and of itself that gives rise to an obligation to make PETT grants to Washington State. The implication of RW's allusion to the waste disposal contracts between utilities and DOE is that the money in the Nuclear Waste Fund cannot be used for PETT payments because it was intended for "waste disposal." That position shows how RW would skirt the NWPA scheme by reading out the PETT provision in section 116(c)(3). RW's apparent conviction that Washington should not get a PETT grant for B&O tax on the BWIP because the repository will not be built at Hanford may explain why RW has strained to come up with any reason it can to avoid making the payment. Site characterization of "candidate sites," i.e. potential repository locations approved by the President, was always an integral step in the waste disposal process envisioned by the NWPA. More importantly, under section 116(c)(3), site characterization is all that is needed to support a PETT grant to Washington for the B&O tax, as long as the State can satisfy the general PETT eligibility requirements stated in the NOIP.

The State's third witness was Donn Smallwood, a former DOR employee who testified on Washington tax policy. Smallwood provided corroboration for the State's description of the B&O tax, which in 2000 generated approximately 17 percent of the State's revenue According to Smallwood, this figure was "fairly consistent" over the time period concerned. *Id*. at. 129-132; see State's Hearing Exhibit 8 (B&O tax represented 13 percent of all taxes collected by the State in fiscal year 1985). Smallwood confirmed that the B&O tax applies not only to entities that are in business to make a profit, but to all who generate gross receipts, "whether you're organized for profit, do in fact make a profit, or, or organized as not for profit." *Id*. at 133. He also confirmed that the "Service and Other Activities" category was a catch-all category for business activities that are not covered by one of the several tax rate categories specified by the legislature. Smallwood also confirmed what previous State witnesses said about the pyramiding feature of the B&O tax. *Id*. at 134-135.

On cross-examination, Smallwood's testimony was not particularly helpful to the parties, except in regard to the application of the B&O tax to grant payments. He declined to answer many of RW's questions, and he denied having sufficient knowledge of the Federal legislation involved. *Id*. at 144. Finally, RW asked Smallwood if "some of the items in the BWIP budget included money going to Indian Tribes in the form of grants, and these grants would apparently be for helping the Tribes to understand what the BWIP project was about," how those grants would be treated for purpose of the B&O tax. Smallwood replied that there is an exemption which applies to the receipt of grants, and that if an entity passed through a grant, "the only question is whether there would be taxes owed by the ultimate recipient." *Id*. at 156-57.

B. RW's Witnesses

RW presented four witnesses to support its contention that the State should have viewed the Hanford site characterization activities differently for purposes of applying the B&O tax. The first two witnesses called by RW were Kenneth J. Capek, a manager in the Audit Division of the Washington State Department of Revenue, and Don Taylor, Research Analysis Manager for the Washington DOR. Unlike Akerly and Wiest, neither Capek nor Taylor worked on the actual BWIP audit that formed the basis for State's PETT claim, and their testimony was not particularly helpful to RW's case.

RW attempted through Capek to buttress its alternative theories of looking at the Hanford site characterization for purposes of the B&O tax, which were expounded during RW's opening statement and depicted in a series of charts designated RW Hearing Exhibit 2. RW asked Capek to explain how a DOR auditor would try to figure out if the DOE's role in the Hanford site characterization project was more like a contractor or a managing agent. Capek testified that the auditors would look at the contract, the underlying Statute that was being applied, and what activities actually occurred. *Tr*. at 178. Capek confirmed that it was more important who controlled the work performed by subcontractors rather than

who wrote the checks for that work. *Id*. at 180. According to Capek, if there was a contract directly between a subcontractor and the Congress, then the DOE would not have the tax liability for that contract. *Id*. However, since the record shows DOE was responsible for the Hanford site characterization under the NWPA, and DOE functioned like a general contractor that hired the subcontractors who worked on the project, we find that Capek's testimony on those points did not support RW's theory of the case, as outlined in Hypothetical L. To the contrary, it further demonstrated that the State's legal fiction is significantly closer to reality than RW's legal fiction. *See* State's Hearing Exhibits 9 and 10.

RW also tried to show by Capek's testimony that the role DOE played in the Hanford site characterization process was less like a general contractor, and more like a "managing agent" or a "construction manager." *Id.* at 183-188. Neither a managing agent nor a construction manager would be liable for B&O tax on the entire amount of the BWIP expenditures. Underlying these theories was RW's notion that DOE merely passed through the payments to its contractors on the Hanford site characterization project so those contractors were liable directly to Congress which appropriated the money from the U.S. Treasury. However, since DOE was responsible for the project under the NWPA, and actually engaged the contractors who performed portions of the work, there is no factual basis for treating the Department as a managing agent or a construction manager.

RW's second witness, Don Taylor, worked with the State officials who first considered how to implement the PETT provision in section 116(c)(3) of the NWPA. In 1986, he wrote a memo to Donn Smallwood and another DOR official that is in the record as RW's Hearing Exhibit 3; this memo characterized the task as "a real can of worms, as we've never had to determine B&O tax on nonproprietary governmental activities." *Tr*. at 197. RW asked Taylor why, in 1988, he thought the Hanford site characterization project should be taxed as if it were being conducted by a private entity. *Id*. at 205. Taylor explained that "as a researcher trying to make some sense out of this federal statute that didn't make a lot of sense, what that told me is that we were. . . directed to constru[e] the activities that happened with regard to site characterization as if it were conducted by a private entity." *Id*. Finally, Taylor confirmed that he was not involved in the audit of the BWIP or the preparation of the actual PETT claim that is the subject of the present appeal. *Id*. at 211.

RW's two principal witnesses were Jerry H. Hammond and Lesley J. Jaster, both former DOR audit officials who are now Certified Public Accountants in private practice. RW submitted separate expert witness reports from Hammond and Jaster before the hearing. Both of these reports attempted to advance RW's various theories, but they also revealed the inherent weakness in RW's position. Hammond's report opined that the State "has not identified any transaction or activity DOE engaged in that would be subject to [B&O] tax." Hammond Report (January 18, 2001) at 1. Regarding the PETT provision in section 116(c)(3) of the NWPA, Hammond's report stated that "An auditor looking at the enabling statute still has to determine if the activity takes place in more than one state, is the structure that of a branch or separate corporation, is there nexus, and finally, what activity is engaged in." *Id*. at 6. Hammond's report went on to explain the basis for his opinion that a proper analysis of State tax law and the factual situation should have concluded that there was no transaction on which to base the B&O tax because the Hanford site characterization was comparable to a site characterization undertaken before operating a new landfill on company-owned land by a Washington State branch office of a foreign corporation, funded by an intra-company transfer. Hammond's report wholly supported RW's theory of the case, as embodied in "Hypothetical L." According to Hammond, there would be no B&O tax due until the taxable activity of waste disposal in the landfill takes place and the landfill generates income. *Id*. at 8.

Jaster's report was similarly aligned with RW's fundamental position that no B&O tax should be due for the BWIP site characterization because it was done with Federal money on Federal land, and therefore analogous to a business entity who performs site development activities using its own employees or purchases these services from contractors. Jaster Report (January 15, 2001) at 2. According to Jaster, "the B&O tax applies to persons who perform services for others," and he took the position that the BWIP site characterization was not a service performed for others. *Id*. Jaster opined that the DOR will not generally bifurcate a contract into the various possible activities being performed as part of a contract, but will

impose the B&O tax on the predominant activity. *Id*. Jaster also asserted that if services were performed "both within and without Washington, the taxpayer is entitled to apportion the income received." Finally, Jaster's report challenged the State's use of the entire amount appropriated for the Hanford site characterization as a surrogate for gross income, and opined that only money received for waste disposal "apportioned to the collection activity that will occur in Washington would require a ?payment equal to taxes.'" *Id*. at 3.

These two reports share several fundamental shortcomings, which permeate RW's determination to deny PETT for the B&O tax. They ignored the fact that site characterization is a statutory duty in and of itself that gives rise to the obligation to pay PETT grants under the statutory scheme in the NWPA, as interpreted by RW in the NOIP. In addition, they shared the same flaw as RW in its refusal to use the type of legal fiction required by the statute and NOIP. They would have us treat the entire Federal government as a monolith, and refuse to analogize the BWIP site characterization activities as work done for others by a private general contractor subject to the B&O tax. Finally, both reports focused incorrectly on the ultimate goal of waste disposal as the only activity that could make the BWIP subject to the B&O tax. Even though the bulk of Hammond and Jaster's testimony at the hearing was so doctrinaire that it missed the point, both witnesses also addressed issues regarding the application of the B&O tax to the BWIP that we find relevant to our analysis later in this decision.

At the hearing, Hammond testified that his last position in the DOR was manager of Audit Standards and Procedures, where he was responsible for reviewing any audit assessment over $100,000 and any disputed assessment. *Tr*. at 232. Hammond was not involved in the submission of the PETT claim. *Id*. at 255-256. He criticized Akerly's audit as "a very quick and superficial analysis of the situation." *Id*. at 234. Hammond alluded to his experience auditing the contract manager who oversaw the construction of the Washington Public Power Supply (WPPS) nuclear power plants, and recounted how the WPPS audit found that the taxpayer should have applied different B&O tax rates to different categories of business activities such as service, retailing, and public road construction. *Id*. at 235-238. When asked to explain when it was appropriate to apply different tax rates to different parts of the same project, Hammond said that depended on the contracts involved, and that Akerly's audit showed different activities performed by different subcontractors that could have been taxed at different rates. *Id*. at 241-241. Hammond also questioned the legitimacy of some of the BWIP expenses appearing on RW Hearing Exhibit 6, an itemized list prepared by RW consultant Carl B. Ellis, including grant payments to Indian Tribes. He thought those payments should not have been legitimately included among the costs of site characterization, even if they were mandated by section 116 of the NWPA. *Id*. at 244-245, 266; RW Hearing Exhibit 6. Similarly, Hammond believed that payments to BWIP subcontractors located outside of Washington State, e.g., in Illinois and Nevada, should not have been considered site characterization costs for purposes of the B&O tax. RW Hearing Exhibit 6; *Tr*. at 247. Hammond admitted that he had not examined the information furnished by DOE/RL to Akerly, but he asserted that if he had been the audit manager reviewing Akerly's work, he would have "to question how those costs are associated with site development." *Tr*. at 250-254.

Hammond next introduced two Washington Tax Decisions to support RW's claim that corporations doing some of their business in Washington State could exclude gross income derived from outside the State from the gross income figure used to calculate B&O tax liability. RW Hearing Exhibits 7, 8. Based on the names of some subcontractors listed on RW's Hearing Exhibit 6, Hammond ventured that research and development work performed outside of Washington State should not have been counted towards any B&O tax liability for Hanford site characterization activities. However, Hammond admitted that he did not know whether those subcontractors, including "Argonne Laboratories," "Chicago University," Batelle, and Oregon State University, actually did their research work inside or outside of Washington State. Nor did Hammond indicate whether any work performed by out-of-state subcontractors was so closely connected to the Hanford site characterization that it would be subject to the B&O tax under the principle established in *Chicago Bridge & Iron Co. v. State Dept. of Revenue* (1983) 98 Wash.2d 814, 659 P.2d 463, *appeal dismissed* 104 S.Ct. 542, 464 U.S. 1013, 78 L.Ed.2d 718, discussed later in this decision. *Tr*. at 259.

After reading section 116(c)(3), Hammond concluded that it would be proper to tax a portion of any

money DOE receives under the "Standard Contract for Disposal of Spent Nuclear Fuel" (10 CFR Part 961, RW Hearing Exhibit 10) from the only commercial nuclear power plant operating in Washington, WPPS Number 2, if and when a high level nuclear waste repository begins operating in Washington. *Id*. at 283-294. Hammond maintained that "the PETT claim should be based on that income stream, rather the cost of production." *Id*. We find this suggestion disingenuous, since we know the repository will not be built in Washington. Moreover, by focusing on waste disposal, Hammond, Jaster, and their RW interlocutors simply ignored the mandate of section 113 of the NWPA that the DOE conduct site characterization at "candidate sites," which creates an obligation to make PETT grants to eligible jurisdictions.

Based on his discussions with RW's attorneys, and his observation of the other witness who testified before him, Hammond also voiced his agreement with the RW theory that DOE's role in the Hanford site characterization was more like a construction manager than a prime contractor. Hammond noted that a construction manager would have no B&O tax liability for any contracts that are signed directly between the owner and the contracting party where he merely acts as managing agent. *Id*. at 299. This would mean that only certain portions of the money Congress appropriated to DOE for the Hanford site characterization would be taxable at the construction manager level. However, when questioned by the hearing panel, Hammond admitted he had no actual knowledge of DOE's role in the Hanford site characterization. *Id.* at 301-305. As a result, Hammond's musings about whether DOE more closely resembled a construction manager than a prime contractor were not convincing.

On cross-examination, Hammond was unable to identify the source of the footnote on RW Hearing Exhibit 6, the list prepared by RW consultant Carl Ellis, which speculated that "non RL contractors," i.e. those not located in Richland, "expended their funds outside the State." Consequently, that footnote in RW Hearing Exhibit 6 was stricken from the record. *Tr*. at 308. Hammond also conceded, in his answer to a hypothetical question from the State's counsel, that a Washington company doing site characterization at Hanford for $20 million would owe B&O tax on that entire amount, even if some portion of the money was used to hire a subcontractor based in Ohio to conduct the soil analysis. *Id*. at 320. Hammond agreed with a statement in Jaster's expert witness report, echoed earlier in the hearing by the State's witnesses, that "[t]he DOR will generally not bifurcate a contract into the various possible activities being performed as part of the contract, but will impose the B&O tax on the predominant activity." *Id*.

Jaster, RW's final witness, is a CPA who worked for many years as an auditor and audit manager in the DOR before joining a private accounting firm. During the latter part of his government career, Jaster was involved in analyzing the impact of federal statutes and how they affect Washington State law. Currently, Jaster represents private clients in matters involving Washington tax law. *Id*. at 332-336. RW attempted to use this knowledgeable witness to support its several theories why Washington State should not receive a PETT grant for the B&O tax.

Jaster testified that in his opinion, the State cannot receive PETT for the B&O tax unless there is an operating repository at the Hanford site. According to Jaster, the standard contract in 10 CFR Part

961 calls for payments by utilities to DOE for waste disposal. This means that the waste disposal, whenever it occurs in the future, could be taxed, but not until that time. *Id*. at 336-337. Jaster maintained that under various hypothetical scenarios posed by RW's attorneys, if contractual payments were made for waste disposal, no B&O tax would be due while possible landfill sites were characterized, *id*. at 343, and if no waste is ever disposed of in Washington, no B&O tax would ever be due. *Id*. at 349. However, Jaster conceded that if there were a site characterization for hire contract and someone outside the State pays for site characterization in Washington, then B&O tax would be due. *Id*.

Commenting on RW's "alternative fictional tax theory," Jaster retreated to the original RW position that no B&O tax is due at all, because he does not believe "DOE itself has a contract to build or do site characterization activities for [the] Congress and President." *Id*. at 356; RW Hearing Exhibit 2. He went on to explain that he thought DOE was more like a contract manager, even though the Department had "lots of people" working on the Hanford site characterization, because "the . . . payments are coming from

the U.S. Treasury." *Tr*. at 357. Jaster ventured that "[i]f you looked at, at the Contract, I would expect that the contractors are the ones that have contracted with the Federal Government to perform the work, and so they are the ones that have the liability to perform that, that work." *Id*. The application of RW's alternative fictional tax theory "would exclude the pyramiding except to the extent that DOE itself does some activity and, and receives some appropriations from the Federal Government." *Id*. However, Jaster conceded that "if it's my liability to perform the contract, then I simply subcontract a hundred percent of the services out . . . I'm still subject to the B&O tax, regardless of who pays." *Id*. at 358.

From this preceding colloquy with Jaster, we can reasonably conclude that if DOE were "liable" for the performing the Hanford site characterization, even if it hired subcontractors to do all the work, it would still be subject to the B&O tax. The remainder of Jaster's related testimony was unconvincing. Since the NWPA and the facts documented in State's Hearing Exhibits 9 and 10 make it clear that DOE was responsible for the site characterization, and DOE hired the contractors for the BWIP, there is no factual support in the record for Jaster's opinion that DOE's role in the process was more like a construction manager than a general contractor.

Jaster next addressed the validity of the State's use of a proxy for gross income under his interpretation of Washington law. He opined that there was no provision in the statutes for measuring gross proceeds of sales or gross income of the business by cost. The main exception Jaster noted was a cost-plus contract "when the contractor has agreed to be compensated by recovery of all of their costs plus generally some fee," in which case the DOR uses costs plus the fee as the gross proceeds of sales. *Id*. at 363. In general, Jaster agreed with RW's counsel that the State of Washington does not have the authority to tax when there is no gross revenue. *Id*. But this is a meaningless point, in view of Akerly's prior testimony that under Washington tax practice, the State taxed the M&O contractors at Hanford on the basis of their costs plus fees, and the other evidence of cases showing the DOR's creative application of the B&O tax to entities and transactions that did not show gross revenue. Since it is without foundation, we reject this argument.

Giving his analysis of section 116(c)(3), as interpreted by RW in the PETT Notice, Jaster indicated that "if some B&O tax applied, or any tax applied, the Federal Government here should be paying a tax . . . equal to the tax that any other organization would pay." *Id*. at 369. And "if the State is authorized to tax the federal/state site activities at such site, then the jurisdictions were eligible for payments equivalent to those amounts." Id. at 370. Jaster pointed out that section 116(c)(3) was "not written specifically for the State of Washington. This includes taxes that would be imposed on, in several states. To the extent that a repository was being considered in Nevada, Texas as well as Washington, this section would apply to them." *Id*. He went on to challenge the assertion by the State's witnesses that the PETT provision would be rendered meaningless if RW does not pay a B&O tax, stating that "it's meaningful to the extent that if . . . some . . . tax applies, then the tax is going to be due." *Id*. at 371. Jaster noted that RW has already agreed that Washington retail sales tax is due, and that the statute had some meaning with respect to real property tax, the basis for the PETT granted to Benton County. He said that "[t]he only reason it may not have any meaning with respect to the B&O tax is because if the B&O tax doesn't apply to any other taxpayer that's situated here, then it's . . . not going to have any more meaning to the Federal Government either . . . ." *Id*.

Jaster argued creatively, but he ultimately fell back on a key RW assumption to support his opinion that no B&O tax would be due on the Hanford site characterization activities. Referring to the statement in the PETT Notice that "PETT is . . . contingent upon the taxing jurisdiction having the requisite taxing authority," NOIP, 56 Fed. Reg. at 42318, Jaster maintained that the State "would require DOE to pay an amount that is not equivalent to the tax that a taxpayer standing in the same shoes who is not in the Federal Government would have to pay." He based this opinion on RW's characterization that "the DOE is not being paid to perform site characterization for hire. There is no other taxpayer that we can identify who develops land, does site characterization, any of those type of activities, does it for themselves, not for hire, would have to pay that tax . . . ." *Tr*. at 374. As noted above, this opinion is based on RW's faulty assumptions of fact and its misinterpretation of the law.

Finally, Jaster discussed two decisions by the Washington State Supreme Court. The first case held that if there is any ambiguity in a taxing statute, the ambiguity needs to be resolved in favor of the taxpayer, which Jaster thought supported RW's position. *Buffelen Lbr. & Mfg. Co. v. State*, 32 Wn. 2d (1948), RW Hearing Exhibit 15. However, the OHA panel noted that the *Buffelen* case just as easily could be read to support the State's interpretation of Washington law that its authority to tax the Hanford site characterization activities was not ambiguous. *Tr*. at 376-378. The second decision held that road building, when performed by a logging company while harvesting timber on land owned by the State, was incidental to the main contract for the purchase and sale of timber, and was not an activity subject to the retail sales tax. *Lyle Wood Products, Inc. v. Dept. of Revenue*, 91 Wn. 2d 193, 588 P.2d 215 (1978), RW Hearing Exhibit 16. Jaster interpreted the *Lyle* case to support RW's idea of looking at the primary activity of a contract, which he thought was waste disposal, and applying the tax to that activity alone. *Tr*. at 380. According to Jaster, the Hanford site characterization should not be taxable because it is incidental and preliminary to performing the main contract for waste disposal. *Id*. at 381-382.

On cross-examination, the State's counsel asked Jaster if he meant there were ambiguities in the Washington statutes that led him to discuss the *Buffelen* and *Lyle* cases. Jaster replied that the ambiguity is in the federal statutes. *Id*. at 392. This undercuts his assertion that the *Buffelen* case, which dealt with ambiguities in Washington law, supports RW's position.

The State concluded its cross-examination of Jaster by reminding the witness that the subcontractors working on the Hanford site characterization had contracts nominally with the DOE, not with "the Federal government," and that it was DOE that had the responsibility under the NWPA of performing site characterization as a first step in developing a repository. *Id*. at 396-397. This final interchange between Jaster and the State's counsel illustrates how RW and its witnesses attempted to recast reality, and lumped the entire Federal government together in a fictional monolith that ignores the legal and functional separation of powers into different branches of government that operate independently of each other as they have in this case.

3. We conclude that the State's PETT claim for the B&O tax should have been granted

Based on the foregoing analysis of the evidence adduced at the hearing, we find the State has met its burden of proving that it had the requisite taxing authority under Washington law and tax practice to apply the B&O tax to the Hanford BWIP site characterization, and that it was reasonable and proper on the basis of the entire legal and factual record, to use the cost of the BWIP budget expenditures as the basis for calculation of that tax. Thus, we find that RW should have granted the State's PETT claim. Having decided the issue of PETT eligibility for the B&O tax in favor of the State, we next consider a number of ancillary issues, including (1) whether the entire amount expended for the Hanford BWIP site characterization should have been taxed under the "services" rate, (2) whether different activities undertaken by subcontractors as parts of the overall project should have been taxed at different B&O tax rates, (3) whether any part of the BWIP expenditure attributable to activities undertaken by subcontractors should be apportioned between Washington and other States, and (4) whether the period of PETT eligibility should run from May 28, 1986 to December 22, 1987, as provided in the NOIP, or run from January 7, 1983 through December 22, 1987, as claimed by the State.

C. Application of the B&O Tax to the BWIP expenditures

1. Pyramiding of the B&O Tax

In its March 23, 1999 Determination and subsequent written submissions during the course of the present appeal, RW's principal position could be described as preemptive, arguing that no B&O tax was appropriate for the Hanford BWIP site characterization. RW did not challenge the fact that the B&O tax is

pyramided. However, RW did propose alternative legal fictions regarding DOE's role in the Hanford site characterization, namely that the Department should be analogized to a managing agent, or a construction manager, rather than a general or prime contractor. For clarity, we will address that proposal here. The application of RW's alternative legal fictions would reduce the base of the pyramid, and mean that part of the BWIP expenditure would not be subject to the B&O tax. By contrast, accepting the State's analogy of DOE as general contractor would mean that the entire amount expended for the Hanford site characterization would be subject to the B&O tax, unless otherwise exempted by apportioning certain expenditures that lacked a sufficient nexus to Washington, an issue considered later in this section. For the reasons stated above, we reject RW's alternative legal fictions, and find that under the law and facts of this case, DOE's role was analogous to a general contractor performing site characterization for hire. The NWPA spells out the terms of the mandatory contract: the Secretary of Energy performs site characterization of "candidate sites," and the Congress pays the DOE for that task. The DOE uses a large number of its own employees, and it hires subcontractors whom it pays. The DOE is ultimately responsible for the task specified in the contract. Therefore, the entire amount of the BWIP expenditures should generally be subject to the B&O tax as the base of the pyramid.

2. Bifurcation of BWIP activities among different tax rates

The State asserts that the "service or other activities" rate is the proper B&O tax rate for the entire site characterization project. During the hearing, several witnesses, including those presented by the State, commented on the so-called bifurcation issue: whether, under Washington law, a single tax rate should be applied to the overall project, or different rates should be applied to different activities. The leading case is *Chicago Bridge & Iron Co. v. State Dept. of Revenue* (1983) 98 Wash.2d 814, 659 P.2d 463, *appeal dismissed* 104 S.Ct. 542, 464 U.S. 1013, 78 L.Ed.2d 718. *Chicago Bridge* involved a constitutional challenge to the imposition of the B&O tax to revenues received by a foreign corporation for work done outside Washington (design and manufacturing) for a project ultimately installed within the State. The Supreme Court of Washington upheld the application of the B&O tax to a foreign corporation's gross income when some of the functions related to that firm's contracts with in-state customers were performed outside Washington. The controlling factor in *Chicago Bridge* was the contract, which was for a lump sum for a project installed in Washington, but designed and built outside the state. Other cases decided by DOR begin by applying the general principle enunciated in *Chicago Bridge*, and the result depends on the nature of the contract involved. For example, the DOR applied different B&O tax rates in a case involving a fixed price contract to perform a variety of activities, each of which is taxable according to its corresponding B&O tax category, where the values assigned to the various activities were negotiated by the parties prior to performance of the contract. 11 Washington Tax Decisions (WTD) 313 (1992). Under these decisions, a condition for bifurcation is that the taxpayer's contract is not a "lump sum" contract, but rather details the dollar values of the various activities. *Id*.; *see also* 17 WTD 247 (1998).

Applying the foregoing legal principles to the present PETT appeal, we must analyze the Hanford site characterization to see what it resembles most: a fixed price contract, or a contract in which different activities have specific dollar values that were separately negotiated. What we see does not make a perfect analogy to a specific category of Washington tax cases. There was no bifurcation of contractual activities among two or more B&O tax rates, since there was not a negotiation between the parties; nor was there a meeting of the minds as in a garden variety government procurement contract. The Hanford site characterization most resembles a mandatory contract that occurred when the Congress enacted section 113(a) of NWPA, ordering the Secretary to do it. No further details or dollar values of the site characterization activities are specified in the statute, so at first blush, the statutory directive to the Secretary resembles a lump sum contract that would be subject to a single B&O tax rate.

However, the matter is more complicated than it seems, since section 302(e)(2) of the NWPA requires the Secretary to submit the budget of the Nuclear Waste Fund to the Office of Management and Budget (OMB) triennially. The budget of the Nuclear Waste Fund presumably included funding for the Hanford site characterization expenditures during the relevant time period. But there is no evidence in the present record to indicate what specific budget items the Secretary requested, OMB approved and submitted as

part of the Budget of the United States Government, and the Congress appropriated, for the period concerned. Without knowing that missing factual information, we cannot analyze whether the undertaking more closely resembled a lump-sum contract, rather than a contract with several subcategories that were separately bargained for and priced, and we cannot decide whether a single B&O tax rate should apply to the overall Hanford site characterization project for purposes of section 116(c)(3). Accordingly, we will remand the "bifurcation" issue to the parties with directions that they submit a joint report to the OHA on the specific budget or budgets that included the money for the Hanford site characterization.

3. Apportionment of BWIP expenditures between Washington and other States

The next issue is whether the BWIP expenditures should be "apportioned" to exclude monies paid to subcontractors lacking a sufficient nexus to Washington State to be subject to the B&O tax. The courts have upheld the broad application of the B&O tax to foreign corporations doing business in Washington. *General Motors Corp. v. Washington*, 84 S.Ct. 1564, 377 U.S. 436, 12 L.Ed.2d 430, rehearing denied 85 S.Ct. 14, 379 U.S. 875, 13 L.Ed.2d 79 (1964). The Supreme Court of the United States concluded in *General Motors* that nexus is established if in-state services are substantial "with relation to the establishment and maintenance of sales, upon which the tax is measured." *General Motors*, 377 U.S. at 447, 84 S.Ct. at 1571. This principle was applied by the Supreme Court of Washington, which held that "It is only when activities in the state are in no way connected with the business taxed that nexus has been found to be absent." *Chicago Bridge*, 98 Wash.2d at 821, 659 P.2d at 468. Unlike the bifurcation question, there is no credible evidence in the record on the apportionment issue that indicates BWIP contractors performed work that was "in no way connected with the business taxed," i.e. the Hanford site characterization. The facts in the present case are similar to the situation in *Chicago Bridge*, and that case is controlling. DOE had the statutory responsibility for the overall Hanford site characterization, and hired subcontractors with the necessary expertise. Some of the BWIP subcontractors had principal places of business that were located outside the State of Washington, and they may have performed work outside Washington, but they were hired to work on the BWIP site characterization. There is no evidence that their functions were not related to the primary task of the BWIP site characterization required by NWPA section 113(a). Consequently, none of the funds that the DOE expended for its subcontractors on the Hanford site characterization should be exempted from the B&O tax for lack of a sufficient nexus under the *Chicago Bridge* case.

4. The time period for PETT eligibility

Our position on this issue was evident in the interlocutory Decision denying RW's Second Motion for Summary Judgment. 28 DOE ¶ 82,501 (2001). The State's original PETT claim for the B&O tax calculated its PETT entitlement by reference to an eligibility commencement date of January 7, 1983, rather than May 28, 1986 when the President approved the BWIP as a candidate site for site characterization as a potential repository. RW correctly points out our determination in the *Benton County* decision that PETT eligibility did not begin until May 28, 1986 when the BWIP was approved as a candidate site under section 112© of the NWPA. *Benton County*, 26 DOE ¶ 80,145 at 80,618 (1996). The State has not submitted any additional evidence or arguments during the course of the present appeal that would lead us to change our prior ruling on the commencement date for PETT eligibility.

In *Benton County*, we determined, *sua sponte*, that the NOIP erred in determining that eligibility for PETT ended on December 22, 1987, the date of enactment of the 1987 NWPA amendments. After reviewing the law, we concluded that PETT eligibility continued for 90 days after that date until March 21, 1988. The relevant part of the 1987 Act, section 160(a) of the NWPA, as amended, provides

> **§ 10172. Selection of Yucca Mountain site**
>
> (a)(1) The Secretary shall provide for an orderly phase-out of site specific activities at all candidate sites other than the Yucca Mountain site.

(2) The Secretary shall terminate all site specific activities (other than reclamation activities) at all candidate sites, other than the Yucca Mountain site, within 90 days after the date of enactment of the Nuclear Waste Policy Amendments Act of 1987.

42 U.S.C. § 10172. Section 116(c)(3) of the NWPA specifies that PETT grants "shall continue until such time as all [site characterization] activities . . . are terminated at such site." Since termination of site characterization at Hanford was effective 90 days after December 22, 1987, we held that March 21, 1988 was the proper date for termination of PETT eligibility for Benton County. *Benton County*, 26 DOE ¶ 80,145 at 80,618. We disagreed with RW on the termination date for PETT eligibility, and our interlocutory Decision denied RW's Second Motion for Summary Judgment. 28 DOE ¶ 82,501 at 85,003.

RW has asked for reconsideration of our ruling on the termination date for PETT eligibility, and submitted a new legal argument in support of its position. According to RW, section 116(c)(6), which was added by the 1987 NWPA amendments, precluded further "financial assistance" to any State "other than the State of Nevada" after enactment of the NWPA Amendments Act of 1987, and this provision should be read to terminate Washington's PETT eligibility as of December 22, 1987, because it is a "State," rather than a county. In our view, RW has misread the statute, and its argument should be rejected.

As explained above in section *I.A.* of this Decision, section 116(c) of the NWPA provided for two different kinds of grants to States with one or more potential repository sites. Sections 116(c)(1) and (c)(2) provided for "financial assistance" grants to enable the States to participate in the public process leading to the final selection of a repository site. Section 116(c)(3) provided that "The Secretary shall also grant . . . an amount each fiscal year equal to the amount such State and unit of general local government would receive were they authorized to tax such site characterization activities at such site." It is clear under the statute, as originally enacted, and as amended, that PETT grants had a different purpose from financial assistance for participation in the repository selection process. As we noted during the discussion of the legislative history in this Decision and *Benton County*, payments equal to taxes were to ensure "that a State would not be worse off by virtue of having one of these facilities in their State than they would be in terms of taxes. . . ." NOIP, *supra, citing* 128 Cong. Rec. S4132 (April 28, 1982). The statutory language maintains this distinction throughout section 116. The term "financial assistance" is only used in reference to participation by State and affected units of local government in the repository selection process. By contrast, the term "financial assistance" is never used in either the original or the amended version of section 116(c)(3) in reference to payments equal to taxes.

When the 1987 amendments limited the repository selection process to the Yucca Mountain site, section 116(c)(6) terminated the payment of "financial assistance" grants to States other than Nevada as of the effective date of the Act on December 22, 1987. Section 116(c)(6) did not refer to payments equal to taxes. In our reading of the statutory language, the omission of payments equal to taxes from section 116(c)(6) appears to be intentional, since it is consistent with Subtitle E of the 1987 Act, entitled "REDIRECTION OF THE NUCLEAR WASTE PROGRAM," which contained section 160(a), quoted above. 42 U.S.C. § 10172. Under section 160(a) of the amended NWPA, site characterization activities at Hanford were terminated 90 days after enactment of the 1987 Act, on March 21, 1988. Since PETT was to continue until site characterization was terminated at Hanford, it is understandable that there was no mention in section 116(c)(6) of payments equal to taxes ending on the effective date of the 1987 Act. Based on the foregoing analysis, we have concluded that RW has failed to show the State of Washington's PETT eligibility ended before March 21, 1988.

5. Grants for financial assistance to Tribal Governments

There is evidence in the record that the amount of Hanford site characterization budget expenditures that the State used to compute the amount of B&O in its PETT claim included grants that were paid to the governments of Indian Tribes. RW's Hearing Exhibit 6; testimony of Jerry Hammond, *supra*. Federal government grants are generally exempt from the B&O tax, according to the testimony of Donn Smallwood, *supra*, and a DOR pamphlet entitled "Information on the Washington State BUSINESS &

OCCUPATION TAX," submitted as State's Hearing Exhibit 8. Even viewing DOE's role in the Hanford site characterization process as that of a general contractor, if the Department's payments to Tribal governments were Federal grants, they do not qualify as site characterization activities under the NOIP, and therefore, should not be counted toward DOE's B&O tax equivalent. The record is inconclusive about the amount of these payments, and we will direct the parties to confer with each other about them and include that information on the joint report which they are to file after receiving this Decision.

V. Conclusion

Based on the foregoing analysis of the record, we have reached the following determinations on the major issues involved in this appeal:

(1) The State of Washington has met its burden of proving that RW's application of the NWPA to the facts of this case, in its Determination to deny the State's PETT claim for the Washington B&O tax, was erroneous in fact and in law, and arbitrary and capricious. We have also determined that the State had the requisite taxing authority under Washington law and tax practice to apply the B&O tax to the Hanford BWIP site characterization, and that it was reasonable and proper on the basis of the entire legal and factual record to use the cost of the BWIP budget expenditures as the basis for calculation of that tax. Thus, we conclude that RW should have granted the State's PETT claim as submitted, subject to certain exceptions noted below.

(2) We are unable to determine whether the entire amount expended for the Hanford BWIP site characterization should have been taxed under the "services" rate, or taxed at different B&O tax rates based on the activities involved. We cannot decide this issue on the basis of the present record because we lack information about the relevant portions of the Federal budget legislation that appropriated funds for site characterization during the period concerned. This information is necessary under the applicable case law to determine whether the budgets for the BWIP site characterization more closely resembled a lump sum contract, or a contract in which specific items were separately valued. If the budget legislation specifically authorized or appropriated separate amounts of money for distinct tasks, it may be proper to "bifurcate" the B&O tax and apply different rates of B&O tax for specific activities.

(3) There has been no showing made under the applicable case law that any part of the overall BWIP expenditure attributable to payments for activities undertaken by DOE's contractors and subcontractors should be "apportioned" between Washington and other States, in which case the amount of B&O tax liability for PETT would have been reduced accordingly.

(4) The period of PETT eligibility should run from May 28, 1986 to March 21, 1988. May 28, 1986 is the date on which the Hanford BWIP became a "candidate site" for site characterization as a possible repository location, and March 21, 1988 is the date on which the Hanford site characterization was effectively terminated under the 1987 amendment to the NWPA.

(5) Grants to Indian Tribal Governments may not be properly included among the costs used to determine DOE's PETT obligation for the B&O tax. We direct the parties to confer with each other and submit a report to supplement the record regarding the grants that were paid to the Tribal Governments under the NWPA, and in what amounts. The basis for calculating the B&O tax liability for PETT should be accordingly reduced.

VI. Reporting Requirements

For the reasons explained above, we are directing the parties to confer with each other, and submit a joint report to the OHA including the following matters: (1) the DOE's treatment of business and income taxes

in its PETT settlement with the State of Nevada; (2) the terms of the Federal budget legislation that appropriated funds for the Hanford BWIP site characterization during the period of PETT eligibility; (3) the relevant grants to Indian Tribal Governments; and (4) the recalculation of Washington's PETT claim, based on the period of PETT eligibility determined in this Decision, with interest through July 31, 2002. The joint report should be submitted to the OHA within 45 days of the issuance of this Decision.

VII. Use of Alternative Dispute Resolution

With this determination, OHA has resolved the major legal issues regarding the State of Washington's eligibility for PETT for the B&O tax. We therefore provide a framework for the parties to use for negotiating with each other to reach a final resolution of this matter. There is a precedent in the PETT area for settlements: RW has settled with Nye County, with Nevada, and with Benton County. The Alternative Dispute Resolution Act, 28 U.S.C. § 651, encourages the use of ADR within the Federal court system. The Benton County settlement came about through mediation after a similar Decision by the OHA. The parties should contact the Director of the Office of Dispute Resolution in DOE's Office of General Counsel for assistance in finding a suitable mediator who can assist the parties to resolve remaining issues. The parties will be required to submit a status report to the OHA on the settlement negotiations that we direct them to initiate.

IT IS THEREFORE ORDERED THAT:

(1) The appeal filed by the State of Washington (State) Department of Revenue of the March 23, 1999 Determination by the Department of Energy Office of Civilian Radioactive Waste Management (RW) is hereby granted in part, and denied in part, as set forth in paragraph (2) below.

(2) The March 23, 1999 RW Determination is hereby reversed and set aside, except that:

(a) The period of PETT eligibility for the State shall be May 28, 1986 through March 21, 1988.

(b) Federal grants to Indian Tribal Governments shall not be counted as costs of the Hanford site characterization for purposes of computing the amount of B&O tax for the PETT grant to the State.

(3) No later than 45 days after the date of issuance of this Decision, the parties shall submit a joint report to the Office of Hearings and Appeals, addressing the following matters: (1) the DOE's treatment of business and income taxes in its PETT settlement with the State of Nevada; (2) the terms of the Federal budget legislation that appropriated funds for the Hanford BWIP site characterization during the period of PETT eligibility; (3) the grants to Indian Tribal Governments; and (4) the recalculation of Washington's PETT claim, based on the period of PETT eligibility determined in this Decision, with interest through July 31, 2002.

(4) This matter is hereby remanded to RW, which shall confer with the State, and within 60 days of the date of this Decision and Order, implement the findings and conclusions set forth herein by issuing a revised determination granting the State PETT based on the Washington Business and Occupation Tax, computed by using the cost of the expenditures for the Hanford site characterization, as if the site characterization had been performed by a private general contractor. The amount of interest on the PETT grant shall be calculated through July 31, 2002.

(5) No later than 75 days after the date of issuance of this Decision and Order, the parties shall submit a joint report to the Office of Hearings and Appeals, explaining their progress toward a final, negotiated resolution on the amount of the State's PETT grant. If for some reason the parties are unable to reach a final resolution on the amount of the State PETT grant before submitting their 75 day report, the Office of

Hearings and Appeals will proceed to issue a supplemental order fixing the amount of the PETT grant.

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 25, 2002

June 25, 2002
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: State of Washington

Date of Filing: April 26, 1999

Case Number: VPA-0001

This determination will consider an Appeal filed with the Office of Hearings and Appeals (OHA) on April 26, 1999, by the State of Washington's Department of Revenue under the Notice of Interpretation and Procedures (NOIP) implementing the "payments-equal-to-taxes" (PETT) provision in section 116(c)(3) of the Nuclear Waste Policy Act of 1982, (NWPA), 42 U.S.C. § 10101 *et seq*. Under the NOIP, the Department of Energy (DOE) will grant, to a State in which a candidate site for a high-level nuclear waste repository is located, a payment equal to the amount that State would receive if it were authorized to tax site characterization activities at that site. *See* 56 Fed. Reg. 42314 (August 27, 1991). The payment authorized by the NWPA is known as a "PETT grant." The history of the PETT program and the Basalt Waste Isolation Project and Near Surface Test Facility (collectively referred to as the BWIP) for characterization of a candidate site for a repository on the Hanford reservation in Washington State is described at length in Benton County, Washington, 26 DOE ¶ 80,145 (1996), http://www.oha.doe.gov/cases/pett/lpa0001.htm.

On February 24, 1993, the State submitted a formal claim to the DOE's Richland Operations Office for a PETT grant equal to the taxes it would have levied for site characterization activities at Hanford. By letter dated March 23, 1999, DOE's Office of Civilian Radioactive Waste Management (RW) denied the State's claim for a PETT grant based on Washington's Business and Occupation ("B&O") Tax. The amount in controversy is substantial; with interest through March 30, 2001, the State calculated the value of its claim as $14,096,589. State's Hearing Exhibit 6.

The fundamental dispute between the State and RW can be summarized as follows: According to the State, the B&O tax is Washington's principal tax on business activities. It is based on a taxpayer's gross income, and it is intended to reach all business activity within Washington State. Since the BWIP was a Federal project funded through the DOE, it did not have any gross income, and the State based its PETT claim on "the most comparable surrogate, the amount of expenditures associated with site characterization at Hanford." Petitioner's Statement of Position at 7. The State asserts that unless the BWIP is analogized to a private firm performing site characterization activities

for hire, the PETT provision in section 116(c)(3) is rendered meaningless. RW maintains that since the BWIP had no gross income, its site characterization activities could not form the basis for taxation under the Washington B&O tax, and no PETT grant is due. RW also contends that the State cannot use the BWIP budget expenditures as a surrogate for gross income because that is not normally done under Washington tax practice. RW further contends that it is more appropriate to analogize the BWIP expenditures to "interdepartmental charges," in the nature of purely financial transfers from one branch of a hypothetical foreign corporation to another branch doing site characterization "in its own backyard" on land owned by the parent in Washington State. According to RW, such interdepartmental charges would be exempt from the B&O tax under Washington State law, and no PETT would be due.

I. Background

A. The Nuclear Waste Policy Act of 1982, as amended

A principal purpose of the NWPA was to provide for the development of a geologic repository for the permanent storage of high-level radioactive waste and spent nuclear fuel. As originally enacted, section 112(b) of the NWPA directed the Secretary of Energy to recommend three candidate sites for the repository to the President. Section 112(c) required approval by the President of these sites. Under these provisions, the Secretary recommended sites in Washington State (BWIP), Nevada (Yucca Mountain), and Texas (Deaf Smith County). On May 28, 1986, the President accepted the Secretary's recommendation and approved these sites. Section 113(a) directed the Secretary to carry out site characterization "beginning with the candidate sites that have been approved under section 112." Section 116(c)(3) of the NWPA directed the DOE to make PETT grants to the state and local governments in which potential repository sites were located:

> The Secretary shall also grant to each State and unit of general local government in which a site for a repository is approved under section 112(c) an amount each fiscal year equal to the amount such State and unit of general local government, respectively, would receive were they authorized to tax such site characterization activities at such site, and the development and operation of such repository, as such State and unit of general local government tax other real property and industrial activities occurring with such State and unit of general local government. Such grants shall continue until such time as all such activities, development, and operation are terminated at such site.

42 U.S.C. § 10136(c)(3) (emphasis added). PETT grants were to be paid from the Nuclear Waste Fund. 42 U.S.C. § 10136(c)(5).

Only 18 months after the President approved the BWIP as a candidate site for the repository, Congress enacted the NWPA Amendments of 1987 in Title V of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203. This legislation narrowed the search for a repository site by designating the Yucca Mountain site under section 112 of the NWPA as the sole candidate for characterization in accordance with section 113, 42 U.S.C. § 10133. DOE was directed to terminate

all site characterization activities at the BWIP within 90 days after December 22, 1987, the date on which the NWPA Amendments of 1987 were signed into law. 42 U.S.C. § 10172.

The 1987 amendments made other, conforming changes in the NWPA that are relevant to a contested issue in the present appeal, namely the termination date for Washington's PETT eligibility. As originally enacted, section 116 provided for participation of "States with one or more potentially acceptable sites for a repository" in a public process leading to the final selection of a repository site. Sections 116(c)(1) and (c)(2) provided for "financial assistance" grants to enable the States to participate in the selection process. 42 U.S.C. § 10136. Those financial assistance grants to the States were distinct from PETT grants and had a different purpose from the PETT grants contemplated by section 116(c)(3), and the statute as originally enacted stated that payments equal to taxes were *in addition to* financial assistance grants by beginning the PETT provision with the phrase "The Secretary shall also grant to each State...." When the 1987 amendments limited site characterization to Yucca Mountain, the language of section 116 was modified by deleting the general references to "States" and substituting specific references to "the State of Nevada." That word change recognized that henceforth, Nevada would be the only State entitled to receive financial assistance grants for participating in the repository selection process, and PETT grants for site characterization activities (and the possible development and operation of a repository). The PETT provision in section 116(c)(3)(A) of the amended statute begins with the phrase, "In addition to the financial assistance grants under paragraphs (1) and (2), the Secretary shall grant to the State of Nevada...." Finally, a new paragraph (6) was added to section 116(c) which provides that "No State, other than the State of Nevada, may receive financial assistance under this subsection after December 22, 1987." 42 U.S.C. § 10136(c)(6)(emphasis added).

B. DOE's Notice of Interpretation and Procedures

In August 1991, RW issued a final Notice of Interpretation and Procedures (NOIP) for administering the PETT provisions of the NWPA, as amended. 56 Fed. Reg. 42314 (August 27, 1991). The final NOIP addressed comments received in response to a Proposed Notice issued on March 7, 1990. Several of the changes adopted in response to those comments are relevant to the present case. First, the interpretation of "site" was expanded to include all site characterization activities associated with a candidate site coextensive with the taxing jurisdiction's taxing authority, whether or not those activities are conducted on the physical site. In the present case this means that all site characterization-related activities subject to taxation by the State of Washington are eligible for inclusion in the State's PETT claim, no matter where those activities occurred. *Id*. at 42316. Second, the NOIP provided for an appeal process through the OHA for those jurisdictions having disputes with RW regarding PETT, and stated that OHA's decision on an appeal will serve as the final DOE action with respect to PETT. *Id*. at 42317. Finally, the NOIP considered comments about the commencement and termination of PETT eligibility. The NOIP determined that the State's eligibility for PETT would begin on May 28, 1986, the date on which the President approved the three candidate sites, and end on December 22, 1987, the date of enactment for the NWPA Amendments of 1987. In addition, the NOIP established the administrative procedures for considering PETT claims. *See* 56 Fed. Reg. 42318-20.

In setting the time limits for the State's PETT eligibility, the NOIP considered comments submitted by the State of Washington and the Mid-Columbia Consortium of Governments. These commenters claimed that DOE's proposed selection of May 28, 1986 as the commencement date for PETT eligibility was unreasonable, since site characterization activities were underway at the BWIP before it was formally recommended for site characterization under the NWPA procedures. After considering these comments, DOE determined that the preliminary activities undertaken before any site was designated as a "candidate site" under the NWPA did not constitute "site characterization" within the meaning of section 2(21) of the NWPA. In reaching that determination, DOE pointed out that the term "site characterization" is defined as:

> (A) siting research activities with respect to a test and evaluation facility at a candidate site; and (B) activities, whether in the laboratory or in the field, undertaken to establish the geologic condition and the ranges of the parameters of a candidate site relevant to the location of a repository, including borings, surface excavations, excavations of exploratory shafts, limited subsurface lateral excavations and borings, and in situ testing needed to evaluate the suitability of a candidate site for the location of a repository, but not including preliminary borings and geophysical testing needed to assess whether site characterization should be undertaken.

42 U.S.C. § 101(21). The NOIP explained that although various laboratory and field activities may have been underway at the sites prior to May 28, 1986, "these activities were neither related to a test and evaluation facility nor were they undertaken to establish the geologic condition or ranges of the parameters relevant to the location of repository." 56 Fed. Reg. at 42318. The NOIP goes on to state that "[e]ven if some of the data collected before the May 28, 1986 date were relevant to the overall characterization of the site, that fact alone would not qualify the data collection process as 'site characterization' for purposes of the NWPA." *Id*.

In addition to setting the time limits that apply to the State, the NOIP specified the following general requirements for a jurisdiction to be eligible to receive PETT payments for site characterization activities: (i) the jurisdiction must have the requisite taxing authority, and (ii) the jurisdiction must levy taxes applicable to non-Federal activities that are similar to the site characterization activities conducted by the Federal Government. *Id*. at 42318.

Based on the definition of site characterization in section 2(21) of the NWPA, the NOIP determined that the following types of activities would be eligible for PETT: (i) activities that impact the assessed value of real property; (ii) activities carried out prior to May 28, 1986, but only to the extent that the residual value of these activities after May 28, 1986 is treated as improvements to real property, used in support of site characterization for purposes of assessment valuation; (iii) ownership or possessory use of personal property; (iv) purchase or transfer of personal property acquired in one State for use in an eligible State; (v) use of motor vehicles; (vi) use of special fuels; (vii) payment of salaries to Federal employees; and (viii) activities subject to business or income taxes. The preceding list is not exclusive, and the NOIP recognized that other activities undertaken

by DOE to evaluate the geologic suitability of the site that an eligible jurisdiction is authorized to tax may also be considered in the calculation of PETT. *Id*.

The "Administrative Procedures" section of the NOIP described the "estimated PETT analysis" that the eligible jurisdictions should submit to the DOE. For the period concerned in the present Appeal, only two state governments were eligible to submit estimates for PETT payments: Nevada, for the Yucca Mountain site, and Washington, for the Hanford site. According to the NOIP, the estimated PETT analysis should include the following:

> 1. Basis for eligibility showing how the jurisdiction meets the requirement for eligibility as set forth in this Notice. 2. Citations of relevant tax rules, regulations, rates, and bases for applying the rates. 3. Lists of Federal site characterization activities considered in estimating the PETT. 4. Calculations supporting the estimates in sufficient detail to allow DOE to verify the estimates. 5. Estimate of PETT liability for each tax type to which DOE's site characterization activities are subject and estimates of PETT liability for each tax type in accordance with the appropriate tax laws.

Id. at 42319. The NOIP states that DOE will review these analyses to verify that they are complete and correct regarding DOE's site characterization activities, the assessed value of DOE's property used to support its site characterization activities, DOE's operational activities subject to tax, and the tax laws of the eligible jurisdiction. The Notice provides that "late payments shall include interest, if appropriate, in accordance with applicable requirements of the taxing jurisdiction." *Id*.

II. Positions of the Parties

A. The State's PETT Estimate

The State submitted its PETT claim to DOE/RL on February 24, 1993. The claim was based on several types of taxes that Washington collects. At this point, RW has granted the claim in part and paid Washington a PETT grant based on all applicable taxes but one, the B&O tax, which is the focus of the present appeal. The claim stated that the B&O tax is Washington's principal tax upon business activities, citing Revised Code of Washington (Wash. Rev. Code) 82.04.220, and noted that the tax is based on "the gross income of the business," as that term is defined in Wash. Rev. Code 82.04.280. The claim continued that "for PETT purposes there are no 'sales' or 'income' comparable to the private sector meaning of gross receipts." The State determined that the closest approximation of gross income is the amount of expenditures associated with the BWIP site characterization, and used these amounts as a measure of the B&O tax liability for PETT purposes. The State separated its PETT claim into two periods. The first period was for January 7, 1983 until May 28, 1986. For this period, the State sought B&O tax of $3,330,520, plus interest through December 31, 1992. The second period covered by the State's claim was for May 28, 1986 until December 22, 1987. For that period, the State sought B&O tax of $2,895,227, plus interest through December 31, 1992. The updated amounts for the two periods claimed by the State, including

interest through September 30, 1998, were $7,321,166 (for the period January 7, 1983 to May 28, 1986) and $5,672,528 (for the period May 28, 1986 though December 22, 1987).

B. RW's Determination

On March 23, 1999, RW issued a determination denying the State's claim for a PETT grant based on the B&O tax. This determination rejected the State's PETT estimate for several reasons. First, RW read Wash. Rev. Code 82.04.290 as suggesting that an ordinary Washington business with "no gross income" would pay zero B&O tax. Determination at 4. Second, RW found no legal authority for the State's substitution of its own "approximation" for gross income in cases where gross income is zero, noting that the State's PETT estimate had submitted no examples of other taxpayers who paid B&O tax on the basis of an approximation of gross income. *Id*. Third, RW determined that the DOE's BWIP budget was the equivalent of an interdepartmental charge, furnished by one branch of a business organization to another department or branch. Under Washington Administrative Code (WAC) 458-20-201, amounts representing interdepartmental charges are excluded in computing the amount due for B&O tax. RW observed that Washington could have subjected interdepartmental charges to the B&O tax, but the legislature deliberately determined not to subject a purely financial transaction, such as the transfer of funds from one corporate department to another, to the B&O tax, *citing* Washington Excise Tax Bulletin 86.04.201.203 issued July 22, 1986. RW's determination reasoned that:

> Since Section 116(c)(3) requires that site characterization activities be subject to the same taxation rules as are all Washington businesses, the interdepartmental charge exemption to the B&O tax must also be applied to site characterization activities. Accordingly, a simple allocation of funds from one branch or department of the Federal government to another, i.e. from President and Congress to the [DOE] and the BWIP project, is not the type of transaction that would be taxed under Washington law, and thus may not form the basis for a PETT grant.

Determination at 5.

RW's determination then summarized its fundamental reasons for rejecting the claim:

> In order to establish a basis for the B&O tax, the [State] would postulate a fictional transaction in place of the transaction which actually occurred, and then apply the B&O tax to the fictional transaction. However, we have found no basis in Washington tax law for the use of legal fictions of this nature in determinating the amount of B&O tax due. Such a legal fiction could well form the basis for a PETT grant if it were shown to be a regular part of Washington tax practice, applicable to all industrial taxpayers. However, our study of Washington tax law indicates that the term "gross income" is construed strictly in accordance with the statutory definitions. Since Congress requires that PETT be determined in accordance with the same rules applicable to all taxpayers, we must use the standard definition of gross income.

Id. The determination also addressed two other issues that the State raised: an issue concerning RW's characterization of the BWIP budget as an "interdepartmental charge," and an issue concerning the "pyramiding" of the B&O tax. The State had argued that "to conclude that DOE was merely a department of a larger corporation would render the grant language of Section 116(c)(3) virtually meaningless, if not entirely meaningless." *Id*. at 6, *quoting* the State's July 27, 1998 letter. RW asserted that the State's foregoing argument "would have more weight if the B&O tax were the only one which could support a PETT grant." However, RW noted that it had previously determined that the State was eligible for PETT concerning the Tax for Common Schools, and also the State Use Tax, and that "these determinations give substantial meaning to Section 116(c)(3)." RW reiterated that departments of larger corporations in Washington State regularly receive transfers of money from corporate treasuries without the payment of B&O taxes on these transfers, and that the State "would have us render 'entirely meaningless' the fundamental congressional intent underlying Section 116(c)(3): the concept that payments are to be 'equal' to taxes." *Id*.

The RW determination noted that the PETT grant claimed by the State would be "pyramided" upon the B&O taxes already collected from BWIP contractors who did the bulk of project work. Since the State has already collected "a full portion of B&O tax from this source," RW "saw no need to adopt a strained reading of Section 116(c)(3) merely to add 'meaning' to this provision." According to RW, "the best interpretation of Section 116(c)(3) would have us calculate the B&O tax for PETT purposes exactly as [the State] would apply the tax to private, industrial taxpayers." *Id*.

In view of RW's decision to reject the B&O tax claim since the BWIP had no gross income, and in view of its characterization of the BWIP budget as purely financial interdepartmental charges exempted by the legislature from the B&O tax, the Determination declined to consider various other issues, such as the exact calculation of such a tax, and the particular tax rate that should be applied. *Id*. Finally, the Determination did not address the issue of the time periods for which Washington State would be eligible for PETT. However, RW has argued in the present appeal that the State's PETT eligibility, if any, ran from May 28, 1986 (when the President designated the BWIP as a candidate site) through December 22, 1987 (when the NWPA amendments were signed into law).

C. Washington State's Contentions on Appeal

The State contends that RW's Determination erred in denying its PETT claim for B&O tax. The State begins by describing what it characterizes as the "pervasive"nature of the B&O tax. In response to RW's Determination, the State gives examples of nonprofit associations and municipal governmental entities that have been assessed B&O tax on activities undertaken for public benefits other than profits, and examples of private firms that have been assessed B&O tax based on their actual costs, even when their accounting systems did not yield gross receipts, or gross income in the usual sense. Then the State goes on to explain why it believes that section 116(c)(3) must be read in conjunction with the Washington taxation scheme to authorize a PETT grant based on the B&O tax. The State rejects RW's alternative theory that analogizes the BWIP budget expenditures to "interdepartmental charges" transferred from one branch of a hypothetical foreign corporation to fund site characterization activities by its Washington State branch on its own land. Finally, the

State addresses the rate of taxation that it contends is appropriate for the BWIP site characterization, and the time periods for which it contends PETT should be granted. Each of these arguments is addressed below.

The State contends that making a profit is not required before the B&O tax is imposed, and notes that the Washington Supreme Court has rejected arguments made by nonprofit associations and municipal governments that they were not engaged in business because their activities did not benefit themselves or their members monetarily. Petitioner's Statement of Position at 4, *citing Young Men's Christian Ass'n v. State*, 62 Wash.2d 504, 508, 383 P.2d 497 (1963) (the B&O tax applies to all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly), *Seattle v. State*, 59 Wash.2d 150, 367 P.2d 123 (1961) (the legislature did not intend to restrict meaning of the term "business" to those activities engaged in solely for profit), and *Tacoma v. State Tax Comm'n*, 177 Wash. 604, 33 P.2d 899 (1934) (the legislature intended to tax activities engaged in with the object of nonmonetary benefit).

The State further argues that the mere fact that the amount received by a taxpayer only equals its costs is not controlling for B&O tax purposes. Petitioner's Statement of Position at 4. In support of this point, the State cites the case of *Pullman Co. v. State*, 65 Wash.2d 860, 400 P.2d 91 (1965), in which the Washington Supreme Court held that even though the payments Pullman received for repairing and maintaining railroad cars owned by other entities were intended to represent a reimbursement for the actual costs and yielded no profit to Pullman under its accounting scheme, they became taxable as part of the gross income derived from "retailing" under the B&O tax. In addition, the State cites Washington court decisions holding that deductions, exemptions, and even the terminology used by the legislature in the B&O tax statutes are to be narrowly construed to fulfill the legislative intent to make it a pervasive tax.

In its Answers to RW's Requests for Admission, the State also cited a case decided by the Washington Board of Tax Appeals in which the Department of Revenue (DOR) was required to determine a taxable value for products for which there was no "sale" or "income." *Shell Oil Co. v. State of Washington, Dep't of Rev.*, BTA No. 93-28 (May 23, 1997) (*Shell*). The primary issue in that case was how to value exchanged petroleum products for purposes of the B&O tax. During the tax years at issue, the taxpayer participated in large volume exchanges with other refiners. This practice involves a transaction where one party delivers barrels of product to the exchange partner and receives back a like amount of barrels at another place and time. In Shell's case, generally no money changes hands in these exchanges, but the value of the exchanged products is fully taxable under the B&O tax unless the exchange qualifies as an exempt accommodation sale under Wash. Rev. Code § 82.04.425. Shell's exchanges did not qualify for that exemption, and they were subject to B&O tax on the market value of the products given up in the exchange as the DOR determined by reference to *Platt's*, an industry standard oil price reporting service. *Shell, supra*. That valuation is similar to imputing a total revenue to the value of the exchange at the time the products were made available to the exchange partner.

The State also argues that the language of section 116(c)(3) provides a basis for the granting of PETT. According to the State, the PETT statute "further provides that the amount to be paid shall

be equivalent to what the State would receive from a taxable entity engaging in industrial activity within the State." In the State's view,

> the appropriate analogy, therefore, is to liken USDOE to a general contractor performing work for the federal government which is paid a given amount for work it will perform itself, with or without the assistant of subcontractors. To analogize USDOE to an independent contractor gives meaning to § 116(c)(3). Otherwise, the language granting PETT to states in the amount they would receive were they authorized to tax site characterization activities at the federal site really is meaningless.

Petitioner's Statement of Position at 7. The State also asserts that under Wash. Rev. Code 82.04.290, such site characterization activities would be subject to the "catch-all" rate of tax for "other business and service activities." *Id*. The State asserts that "pyramiding" of tax burdens is a significant feature of the B&O tax, so that even if the BWIP subcontractors have already paid B&O tax on the amounts they received from DOE, the BWIP itself as the general contractor in the State's analogy, would have to pay B&O tax based on its gross income. *Id*. at 2, 3.

III. OHA Procedural History

After the present Appeal was filed on April 26, 1999, OHA requested that each party submit a statement setting forth its position in detail. Following the exchange of these Statements of Position, a series of status conferences were held by telephone during the next several months, and the parties conducted discovery. OHA issued one interlocutory decision to resolve discovery issues. *State of Washington*, 27 DOE ¶ 82,503 (200). We explored the possibility of avoiding an evidentiary hearing and proceeding directly to decide the case on cross motions for summary judgment. However, we ultimately determined that since certain fundamental facts remained in dispute, it would be necessary to hold an evidentiary hearing in order to develop a complete record.

Shortly before the evidentiary hearing, OHA issued a second interlocutory decision in which we denied two motions for partial summary judgment that were filed by RW. *State of Washington*, 28 DOE ¶ 82,501 (2001). The first motion sought partial summary judgment on the following legal proposition: "that a private taxpayer, operating in a similar factual context, would not be subject to B&O tax under Washington law." *Motion* at 1. RW's motion was based on the responses of two State witnesses, David J. Wiest and Kenneth Capek, to hypothetical questions posed to them in depositions by RW's counsel, and the State's answers to RW's requests for admissions. The State disputed RW's characterization of the BWIP project in those hypothetical questions as "a private taxpayer in Washington, who, on its own behalf and using its own money, does site characterization work in its own backyard to determine the yard's suitability for some future purpose." 28 DOE ¶ 82,501 at 85,002. According to the State, "under an equally plausible characterization of the BWIP, gross revenues derived by a company performing site characterization activities for another are indisputably subject to B&O tax" under Washington law. *Id*. The State argued that RW's interpretation of the NWPA's PETT provision would produce a result (no PETT grant for B&O tax on industrial activities at the BWIP during site characterization) that is inconsistent with both Congressional intent and RW's own interpretation of the NWPA in the NOIP. We indicated that we

agreed with the State that RW postulated an analogy that would yield the result which it advocates, but that RW's analogy does not comport exactly with the facts. We therefore denied the first motion for partial summary judgment based on our finding that there is a material dispute about which party's characterization of the BWIP is more appropriate under the circumstances of this case.

RW's second motion sought partial summary judgment on the following proposition: "that the time period for measuring the Petitioner's entitlement for payments equal to taxes (PETT) under section 116(c)(3) of the Nuclear Waste Policy Act (NWPA) commenced on May 28, 1986, and ended on December 22, 1987." *Motion* at 1. RW pointed out that in the *Benton County* decision, OHA had determined that PETT eligibility did not begin until May 28, 1986 when the BWIP was approved as a candidate site under section 112(b) of the NWPA. *See* 26 DOE ¶ 80,145 at 80,618. OHA agreed with RW's position on the start date for PETT eligibility, but we disagreed with RW on the termination date. OHA ruled in the *Benton County* decision that the termination date for PETT eligibility should be March 21, 1988, the effective termination date for BWIP site characterization activities according to the NWPA amendments of 1987. That statute, codified at 42 U.S.C. § 10172, directed DOE to terminate all site characterization activities at the BWIP 90 days after December 22, 1987. Section 116(c)(3) of the NWPA as originally enacted specifies that PETT grants "shall continue until such time as all [site characterization] activities are terminated at such site." 26 DOE ¶ 80,145 at 80,619. Based on our determination that the premise of the second motion was half right and half wrong, we denied that motion as well. 28 DOE ¶ 82,501 at 85,003. RW moved for reconsideration of our decision denying the second motion for partial summary judgment, arguing that section 116(c)(6), which was added by the 1987 NWPA amendments, precluded further "financial assistance" to any State "other than the State of Nevada." We declined to consider the request on the eve of the evidentiary hearing. However, we will consider RW's argument based on the language of section 116(c)(6) later in the present decision.

An evidentiary hearing was held in Seattle on March 28 and 29, 2001. Post-hearing briefs were submitted in August 2001, and reply briefs were submitted in October 2001. In November 2001, after reviewing the entire record, OHA informed the parties that we were prepared to issue a decision without oral argument. This determination was based on our observation that after preliminary briefing, a lengthy discovery process, expert witness statements, a two-day evidentiary hearing, post hearing submissions, and two rounds of post-hearing briefs, the dispute in this case was clearly delineated, and both parties had repeated opportunities to state their respective positions and to challenge each other's theory of the case. RW requested leave to file a rejoinder brief, and the State opposed this request. In December 2001, OHA denied RW's request to file a rejoinder brief, and we took the case under advisement.

IV. Analysis

Under the NOIP, the burden of proof in this case is on Washington State as the applicant for a PETT grant. To prevail in this appeal, the State must show that RW's Determination was erroneous. In that regard, we will begin by considering whether RW erred in its application of the PETT statute to the facts of this case by determining that the State should receive no PETT for the B&O tax. In the papers it filed before the hearing, RW gave two alternative reasons to justify its denial of PETT

for the B&O tax: (1) the BWIP had no gross income, or (2) the BWIP should be analogized to a division of a foreign (i.e. out-of-state) corporation performing site characterization on land owned by its parent in Washington, funded by an interdepartmental transfer payment, which would be exempt from the B&O tax. Both RW and the State have extensively briefed their respective positions on how the PETT grant provision should be applied to the BWIP.

If we find that RW erred in denying the State's PETT claim, we will then consider whether and to what extent we agree with the State that section 116(c)(3) requires RW to analogize the BWIP to a private general contractor performing site characterization for profit, and that the State's use of the BWIP budget expenditures as a surrogate for the gross income of the BWIP is appropriate for PETT purposes. In reaching an answer to the latter questions, we will utilize the expert testimony and documentary evidence submitted at the evidentiary hearing in this matter.

A. Whether RW erred in its application of the PETT statute to the facts of this case

We start from the proposition that RW's views will be sustained unless the State shows that RW's legal fictions and its position are erroneous. After considering the record, we conclude the State has met its burden by showing that RW erred in its application of the PETT statute to the facts of this case. As explained below, we find that the statutory language and the legislative history of the NWPA's PETT provision, RW's interpretation in the NOIP of the PETT provision, the principles established in our *Benton County* decision regarding RW's PETT obligation, and RW's favorable treatment of the State of Nevada's PETT claim, when taken together, support the State's position and compel the conclusion that the State should receive a PETT grant. (The appropriate amount of the grant will be considered below in Sections IV.B. and IV.C. of this opinion.)

1. The NWPA and the legislative history of the PETT provision, while sparse, tend to favor approval of PETT grants to the affected jurisdictions

The Department of Energy is uniquely responsible under the law for conducting site characterization of potential high level radioactive waste repositories. Section 113(a) of the NWPA, as originally enacted, directed the Secretary to carry out site characterization of the candidate sites approved under section 112. Site characterization of candidate sites is an end in and of itself in the first stage of the repository selection process envisioned in the NWPA. The money to fund site characterization comes from the Nuclear Waste Fund established under section 302 of the NWPA, and it is appropriated by the Congress based on budget requests submitted by the Secretary. Under the aspects of this legislative scheme that are relevant to the present PETT appeal, it is more accurate to analogize DOE's activities at Hanford to a private general contractor performing site characterization for hire than to say that DOE is performing site characterization on its own land with its own people as a prelude to performing a service contract for waste disposal at some time in the future. Later in this Decision, it becomes evident that RW's focus on the standard contract for waste disposal as the basis for an alternative legal fiction supporting its denial of PETT for the B&O tax does not comport with the legal reality established by the NWPA.

The language of section 116(c)(3) is general, and the legislative history of the PETT provision is scanty. The Congress did not consider the fine details of State law, and obviously did not anticipate that the application of the Washington B&O tax would be problematical in the way we find in this case. The only mention of site characterization in the legislative history concerns what we dubbed the Hanford "grandfather clause," which was inserted in the NWPA by former Congressman Sid Morrison, whose District then included the BWIP. *Benton County*, 26 DOE ¶ 80,145 at 80,618. That provision has no special relevance to the main issue in this appeal, whether the State should receive PETT for the B&O tax. (However, it is relevant to another issue, discussed later in this decision, whether the State should receive any PETT for the period before May 28, 1986.)

The only mention of PETT in the legislative history is a statement by former Senator J. Bennett Johnston, ranking minority member of the Senate Energy and Natural Resources Committee and one of the sponsors of the legislation, at the time the NWPA was originally being considered for passage. Senator Johnston stated, in relevant part, "that a State should not be worse off by virtue of having one of these facilities in their State than they would be in terms of taxes, at least." See NOIP, RW's Hearing Exhibit 14 at 6, *citing* 128 Cong. Rec. S4132 (April 28, 1982). Neither of these historical references sheds any light on the specific B&O tax issue. However, the grandfather clause shows the Congress knew that preliminary geological studies of the Hanford site were ongoing when the NWPA was enacted. Sen. Johnston's statement offers insight into the policy underlying the PETT provision, and it weighs in favor of the State's position, since the State would clearly be worse off if it were unable to receive PETT for the B&O tax. In quoting the Senator's remark in the NOIP, RW adopted a policy in favor of granting PETT to eligible jurisdictions.

While the statute's legislative history is sparse, there are a number of documents that may be used in reaching a proper interpretation of section 116(c)(3). Those are the NOIP, the *Benton County* appeal decision, and the PETT grants to Nevada. We will discuss each of these in turn.

2. RW's interpretation of the PETT provision in the NOIP

The NOIP carries out the policy objective of section 116(c)(3) by enumerating several categories of activities that qualify for PETT. For purposes of the present appeal, it is most significant that one of the specific categories mentioned is "activities subject to business or income taxes." We take notice of the fact that business or income taxes are usually based on some measure of a taxpayer's sales or revenues, and the Washington B&O tax is a typical business tax in this respect. While RW knew that Washington was one of the two States that would be eligible to receive PETT when it formulated the NOIP through a notice and comment process, RW, like the Congress, did not deal with any issues that could arise in applying the Washington B&O tax. Nor did Washington State raise any questions about the specific application of its B&O tax during the notice and comment process that preceded issuance of the NOIP, even though we learned during the hearing held on this appeal that Department of Revenue officials had earlier recognized that "this could be a real can of worms, as we've never had to determine B&O tax on nonproprietary governmental activities." RW's Hearing Exhibit 3, at 4. Thus, the NOIP does not address the specific issue before us. However, when we consider the implication of the specific phrase "activities subject to business or

income taxes," and look carefully at the other types of activities that were deemed eligible for PETT, we find below that the NOIP is another piece of evidence that supports the State's position.

Following the principle that affected jurisdictions should receive "compensation coextensive with the amounts the taxing jurisdictions otherwise could collect as taxes if site characterization activities were carried on by private parties," the NOIP determined that the following types of activities would be eligible for PETT:

> (i) activities that impact the assessed value of real property; (ii) activities carried out prior to May 28, 1986, but only to the extent that the residual value of these activities after May 28, 1986 are treated as improvements to real property, used in support of site characterization for purposes of assessment valuation; (iii) ownership or possessory use of personal property; (iv) purchase or transfer of personal property acquired in one State for use in an eligible State; (v) use of motor vehicles; (vi) use of special fuels; (vii) payment of salaries to Federal employees; and (viii) activities subject to business or income taxes.

NOIP at 42318. The preceding list is not exclusive, and the NOIP recognized that other taxable activities undertaken by DOE to evaluate the geologic suitability of a site may also be considered in the calculation of PETT.

Since activities subject to business or income taxes are eligible for PETT, it is reasonable under the NWPA and the NOIP to use the specific amount of funds expended by the DOE for the BWIP site characterization as a surrogate for gross income to determine the PETT grant to Washington State for the B&O tax. As the State points out, RW's argument that there was no gross income generated by the BWIP activities is purely tautological, and at odds with the NOIP's mandate. Section 116(c)(3) requires the DOE to determine the amount of PETT by viewing site characterization activities carried out by a Federal project using Federal money on Federal land as if they had been performed by a private entity subject to taxation. Given the scope of that mandate, DOE should take the small step of using a legal fiction purely for the purposes of measurement. This compensates Washington for the business tax revenues it could have realized had the site characterization activities been carried out by a private firm.

The State's position is reasonable because without some way of making "business taxes" eligible for PETT notwithstanding the lack of any gross income for DOE's characterization of candidate sites, the provision in section 116(c)(3) would be a nullity. Indeed, no activities conducted by the DOE under the NWPA would be expected to earn income, but this is not an insuperable problem since there are ways of coming up with alternative methods of measuring their value for PETT purposes. If we assume the State is right in its interpretation of the legislative intent of the PETT provision in section 116(c)(3), then it is necessary to analogize the BWIP to a private entity subject to taxation and create a surrogate for gross income.

3. *The principles established in the Benton County appeal require an interpretation of section 116(c)(3) that favors PETT grants*

To the extent possible, this case should be decided in a manner that is consistent with the agency's decision on the *Benton County* PETT appeal. In that case, we rejected a similar, extreme position taken by RW which would have resulted in a virtual denial of the County's PETT claim for real and personal property taxes. We held that the statute had to be construed in such a way as to give effect to the principle that Congress intended local jurisdictions to receive PETT grants for site characterization activities that would be subject to taxation if undertaken by private entities.

In *Benton County*, RW did not resist the basic legal fiction required by the statute—viewing the Hanford site characterization as a private activity subject to taxation—as it has done in this case. The principal issue in *Benton County* involved the application of the PETT statute to an ad valorem property tax on the land occupied by the BWIP. RW accepted the idea inherent in the PETT statute of the BWIP's fictional conversion from a Federal project, exempt from taxation under the doctrine of sovereign immunity, to a private entity subject to taxation. Instead, RW's opposition to the Benton County PETT claim mainly took the form of minimizing the assessed value of the BWIP land by viewing the project several years after the improvements had been removed and the site restored to a relatively pristine state. After reviewing the historical context and the legislative history of the PETT provision, we found RW's restrictive treatment of the County's PETT claim was inconsistent with the policy underlying the PETT provision of the NWPA, as interpreted by DOE in the NOIP, which states that:

> the Congress intended to provide a level of compensation for the affected jurisdictions that would be coextensive with the amounts the taxing jurisdictions otherwise could collect as taxes if site characterization activities were carried on by private parties.

26 DOE ¶ 80,145 at 80,627, *citing* NOIP, 56 FR at 42317.

In the present case, RW seems to have retreated one step. In effect, it is taking the position that section 116(c)(3) does not require treating the BWIP as if it were a private entity subject to taxation. RW has done this indirectly, by rejecting the State's argument that it is necessary to use the BWIP budget expenditures as a surrogate for gross income in order to effectuate the legislative objective in section 116(c)(3). RW has taken an equally restrictive approach in its alternative reasons for rejecting the State's PETT claim. RW has formulated a hypothetical situation in which the BWIP is considered a branch of a foreign corporation that would not be required under Washington law to pay B&O tax on its site characterization activities. At the hearing held on this appeal, RW also postulated a series of "alternative fictional tax theories" that analogize DOE's role in the Hanford site characterization to a managing agent or a construction manager rather than a general contractor. In addition, as another argument RW would have us focus entirely on the ultimate goal of future waste disposal. Since disposal has not yet occurred, RW argues that no taxation is appropriate. RW would thereby have us disregard the express statutory mandate in NWPA section 113(a), namely, that the Secretary perform site characterization at "candidate sites," and grant PETT under section 116(c)(3) to affected jurisdictions "were they authorized to tax <u>such site characterization activities</u>" (emphasis added). All of RW's analogies and its reasons for denying the PETT claim ignore the express statutory language of the NWPA and the pervasive nature of the B&O tax, which is designed to reach all business activity in Washington State.

4. The Washington PETT claim should be treated the same as the Nevada PETT claim

To the fullest extent possible, the Washington PETT claim should be treated in a manner consistent with the Nevada PETT claim. Since two States were eligible initially under the NOIP to submit PETT estimates, it is relevant for purposes of Washington's appeal to consider the manner in which DOE handled the PETT process with Nevada. As we noted in *Benton County*, there is nothing in the NWPA statute that would warrant treating Washington differently than Nevada, for the period before the termination of Washington's PETT eligibility mandated in the 1987 NWPA amendments. The PETT claim of Nevada based upon site characterization activities at Yucca Mountain was resolved through a negotiated settlement. OHA has no information about whether RW gave Nevada PETT for any business taxes. However, the fact that the matter was settled makes it seem likely that RW paid at least some business taxes to Nevada. In order to ensure that Washington is being treated the same as Nevada, and thus help resolve the present case, RW will be required to submit a report to OHA within 30 days after it receives this decision, explaining how it treated Yucca Mountain's "activities subject to business or income taxes" for purposes of the Nevada PETT settlement.

5. We conclude that RW applied an erroneous interpretation of the NWPA to the Washington State PETT Claim

To summarize, it is our view that RW has adopted an overly narrow interpretation of section 116(c)(3) that is inconsistent with the statute. Its refusal to accept the State's use of the BWIP budget expenditures as a surrogate for gross income for purpose of the B&O tax ignores the policy underlying the PETT provision, the mandate of the NOIP, and common sense. In a series of alternative theories, RW has postulated a fictional corporate structure that it would impute to the BWIP, combined with a fictional role for the DOE in the Hanford site characterization project, all to reach the conclusion that the State would receive no PETT for the Washington B&O tax. This is an extreme position. Barring the State completely from getting any B&O tax revenue for a site characterization project located within Washington with extensive commercial aspects that constituted "industrial activities," is wrong because it frustrates the purpose of the statute, as interpreted by RW in the NOIP. It is also inconsistent with our Decision in the *Benton County* appeal, which considered many of the same fundamental issues. In *Benton County*, we described the historical context of the PETT provision, and concluded that the Congress intended the statute to be interpreted to favor approval of PETT grants. Finally, it is inconsistent with RW's treatment of Nevada's PETT claim, when there is no basis in the statute or NOIP for treating Washington differently from Nevada. We therefore conclude that the State has met its burden of proving that RW erred in its application of the PETT statute to the facts of the present case. We next consider the proper amount of Washington's PETT grant by reference to the extensive record developed in this appeal on the B&O tax.

B. Determining the proper amount of Washington's PETT grant

The State contends that section 116(c)(3) requires RW to analogize the BWIP to a private general contractor performing site characterization for profit, and to use the BWIP budget expenditures as a surrogate for gross income to determine the amount of B&O tax for PETT purposes. RW has

interposed a number of arguments, all of which would reduce the amount of B&O tax. We begin by describing the nature of the B&O tax itself.

1. The B&O tax is a pervasive tax on business activity in Washington and has been extended to cover for-profit entities with unusual accounting systems, to non-profits, municipal corporations, in-kind petroleum exchanges, and to cost-plus fee government contracts, by using "surrogates for gross income"

According to the NOIP, for a jurisdiction to be eligible to receive a PETT payment for site characterization activities: (i) the jurisdiction must have the requisite taxing authority, and (ii) the jurisdiction must levy taxes applicable to non-Federal activities that are similar to the site characterization activities conducted by the Federal Government. *Id*. at 42318. The State has met these requirements by showing that it has the authority to collect B&O tax:

> There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

Wash. Rev. Code § 82.04.220. The B&O tax is Washington's principal tax on business activities, and it is intended to reach all business activity within Washington State. See State's Hearing Exhibit 8. In keeping with the pervasive nature of the B&O tax, the terms "person," "business," and "gross income" are broadly defined. For example, the word "person" as defined for purposes of the B&O tax includes "the United States or any instrumentality thereof." Wash. Rev. Code § 82.04.030.

RW has not challenged the State's assertion that it has the general authority to collect the B&O tax. Instead, RW has argued that "a private entity with no gross income would pay no B&O tax." This argument is not supported by the evidence. As noted elsewhere in this Decision, the record reflects many instances in which Washington State's Department of Revenue, its Board of Tax Appeals, and its courts have applied the B&O tax to entities that did not have "gross income" within the conventional meaning of that term. These include nonprofit associations (the YMCA), and municipal governments (the cities of Seattle and Tacoma), private entities whose accounting systems recorded not profits but reimbursement for the cost of services (the Pullman Co.), refiners using in-kind petroleum product exchanges (Shell Oil Co.), and cost-plus fee contracts (the managing and operating (M&O) contractors at the Hanford Reservation). Thus, the weight of the evidence is that public and private entities with no gross income do pay B&O tax to the State of Washington. The situation presented in the instant case is unusual, but it is by no means unprecedented.

Not only does it lack factual support under Washington tax practice, but RW's position begs the question because it ignores the legal fiction required by the PETT statute and RW's own interpretation in the NOIP: the assumption that site characterization activities at a "candidate site" were performed by a private entity subject to business and income taxes. We agree with the State that merely assuming that the BWIP was a private entity does not go far enough to give meaning to section 116(c)(3). The only interpretation that achieves the purpose of the statute is to view the

BWIP as a private entity like a general contractor performing site characterization for a fee, which can be measured by the amount of funds spent for the project. As explained below, the testimony of the expert witnesses at the hearing provided additional support for this interpretation of the PETT statute.

2. The expert opinion testimony and documentary evidence submitted at the hearing

A. The State's Witnesses

The hearing held in this case was useful since it provided a live forum for the expert witnesses called by the State and RW to debate their competing theories. All of the witnesses called by both parties had worked for the Washington Department of Revenue (DOR) at one time, all of them had expert knowledge about the B&O tax, and some had been directly involved in the audit that formed the basis for the State's PETT claim. The State's two principal witnesses, Frank Akerly and David Wiest, explained what the DOR actually did when faced with the task of submitting a PETT claim for the B&O tax. We found the DOR's application of the B&O tax to the Hanford site characterization activities to be reasonable and consistent with the NWPA. RW's two principal witnesses, Jerry Hammond and Les Jaster, were offered to second-guess the theory underlying the DOR's PETT claim, and to support RW's alternative theories that would either reduce the amount of PETT for the B&O tax for the Hanford site characterization, or eliminate the PETT obligation for that tax altogether. Ultimately, we found the factual and legal assumptions made by RW's witnesses to be unsupported by the record, and as a result, the positions they advocated were unconvincing.

The State's first witness, Frank Akerly, was the Washington Department of Revenue (DOR) auditor who examined the DOE's BWIP records and prepared the Audit Report that was used in formulating the State's PETT claim. Akerly described the essential features of the B&O tax as "a tax that's on every individual and business that has any business or industrial activity in the State of Washington, whatsoever. It's based on gross income without any deduction, and it pyramids." March 28-29, 2001 Hearing Transcript (hereinafter cited as "*Tr.*") at 39. He explained that under the pyramiding aspect of the B&O tax, if a general contractor hires a subcontractor who in turn hires a subcontractor, each one pays tax on the amount that it receives.

Akerly testified that there was a precedent for using DOE's costs as the basis for computing the B&O tax for the PETT claim, since the same approach–using cost information to come up with a B&O tax due–was used for taxing the M&O contractors at the Hanford Reservation. He explained that the Hanford prime contractors had no income other than fee, but "we tax the whole, their expenditures and the fee as a total to determine the tax." *Id*. at 43. (Akerly's account of how the B&O tax is applied to cost-plus fee contracts was later confirmed in the testimony of RW's witness Les Jaster.) Based on information provided by DOE, Akerly testified that at the time of termination, there were approximately 60 DOE employees, and over 800 contractor and subcontractor people working full time on the BWIP site characterization. *Id*. at 46-47; *see also* State's Hearing Exhibits 9 and 10. In addition, Akerly explained that the DOR examined the possible rates, and concluded that the "Service and Other Activities" classification was the most appropriate rate for the B&O tax on BWIP site characterization activities. Under Washington tax practice, according to Akerly, the DOR looks

at the primary purpose of the contract when different types of activities are being performed under one contract, and based on that principle, it applied the Service and Other Activities rate. *Id*. at 47-49.

In its opening statement at the hearing, RW asserted that its consideration of the State's PETT claim for B&O tax began with a search for "an example of what [RW] felt was a comparable activity in the state." *Id.* at 21. According to RW, this was the Echo Bay Mining Company in Denver, which spent $45 million to characterize a site in Washington State, Kettle Falls, to determine if it was suitable for development as a new gold mine. On cross-examination, RW asked Akerly if the firm transferred that amount of money from its headquarters in Denver to its field office in Washington State without paying B&O tax, and Akerly stated that the firm could make the transfer without paying B&O tax "because they're the same entity." *Id*. at 57. Using RW's assumptions, Akerly conceded that since the DOE is part of the Federal government, if he had just applied state law to the BWIP, without considering section 116(c)(3), the situation would be the same as with the mining company. However, in response to a question from the OHA panel, Akerly stated that if someone else paid $45 million to the mining company to do site characterization on the Washington site, in exchange for buying any gold produced at a good price, the mining company would have to pay B&O tax on that $45 million amount. *Id*. at 59. It is the latter situation that most closely resembles the situation of the BWIP, where the Congress mandated in the NWPA that the DOE perform site characterization at candidate sites, and appropriated the money from the Nuclear Waste Fund to pay for it.

In response to a follow-up question from RW, Akerly emphasized that the DOR treated the BWIP site characterization as industrial activity subject to taxation under the B&O tax because the State believed that was required by section 116(c)(3). Aklery maintained that "there would be no allowability of payment[s] equal to taxes if [the BWIP] were considered a nontaxable entity," and he questioned why Congress would have even bothered including section 116(c)(3) in the NWPA if they did not expect the State to receive a PETT grant for the Hanford site characterization. *Id*. at 62. This colloquy with Akerly illustrates the stark difference between RW's scorched-earth approach to the B&O tax PETT claim, and the State's attempt to read meaning into section 116(c)(3). We agree with the State that unless the BWIP is viewed as a taxable private entity that performed site characterization at Hanford for hire, the statutory language would be rendered utterly meaningless.

Moreover, Akerly's testimony illustrates a fundamental flaw in RW's legal fiction. The gold mine example on which RW relies is not analogous to the BWIP situation under section 116(c)(3). In the case of the Denver-based mining company, the site characterization expenditure in Washington State is a pre-development cost undertaken with the firm's own money to decide whether to invest in a new mine. In the case of the BWIP, the site characterization expenditure is required by a Federal statute that also requires the DOE to grant the State PETT as if those activities were performed by a private entity subject to taxation. Moreover, the BWIP site characterization is not a speculative, pre-development cost as in the case of the potential gold mine, but an end it itself–i.e. a task that the Congress expressly directed DOE to perform in section 113(a) of the NWPA. In relying on this analogy, RW appears to have carried over an argument it raised in the *Benton County* case–that certain "soft costs" including pre-development site characterization expenditures–should not be

included in the assessed value of a property until the activity projected for that property, whether operation of a gold mine or a nuclear waste repository, actually begins. We rejected that argument in *Benton County*, and we reject it here since section 116(c)(3) specifically authorizes PETT grants for site characterization by the DOE under section 113(a), regardless of whether a repository is ever built on that candidate site.

The State's next witness, David J. Wiest, was the DOR Field Audit Manager who approved the report prepared by Akerly that formed the basis for the B&O tax claim. Wiest confirmed the choice of the "Service and Other Activities" classification as most appropriate for the BWIP, since it was customarily used for site characterization. He explained that the legislature enacted the "Nonprofit Research and Development" B&O tax rate to be applied to a specific company, and that it could not work for the Hanford site characterization. *Id*. at 69-70; 75-76. He further explained how the pyramiding feature of the tax worked, so that each subcontractor in a chain of contractors would pay B&O tax on the amount they receive from the general or prime contractor, with the prime contractor at the base of the pyramid paying B&O tax on the entire amount it receives from the customer to do the project. Wiest maintained that the B&O tax situation would be the same even if the customer directed its bank to pay one of the subcontractors directly. According to Wiest, each subcontractor would pay B&O tax on the amount it receives and the prime contractor could not escape taxation on a portion of the entire amount just because the payment was made directly to a subcontractor. *Id*. at 77-81. He also confirmed Akerly's testimony that the DOR was required to look at the "overriding nature" of contracts and apply the one B&O tax rate that is appropriate, rather than "bifurcate contracts" and apply multiple tax rates to the different activities. *Id*. at 86-87. The State's attorneys indicated they would submit some cases to support their position on the bifurcation or apportionment of B&O taxes.

On cross-examination by RW, Wiest indicated that the State never considered that DOE was a "managing agent" for purposes of applying the B&O tax to the Hanford site characterization, as RW had proposed in an "alternative fictional tax theory" mentioned in its opening statement. RW Hearing Exhibit 2-E. According to Wiest, the State did not treat the BWIP as a managing agent, because a managing agent would usually have no employees on a project. Wiest added that the State "did not look at DOE as a contractor as such," but "just saw that there was a provision in 116(c) to, for a payment equal to taxes if we looked at a private industrial contractor doing the type of work that was done out there." *Id*. at 97-98. When pushed by RW to explain his thought process, Wiest, like Akerly, questioned why section 116(c)(3) would even have been written if the DOE was not liable for a PETT grant for the B&O tax. *Id*. at 98-99. In response to another series of questions from RW, Wiest maintained that while the State would not impose a B&O tax on a private landowner doing site characterization on its own land with its own employees, section 116(c)(3) mandated a different result in the case of the BWIP, even though the Federal government owned the land on the Hanford Reservation. *Id*. at 108-110.

Wiest's cross-examination ended with a colloquy concerning a hypothetical question asked during Wiest's deposition by RW, known as "Hypothetical L," reproduced below:

> [Question by RW] One, assuming that it is the year 1980. Two, X Corporation is a corporation whose head office is located in New York state. Three, X Corporation employees operate a corporate branch office in Waco, Texas, another branch office in Reno, Nevada, and another branch office in Yakima, Washington. All three branch offices are investigating whether it might be possible to construct a landfill at their sites but, no decisions to construct have actually been made. Four, Y Corporation located in Ohio expects to generate 5 tons of trash per year for the next 20 years for a total of 100 tons. Y plans to accumulate the trash in storage until 100 tons have been accumulated in the year 2000. Five, in the year 1980, the X Corporation head office in New York contracts with Y to take the trash[, and] the contract expressly states no services shall be provided under the contract prior to the year 2000. And the question is the same, what are the Washington state B&O tax consequences to X as a result of the hypothetical L scenario?
>
> [Answer by the Witness] I think it would be real similar to the last example, where if no services, disposal services, actual disposal is provided, it doesn't look like you would have a B&O tax consequence.

November 16, 2000 Deposition of David J. Wiest, at 20-24.

RW has steadfastly maintained that the situation depicted in Hypothetical L is identical to the reality presented in this case, and that it proves that no B&O tax is owed on the BWIP. However, the State's attorneys, Wiest himself, and the OHA panel members, all pointed out the fatal flaw in Hypothetical L, that it fails to mention the existence of section 116(c)(3) so it is different from the real-world situation that we have in this case. *Tr*. at 113-126. Moreover, section 116(c)(3) does not use the term "investigate," as in the hypothetical; it speaks of "site characterization," a task specifically given to the DOE in section 113 of the NWPA. As noted above, site characterization is an end in and of itself that gives rise to PETT grants under section 116(c)(3), regardless of whether a repository is ever operated at a site and regardless of whether or when DOE takes title to, or disposes of, any waste. Contrary to its intended purpose, Hypothetical L proves only that RW has mischaracterized the facts in its legal fiction, and taken a position inconsistent with the law.

RW later recalled Wiest for additional cross-examination about the other hypothetical questions posed during his deposition on November 16, 2000. Specifically, RW asked Wiest if there was "a distinction in the tax treatment of a contract for waste disposal versus a contract for site characterization for hire." *Id*. at 164. Wiest explained that the "service and other activities" rate would apply to site characterization, and there was a different B&O tax rate specifically for waste disposal. In addition, Wiest testified that during the PETT audit, the State never looked at the "Standard Contract" which the nuclear utilities signed with the DOE that provided for waste disposal by the Department. *Id*.; see RW's Hearing Exhibit 10, 10 CFR Part 961. Wiest agreed with RW that there would be no B&O tax due on a contract for waste disposal made in New York unless the person receiving the waste put it in Washington State. In addition, Wiest agreed with RW that if someone in New Jersey contracted with another company to find a place in Washington and study that site in the hope of later sending waste there, there would be B&O tax due on the site characterization for hire. *Id*. at 169. Finally, RW asked Wiest if the State would have taken a

different approach, instead of using the BWIP budget expenditures as the basis for its B&O tax PETT claim, had they found out that the money the DOE used for the BWIP site characterization was coming from utility companies who were paying for waste disposal services. Wiest said that the State had never considered that point. *Id*. at 171.

RW's second round of questions for Wiest illustrates a consistent flaw in RW's theory of the case, namely, its notion that site characterization of the BWIP under section 116(c)(3) is not an end in and of itself that gives rise to an obligation to make PETT grants to Washington State. The implication of RW's allusion to the waste disposal contracts between utilities and DOE is that the money in the Nuclear Waste Fund cannot be used for PETT payments because it was intended for "waste disposal." That position shows how RW would skirt the NWPA scheme by reading out the PETT provision in section 116(c)(3). RW's apparent conviction that Washington should not get a PETT grant for B&O tax on the BWIP because the repository will not be built at Hanford may explain why RW has strained to come up with any reason it can to avoid making the payment. Site characterization of "candidate sites," i.e. potential repository locations approved by the President, was always an integral step in the waste disposal process envisioned by the NWPA. More importantly, under section 116(c)(3), site characterization is all that is needed to support a PETT grant to Washington for the B&O tax, as long as the State can satisfy the general PETT eligibility requirements stated in the NOIP.

The State's third witness was Donn Smallwood, a former DOR employee who testified on Washington tax policy. Smallwood provided corroboration for the State's description of the B&O tax, which in 2000 generated approximately 17 percent of the State's revenue According to Smallwood, this figure was "fairly consistent" over the time period concerned. *Id*. at. 129-132; see State's Hearing Exhibit 8 (B&O tax represented 13 percent of all taxes collected by the State in fiscal year 1985). Smallwood confirmed that the B&O tax applies not only to entities that are in business to make a profit, but to all who generate gross receipts, "whether you're organized for profit, do in fact make a profit, or, or organized as not for profit." *Id*. at 133. He also confirmed that the "Service and Other Activities" category was a catch-all category for business activities that are not covered by one of the several tax rate categories specified by the legislature. Smallwood also confirmed what previous State witnesses said about the pyramiding feature of the B&O tax. *Id*. at 134-135.

On cross-examination, Smallwood's testimony was not particularly helpful to the parties, except in regard to the application of the B&O tax to grant payments. He declined to answer many of RW's questions, and he denied having sufficient knowledge of the Federal legislation involved. *Id*. at 144. Finally, RW asked Smallwood if "some of the items in the BWIP budget included money going to Indian Tribes in the form of grants, and these grants would apparently be for helping the Tribes to understand what the BWIP project was about," how those grants would be treated for purpose of the B&O tax. Smallwood replied that there is an exemption which applies to the receipt of grants, and that if an entity passed through a grant, "the only question is whether there would be taxes owed by the ultimate recipient." *Id*. at 156-57.

B. RW's Witnesses

RW presented four witnesses to support its contention that the State should have viewed the Hanford site characterization activities differently for purposes of applying the B&O tax. The first two witnesses called by RW were Kenneth J. Capek, a manager in the Audit Division of the Washington State Department of Revenue, and Don Taylor, Research Analysis Manager for the Washington DOR. Unlike Akerly and Wiest, neither Capek nor Taylor worked on the actual BWIP audit that formed the basis for State's PETT claim, and their testimony was not particularly helpful to RW's case.

RW attempted through Capek to buttress its alternative theories of looking at the Hanford site characterization for purposes of the B&O tax, which were expounded during RW's opening statement and depicted in a series of charts designated RW Hearing Exhibit 2. RW asked Capek to explain how a DOR auditor would try to figure out if the DOE's role in the Hanford site characterization project was more like a contractor or a managing agent. Capek testified that the auditors would look at the contract, the underlying Statute that was being applied, and what activities actually occurred. *Tr*. at 178. Capek confirmed that it was more important who controlled the work performed by subcontractors rather than who wrote the checks for that work. *Id*. at 180. According to Capek, if there was a contract directly between a subcontractor and the Congress, then the DOE would not have the tax liability for that contract. *Id*. However, since the record shows DOE was responsible for the Hanford site characterization under the NWPA, and DOE functioned like a general contractor that hired the subcontractors who worked on the project, we find that Capek's testimony on those points did not support RW's theory of the case, as outlined in Hypothetical L. To the contrary, it further demonstrated that the State's legal fiction is significantly closer to reality than RW's legal fiction. *See* State's Hearing Exhibits 9 and 10.

RW also tried to show by Capek's testimony that the role DOE played in the Hanford site characterization process was less like a general contractor, and more like a "managing agent" or a "construction manager." *Id*. at 183-188. Neither a managing agent nor a construction manager would be liable for B&O tax on the entire amount of the BWIP expenditures. Underlying these theories was RW's notion that DOE merely passed through the payments to its contractors on the Hanford site characterization project so those contractors were liable directly to Congress which appropriated the money from the U.S. Treasury. However, since DOE was responsible for the project under the NWPA, and actually engaged the contractors who performed portions of the work, there is no factual basis for treating the Department as a managing agent or a construction manager.

RW's second witness, Don Taylor, worked with the State officials who first considered how to implement the PETT provision in section 116(c)(3) of the NWPA. In 1986, he wrote a memo to Donn Smallwood and another DOR official that is in the record as RW's Hearing Exhibit 3; this memo characterized the task as "a real can of worms, as we've never had to determine B&O tax on nonproprietary governmental activities." *Tr*. at 197. RW asked Taylor why, in 1988, he thought the Hanford site characterization project should be taxed as if it were being conducted by a private

entity. *Id.* at 205. Taylor explained that "as a researcher trying to make some sense out of this federal statute that didn't make a lot of sense, what that told me is that we were. . . directed to constru[e] the activities that happened with regard to site characterization as if it were conducted by a private entity." *Id*. Finally, Taylor confirmed that he was not involved in the audit of the BWIP or the preparation of the actual PETT claim that is the subject of the present appeal. *Id*. at 211.

RW's two principal witnesses were Jerry H. Hammond and Lesley J. Jaster, both former DOR audit officials who are now Certified Public Accountants in private practice. RW submitted separate expert witness reports from Hammond and Jaster before the hearing. Both of these reports attempted to advance RW's various theories, but they also revealed the inherent weakness in RW's position. Hammond's report opined that the State "has not identified any transaction or activity DOE engaged in that would be subject to [B&O] tax." Hammond Report (January 18, 2001) at 1. Regarding the PETT provision in section 116(c)(3) of the NWPA, Hammond's report stated that "An auditor looking at the enabling statute still has to determine if the activity takes place in more than one state, is the structure that of a branch or separate corporation, is there nexus, and finally, what activity is engaged in." *Id*. at 6. Hammond's report went on to explain the basis for his opinion that a proper analysis of State tax law and the factual situation should have concluded that there was no transaction on which to base the B&O tax because the Hanford site characterization was comparable to a site characterization undertaken before operating a new landfill on company-owned land by a Washington State branch office of a foreign corporation, funded by an intra-company transfer. Hammond's report wholly supported RW's theory of the case, as embodied in "Hypothetical L." According to Hammond, there would be no B&O tax due until the taxable activity of waste disposal in the landfill takes place and the landfill generates income. *Id*. at 8.

Jaster's report was similarly aligned with RW's fundamental position that no B&O tax should be due for the BWIP site characterization because it was done with Federal money on Federal land, and therefore analogous to a business entity who performs site development activities using its own employees or purchases these services from contractors. Jaster Report (January 15, 2001) at 2. According to Jaster, "the B&O tax applies to persons who perform services for others," and he took the position that the BWIP site characterization was not a service performed for others. *Id*. Jaster opined that the DOR will not generally bifurcate a contract into the various possible activities being performed as part of a contract, but will impose the B&O tax on the predominant activity. *Id*. Jaster also asserted that if services were performed "both within and without Washington, the taxpayer is entitled to apportion the income received." Finally, Jaster's report challenged the State's use of the entire amount appropriated for the Hanford site characterization as a surrogate for gross income, and opined that only money received for waste disposal "apportioned to the collection activity that will occur in Washington would require a 'payment equal to taxes.'" *Id*. at 3.

These two reports share several fundamental shortcomings, which permeate RW's determination to deny PETT for the B&O tax. They ignored the fact that site characterization is a statutory duty in and of itself that gives rise to the obligation to pay PETT grants under the statutory scheme in the NWPA, as interpreted by RW in the NOIP. In addition, they shared the same flaw as RW in its refusal to use the type of legal fiction required by the statute and NOIP. They would have us treat the entire Federal government as a monolith, and refuse to analogize the BWIP site characterization

activities as work done for others by a private general contractor subject to the B&O tax. Finally, both reports focused incorrectly on the ultimate goal of waste disposal as the only activity that could make the BWIP subject to the B&O tax. Even though the bulk of Hammond and Jaster's testimony at the hearing was so doctrinaire that it missed the point, both witnesses also addressed issues regarding the application of the B&O tax to the BWIP that we find relevant to our analysis later in this decision.

At the hearing, Hammond testified that his last position in the DOR was manager of Audit Standards and Procedures, where he was responsible for reviewing any audit assessment over $100,000 and any disputed assessment. *Tr*. at 232. Hammond was not involved in the submission of the PETT claim. *Id*. at 255-256. He criticized Akerly's audit as "a very quick and superficial analysis of the situation." *Id*. at 234. Hammond alluded to his experience auditing the contract manager who oversaw the construction of the Washington Public Power Supply (WPPS) nuclear power plants, and recounted how the WPPS audit found that the taxpayer should have applied different B&O tax rates to different categories of business activities such as service, retailing, and public road construction. *Id*. at 235-238. When asked to explain when it was appropriate to apply different tax rates to different parts of the same project, Hammond said that depended on the contracts involved, and that Akerly's audit showed different activities performed by different subcontractors that could have been taxed at different rates. *Id*. at 241-241. Hammond also questioned the legitimacy of some of the BWIP expenses appearing on RW Hearing Exhibit 6, an itemized list prepared by RW consultant Carl B. Ellis, including grant payments to Indian Tribes. He thought those payments should not have been legitimately included among the costs of site characterization, even if they were mandated by section 116 of the NWPA. *Id*. at 244-245, 266; RW Hearing Exhibit 6. Similarly, Hammond believed that payments to BWIP subcontractors located outside of Washington State, e.g., in Illinois and Nevada, should not have been considered site characterization costs for purposes of the B&O tax. RW Hearing Exhibit 6; *Tr*. at 247. Hammond admitted that he had not examined the information furnished by DOE/RL to Akerly, but he asserted that if he had been the audit manager reviewing Akerly's work, he would have "to question how those costs are associated with site development." *Tr*. at 250-254.

Hammond next introduced two Washington Tax Decisions to support RW's claim that corporations doing some of their business in Washington State could exclude gross income derived from outside the State from the gross income figure used to calculate B&O tax liability. RW Hearing Exhibits 7, 8. Based on the names of some subcontractors listed on RW's Hearing Exhibit 6, Hammond ventured that research and development work performed outside of Washington State should not have been counted towards any B&O tax liability for Hanford site characterization activities. However, Hammond admitted that he did not know whether those subcontractors, including "Argonne Laboratories," "Chicago University," Batelle, and Oregon State University, actually did their research work inside or outside of Washington State. Nor did Hammond indicate whether any work performed by out-of-state subcontractors was so closely connected to the Hanford site characterization that it would be subject to the B&O tax under the principle established in *Chicago Bridge & Iron Co. v. State Dept. of Revenue* (1983) 98 Wash.2d 814, 659 P.2d 463, *appeal dismissed* 104 S.Ct. 542, 464 U.S. 1013, 78 L.Ed.2d 718, discussed later in this decision. *Tr*. at 259.

After reading section 116(c)(3), Hammond concluded that it would be proper to tax a portion of any money DOE receives under the "Standard Contract for Disposal of Spent Nuclear Fuel" (10 CFR Part 961, RW Hearing Exhibit 10) from the only commercial nuclear power plant operating in Washington, WPPS Number 2, if and when a high level nuclear waste repository begins operating in Washington. *Id*. at 283-294. Hammond maintained that "the PETT claim should be based on that income stream, rather the cost of production." *Id*. We find this suggestion disingenuous, since we know the repository will not be built in Washington. Moreover, by focusing on waste disposal, Hammond, Jaster, and their RW interlocutors simply ignored the mandate of section 113 of the NWPA that the DOE conduct site characterization at "candidate sites," which creates an obligation to make PETT grants to eligible jurisdictions.

Based on his discussions with RW's attorneys, and his observation of the other witness who testified before him, Hammond also voiced his agreement with the RW theory that DOE's role in the Hanford site characterization was more like a construction manager than a prime contractor. Hammond noted that a construction manager would have no B&O tax liability for any contracts that are signed directly between the owner and the contracting party where he merely acts as managing agent. *Id*. at 299. This would mean that only certain portions of the money Congress appropriated to DOE for the Hanford site characterization would be taxable at the construction manager level. However, when questioned by the hearing panel, Hammond admitted he had no actual knowledge of DOE's role in the Hanford site characterization. *Id*. at 301-305. As a result, Hammond's musings about whether DOE more closely resembled a construction manager than a prime contractor were not convincing.

On cross-examination, Hammond was unable to identify the source of the footnote on RW Hearing Exhibit 6, the list prepared by RW consultant Carl Ellis, which speculated that "non RL contractors," i.e. those not located in Richland, "expended their funds outside the State." Consequently, that footnote in RW Hearing Exhibit 6 was stricken from the record. *Tr*. at 308. Hammond also conceded, in his answer to a hypothetical question from the State's counsel, that a Washington company doing site characterization at Hanford for $20 million would owe B&O tax on that entire amount, even if some portion of the money was used to hire a subcontractor based in Ohio to conduct the soil analysis. *Id*. at 320. Hammond agreed with a statement in Jaster's expert witness report, echoed earlier in the hearing by the State's witnesses, that "[t]he DOR will generally not bifurcate a contract into the various possible activities being performed as part of the contract, but will impose the B&O tax on the predominant activity." *Id*.

Jaster, RW's final witness, is a CPA who worked for many years as an auditor and audit manager in the DOR before joining a private accounting firm. During the latter part of his government career, Jaster was involved in analyzing the impact of federal statutes and how they affect Washington State law. Currently, Jaster represents private clients in matters involving Washington tax law. *Id*. at 332-336. RW attempted to use this knowledgeable witness to support its several theories why Washington State should not receive a PETT grant for the B&O tax.

Jaster testified that in his opinion, the State cannot receive PETT for the B&O tax unless there is an operating repository at the Hanford site. According to Jaster, the standard contract in 10 CFR Part

961 calls for payments by utilities to DOE for waste disposal. This means that the waste disposal, whenever it occurs in the future, could be taxed, but not until that time. *Id*. at 336-337. Jaster maintained that under various hypothetical scenarios posed by RW's attorneys, if contractual payments were made for waste disposal, no B&O tax would be due while possible landfill sites were characterized, *id*. at 343, and if no waste is ever disposed of in Washington, no B&O tax would ever be due. *Id*. at 349. However, Jaster conceded that if there were a site characterization for hire contract and someone outside the State pays for site characterization in Washington, then B&O tax would be due. *Id*.

Commenting on RW's "alternative fictional tax theory," Jaster retreated to the original RW position that no B&O tax is due at all, because he does not believe "DOE itself has a contract to build or do site characterization activities for [the] Congress and President." *Id*. at 356; RW Hearing Exhibit 2. He went on to explain that he thought DOE was more like a contract manager, even though the Department had "lots of people" working on the Hanford site characterization, because "the . . . payments are coming from the U.S. Treasury." *Tr*. at 357. Jaster ventured that "[i]f you looked at, at the Contract, I would expect that the contractors are the ones that have contracted with the Federal Government to perform the work, and so they are the ones that have the liability to perform that, that work." *Id*. The application of RW's alternative fictional tax theory "would exclude the pyramiding except to the extent that DOE itself does some activity and, and receives some appropriations from the Federal Government." *Id*. However, Jaster conceded that "if it's my liability to perform the contract, then I simply subcontract a hundred percent of the services out . . . I'm still subject to the B&O tax, regardless of who pays." *Id*. at 358.

From this preceding colloquy with Jaster, we can reasonably conclude that if DOE were "liable" for the performing the Hanford site characterization, even if it hired subcontractors to do all the work, it would still be subject to the B&O tax. The remainder of Jaster's related testimony was unconvincing. Since the NWPA and the facts documented in State's Hearing Exhibits 9 and 10 make it clear that DOE was responsible for the site characterization, and DOE hired the contractors for the BWIP, there is no factual support in the record for Jaster's opinion that DOE's role in the process was more like a construction manager than a general contractor.

Jaster next addressed the validity of the State's use of a proxy for gross income under his interpretation of Washington law. He opined that there was no provision in the statutes for measuring gross proceeds of sales or gross income of the business by cost. The main exception Jaster noted was a cost-plus contract "when the contractor has agreed to be compensated by recovery of all of their costs plus generally some fee," in which case the DOR uses costs plus the fee as the gross proceeds of sales. *Id*. at 363. In general, Jaster agreed with RW's counsel that the State of Washington does not have the authority to tax when there is no gross revenue. *Id.* But this is a meaningless point, in view of Akerly's prior testimony that under Washington tax practice, the State taxed the M&O contractors at Hanford on the basis of their costs plus fees, and the other evidence of cases showing the DOR's creative application of the B&O tax to entities and transactions that did not show gross revenue. Since it is without foundation, we reject this argument.

Giving his analysis of section 116(c)(3), as interpreted by RW in the PETT Notice, Jaster indicated that "if some B&O tax applied, or any tax applied, the Federal Government here should be paying a tax . . . equal to the tax that any other organization would pay." *Id*. at 369. And "if the State is authorized to tax the federal/state site activities at such site, then the jurisdictions were eligible for payments equivalent to those amounts." Id. at 370. Jaster pointed out that section 116(c)(3) was "not written specifically for the State of Washington. This includes taxes that would be imposed on, in several states. To the extent that a repository was being considered in Nevada, Texas as well as Washington, this section would apply to them." *Id*. He went on to challenge the assertion by the State's witnesses that the PETT provision would be rendered meaningless if RW does not pay a B&O tax, stating that "it's meaningful to the extent that if . . . some . . . tax applies, then the tax is going to be due." *Id*. at 371. Jaster noted that RW has already agreed that Washington retail sales tax is due, and that the statute had some meaning with respect to real property tax, the basis for the PETT granted to Benton County. He said that "[t]he only reason it may not have any meaning with respect to the B&O tax is because if the B&O tax doesn't apply to any other taxpayer that's situated here, then it's . . . not going to have any more meaning to the Federal Government either . . . ." *Id*.

Jaster argued creatively, but he ultimately fell back on a key RW assumption to support his opinion that no B&O tax would be due on the Hanford site characterization activities. Referring to the statement in the PETT Notice that "PETT is . . . contingent upon the taxing jurisdiction having the requisite taxing authority," NOIP, 56 Fed. Reg. at 42318, Jaster maintained that the State "would require DOE to pay an amount that is not equivalent to the tax that a taxpayer standing in the same shoes who is not in the Federal Government would have to pay." He based this opinion on RW's characterization that "the DOE is not being paid to perform site characterization for hire. There is no other taxpayer that we can identify who develops land, does site characterization, any of those type of activities, does it for themselves, not for hire, would have to pay that tax . . . ." *Tr*. at 374. As noted above, this opinion is based on RW's faulty assumptions of fact and its misinterpretation of the law.

Finally, Jaster discussed two decisions by the Washington State Supreme Court. The first case held that if there is any ambiguity in a taxing statute, the ambiguity needs to be resolved in favor of the taxpayer, which Jaster thought supported RW's position. *Buffelen Lbr. & Mfg. Co. v. State*, 32 Wn. 2d (1948), RW Hearing Exhibit 15. However, the OHA panel noted that the *Buffelen* case just as easily could be read to support the State's interpretation of Washington law that its authority to tax the Hanford site characterization activities was not ambiguous. *Tr*. at 376-378. The second decision held that road building, when performed by a logging company while harvesting timber on land owned by the State, was incidental to the main contract for the purchase and sale of timber, and was not an activity subject to the retail sales tax. *Lyle Wood Products, Inc. v. Dept. of Revenue*, 91 Wn. 2d 193, 588 P.2d 215 (1978), RW Hearing Exhibit 16. Jaster interpreted the *Lyle* case to support RW's idea of looking at the primary activity of a contract, which he thought was waste disposal, and applying the tax to that activity alone. *Tr*. at 380. According to Jaster, the Hanford site characterization should not be taxable because it is incidental and preliminary to performing the main contract for waste disposal. *Id*. at 381-382.

On cross-examination, the State's counsel asked Jaster if he meant there were ambiguities in the Washington statutes that led him to discuss the *Buffelen* and *Lyle* cases. Jaster replied that the ambiguity is in the federal statutes. *Id*. at 392. This undercuts his assertion that the *Buffelen* case, which dealt with ambiguities in Washington law, supports RW's position.

The State concluded its cross-examination of Jaster by reminding the witness that the subcontractors working on the Hanford site characterization had contracts nominally with the DOE, not with "the Federal government," and that it was DOE that had the responsibility under the NWPA of performing site characterization as a first step in developing a repository. *Id*. at 396-397. This final interchange between Jaster and the State's counsel illustrates how RW and its witnesses attempted to recast reality, and lumped the entire Federal government together in a fictional monolith that ignores the legal and functional separation of powers into different branches of government that operate independently of each other as they have in this case.

3. We conclude that the State's PETT claim for the B&O tax should have been granted

Based on the foregoing analysis of the evidence adduced at the hearing, we find the State has met its burden of proving that it had the requisite taxing authority under Washington law and tax practice to apply the B&O tax to the Hanford BWIP site characterization, and that it was reasonable and proper on the basis of the entire legal and factual record, to use the cost of the BWIP budget expenditures as the basis for calculation of that tax. Thus, we find that RW should have granted the State's PETT claim. Having decided the issue of PETT eligibility for the B&O tax in favor of the State, we next consider a number of ancillary issues, including (1) whether the entire amount expended for the Hanford BWIP site characterization should have been taxed under the "services" rate, (2) whether different activities undertaken by subcontractors as parts of the overall project should have been taxed at different B&O tax rates, (3) whether any part of the BWIP expenditure attributable to activities undertaken by subcontractors should be apportioned between Washington and other States, and (4) whether the period of PETT eligibility should run from May 28, 1986 to December 22, 1987, as provided in the NOIP, or run from January 7, 1983 through December 22, 1987, as claimed by the State.

C. Application of the B&O Tax to the BWIP expenditures

1. Pyramiding of the B&O Tax

In its March 23, 1999 Determination and subsequent written submissions during the course of the present appeal, RW's principal position could be described as preemptive, arguing that no B&O tax was appropriate for the Hanford BWIP site characterization. RW did not challenge the fact that the B&O tax is pyramided. However, RW did propose alternative legal fictions regarding DOE's role in the Hanford site characterization, namely that the Department should be analogized to a managing agent, or a construction manager, rather than a general or prime contractor. For clarity, we will address that proposal here. The application of RW's alternative legal fictions would reduce the base of the pyramid, and mean that part of the BWIP expenditure would not be subject to the B&O tax. By contrast, accepting the State's analogy of DOE as general contractor would mean that the entire

amount expended for the Hanford site characterization would be subject to the B&O tax, unless otherwise exempted by apportioning certain expenditures that lacked a sufficient nexus to Washington, an issue considered later in this section. For the reasons stated above, we reject RW's alternative legal fictions, and find that under the law and facts of this case, DOE's role was analogous to a general contractor performing site characterization for hire. The NWPA spells out the terms of the mandatory contract: the Secretary of Energy performs site characterization of "candidate sites," and the Congress pays the DOE for that task. The DOE uses a large number of its own employees, and it hires subcontractors whom it pays. The DOE is ultimately responsible for the task specified in the contract. Therefore, the entire amount of the BWIP expenditures should generally be subject to the B&O tax as the base of the pyramid.

2. Bifurcation of BWIP activities among different tax rates

The State asserts that the "service or other activities" rate is the proper B&O tax rate for the entire site characterization project. During the hearing, several witnesses, including those presented by the State, commented on the so-called bifurcation issue: whether, under Washington law, a single tax rate should be applied to the overall project, or different rates should be applied to different activities. The leading case is *Chicago Bridge & Iron Co. v. State Dept. of Revenue* (1983) 98 Wash.2d 814, 659 P.2d 463, *appeal dismissed* 104 S.Ct. 542, 464 U.S. 1013, 78 L.Ed.2d 718. *Chicago Bridge* involved a constitutional challenge to the imposition of the B&O tax to revenues received by a foreign corporation for work done outside Washington (design and manufacturing) for a project ultimately installed within the State. The Supreme Court of Washington upheld the application of the B&O tax to a foreign corporation's gross income when some of the functions related to that firm's contracts with in-state customers were performed outside Washington. The controlling factor in *Chicago Bridge* was the contract, which was for a lump sum for a project installed in Washington, but designed and built outside the state. Other cases decided by DOR begin by applying the general principle enunciated in *Chicago Bridge*, and the result depends on the nature of the contract involved. For example, the DOR applied different B&O tax rates in a case involving a fixed price contract to perform a variety of activities, each of which is taxable according to its corresponding B&O tax category, where the values assigned to the various activities were negotiated by the parties prior to performance of the contract. 11 Washington Tax Decisions (WTD) 313 (1992). Under these decisions, a condition for bifurcation is that the taxpayer's contract is not a "lump sum" contract, but rather details the dollar values of the various activities. *Id.*; *see also* 17 WTD 247 (1998).

Applying the foregoing legal principles to the present PETT appeal, we must analyze the Hanford site characterization to see what it resembles most: a fixed price contract, or a contract in which different activities have specific dollar values that were separately negotiated. What we see does not make a perfect analogy to a specific category of Washington tax cases. There was no bifurcation of contractual activities among two or more B&O tax rates, since there was not a negotiation between the parties; nor was there a meeting of the minds as in a garden variety government procurement contract. The Hanford site characterization most resembles a mandatory contract that occurred when the Congress enacted section 113(a) of NWPA, ordering the Secretary to do it. No further details or dollar values of the site characterization activities are specified in the statute, so at first blush, the

statutory directive to the Secretary resembles a lump sum contract that would be subject to a single B&O tax rate.

However, the matter is more complicated than it seems, since section 302(e)(2) of the NWPA requires the Secretary to submit the budget of the Nuclear Waste Fund to the Office of Management and Budget (OMB) triennially. The budget of the Nuclear Waste Fund presumably included funding for the Hanford site characterization expenditures during the relevant time period. But there is no evidence in the present record to indicate what specific budget items the Secretary requested, OMB approved and submitted as part of the Budget of the United States Government, and the Congress appropriated, for the period concerned. Without knowing that missing factual information, we cannot analyze whether the undertaking more closely resembled a lump-sum contract, rather than a contract with several subcategories that were separately bargained for and priced, and we cannot decide whether a single B&O tax rate should apply to the overall Hanford site characterization project for purposes of section 116(c)(3). Accordingly, we will remand the "bifurcation" issue to the parties with directions that they submit a joint report to the OHA on the specific budget or budgets that included the money for the Hanford site characterization.

3. Apportionment of BWIP expenditures between Washington and other States

The next issue is whether the BWIP expenditures should be "apportioned" to exclude monies paid to subcontractors lacking a sufficient nexus to Washington State to be subject to the B&O tax. The courts have upheld the broad application of the B&O tax to foreign corporations doing business in Washington. *General Motors Corp. v. Washington*, 84 S.Ct. 1564, 377 U.S. 436, 12 L.Ed.2d 430, rehearing denied 85 S.Ct. 14, 379 U.S. 875, 13 L.Ed.2d 79 (1964). The Supreme Court of the United States concluded in *General Motors* that nexus is established if in-state services are substantial "with relation to the establishment and maintenance of sales, upon which the tax is measured." *General Motors*, 377 U.S. at 447, 84 S.Ct. at 1571. This principle was applied by the Supreme Court of Washington, which held that "It is only when activities in the state are in no way connected with the business taxed that nexus has been found to be absent." *Chicago Bridge*, 98 Wash.2d at 821, 659 P.2d at 468. Unlike the bifurcation question, there is no credible evidence in the record on the apportionment issue that indicates BWIP contractors performed work that was "in no way connected with the business taxed," i.e. the Hanford site characterization. The facts in the present case are similar to the situation in *Chicago Bridge*, and that case is controlling. DOE had the statutory responsibility for the overall Hanford site characterization, and hired subcontractors with the necessary expertise. Some of the BWIP subcontractors had principal places of business that were located outside the State of Washington, and they may have performed work outside Washington, but they were hired to work on the BWIP site characterization. There is no evidence that their functions were not related to the primary task of the BWIP site characterization required by NWPA section 113(a). Consequently, none of the funds that the DOE expended for its subcontractors on the Hanford site characterization should be exempted from the B&O tax for lack of a sufficient nexus under the *Chicago Bridge* case.

4. The time period for PETT eligibility

Our position on this issue was evident in the interlocutory Decision denying RW's Second Motion for Summary Judgment. 28 DOE ¶ 82,501 (2001). The State's original PETT claim for the B&O tax calculated its PETT entitlement by reference to an eligibility commencement date of January 7, 1983, rather than May 28, 1986 when the President approved the BWIP as a candidate site for site characterization as a potential repository. RW correctly points out our determination in the *Benton County* decision that PETT eligibility did not begin until May 28, 1986 when the BWIP was approved as a candidate site under section 112© of the NWPA. *Benton County*, 26 DOE ¶ 80,145 at 80,618 (1996). The State has not submitted any additional evidence or arguments during the course of the present appeal that would lead us to change our prior ruling on the commencement date for PETT eligibility.

In *Benton County*, we determined, *sua sponte*, that the NOIP erred in determining that eligibility for PETT ended on December 22, 1987, the date of enactment of the 1987 NWPA amendments. After reviewing the law, we concluded that PETT eligibility continued for 90 days after that date until March 21, 1988. The relevant part of the 1987 Act, section 160(a) of the NWPA, as amended, provides

> **§ 10172. Selection of Yucca Mountain site**
>
> (a)(1) The Secretary shall provide for an orderly phase-out of site specific activities at all candidate sites other than the Yucca Mountain site.
> (2) The Secretary shall terminate all site specific activities (other than reclamation activities) at all candidate sites, other than the Yucca Mountain site, within 90 days after the date of enactment of the Nuclear Waste Policy Amendments Act of 1987.

42 U.S.C. § 10172. Section 116(c)(3) of the NWPA specifies that PETT grants "shall continue until such time as all [site characterization] activities . . . are terminated at such site." Since termination of site characterization at Hanford was effective 90 days after December 22, 1987, we held that March 21, 1988 was the proper date for termination of PETT eligibility for Benton County. *Benton County*, 26 DOE ¶ 80,145 at 80,618. We disagreed with RW on the termination date for PETT eligibility, and our interlocutory Decision denied RW's Second Motion for Summary Judgment. 28 DOE ¶ 82,501 at 85,003.

RW has asked for reconsideration of our ruling on the termination date for PETT eligibility, and submitted a new legal argument in support of its position. According to RW, section 116(c)(6), which was added by the 1987 NWPA amendments, precluded further "financial assistance" to any State "other than the State of Nevada" after enactment of the NWPA Amendments Act of 1987, and this provision should be read to terminate Washington's PETT eligibility as of December 22, 1987, because it is a "State," rather than a county. In our view, RW has misread the statute, and its argument should be rejected.

As explained above in section *I.A.* of this Decision, section 116(c) of the NWPA provided for two different kinds of grants to States with one or more potential repository sites. Sections 116(c)(1) and (c)(2) provided for "financial assistance" grants to enable the States to participate in the public process leading to the final selection of a repository site. Section 116(c)(3) provided that "The Secretary shall also grant . . . an amount each fiscal year equal to the amount such State and unit of general local government would receive were they authorized to tax such site characterization activities at such site." It is clear under the statute, as originally enacted, and as amended, that PETT grants had a different purpose from financial assistance for participation in the repository selection process. As we noted during the discussion of the legislative history in this Decision and *Benton County*, payments equal to taxes were to ensure "that a State would not be worse off by virtue of having one of these facilities in their State than they would be in terms of taxes. . . ." NOIP, *supra, citing* 128 Cong. Rec. S4132 (April 28, 1982). The statutory language maintains this distinction throughout section 116. The term "financial assistance" is only used in reference to participation by State and affected units of local government in the repository selection process. By contrast, the term "financial assistance" is never used in either the original or the amended version of section 116(c)(3) in reference to payments equal to taxes.

When the 1987 amendments limited the repository selection process to the Yucca Mountain site, section 116(c)(6) terminated the payment of "financial assistance" grants to States other than Nevada as of the effective date of the Act on December 22, 1987. Section 116(c)(6) did not refer to payments equal to taxes. In our reading of the statutory language, the omission of payments equal to taxes from section 116(c)(6) appears to be intentional, since it is consistent with Subtitle E of the 1987 Act, entitled "REDIRECTION OF THE NUCLEAR WASTE PROGRAM," which contained section 160(a), quoted above. 42 U.S.C. § 10172. Under section 160(a) of the amended NWPA, site characterization activities at Hanford were terminated 90 days after enactment of the 1987 Act, on March 21, 1988. Since PETT was to continue until site characterization was terminated at Hanford, it is understandable that there was no mention in section 116(c)(6) of payments equal to taxes ending on the effective date of the 1987 Act. Based on the foregoing analysis, we have concluded that RW has failed to show the State of Washington's PETT eligibility ended before March 21, 1988.

5. Grants for financial assistance to Tribal Governments

There is evidence in the record that the amount of Hanford site characterization budget expenditures that the State used to compute the amount of B&O in its PETT claim included grants that were paid to the governments of Indian Tribes. RW's Hearing Exhibit 6; testimony of Jerry Hammond, *supra*. Federal government grants are generally exempt from the B&O tax, according to the testimony of Donn Smallwood, *supra*, and a DOR pamphlet entitled "Information on the Washington State BUSINESS & OCCUPATION TAX," submitted as State's Hearing Exhibit 8. Even viewing DOE's role in the Hanford site characterization process as that of a general contractor, if the Department's payments to Tribal governments were Federal grants, they do not qualify as site characterization activities under the NOIP, and therefore, should not be counted toward DOE's B&O tax equivalent. The record is inconclusive about the amount of these payments, and we will direct the parties to confer with each other about them and include that information on the joint report which they are to file after receiving this Decision.

V. Conclusion

Based on the foregoing analysis of the record, we have reached the following determinations on the major issues involved in this appeal:

(1) The State of Washington has met its burden of proving that RW's application of the NWPA to the facts of this case, in its Determination to deny the State's PETT claim for the Washington B&O tax, was erroneous in fact and in law, and arbitrary and capricious. We have also determined that the State had the requisite taxing authority under Washington law and tax practice to apply the B&O tax to the Hanford BWIP site characterization, and that it was reasonable and proper on the basis of the entire legal and factual record to use the cost of the BWIP budget expenditures as the basis for calculation of that tax. Thus, we conclude that RW should have granted the State's PETT claim as submitted, subject to certain exceptions noted below.

(2) We are unable to determine whether the entire amount expended for the Hanford BWIP site characterization should have been taxed under the "services" rate, or taxed at different B&O tax rates based on the activities involved. We cannot decide this issue on the basis of the present record because we lack information about the relevant portions of the Federal budget legislation that appropriated funds for site characterization during the period concerned. This information is necessary under the applicable case law to determine whether the budgets for the BWIP site characterization more closely resembled a lump sum contract, or a contract in which specific items were separately valued. If the budget legislation specifically authorized or appropriated separate amounts of money for distinct tasks, it may be proper to "bifurcate" the B&O tax and apply different rates of B&O tax for specific activities.

(3) There has been no showing made under the applicable case law that any part of the overall BWIP expenditure attributable to payments for activities undertaken by DOE's contractors and subcontractors should be "apportioned" between Washington and other States, in which case the amount of B&O tax liability for PETT would have been reduced accordingly.

(4) The period of PETT eligibility should run from May 28, 1986 to March 21, 1988. May 28, 1986 is the date on which the Hanford BWIP became a "candidate site" for site characterization as a possible repository location, and March 21, 1988 is the date on which the Hanford site characterization was effectively terminated under the 1987 amendment to the NWPA.

(5) Grants to Indian Tribal Governments may not be properly included among the costs used to determine DOE's PETT obligation for the B&O tax. We direct the parties to confer with each other and submit a report to supplement the record regarding the grants that were paid to the Tribal Governments under the NWPA, and in what amounts. The basis for calculating the B&O tax liability for PETT should be accordingly reduced.

VI. Reporting Requirements

For the reasons explained above, we are directing the parties to confer with each other, and submit a joint report to the OHA including the following matters: (1) the DOE's treatment of business and income taxes in its PETT settlement with the State of Nevada; (2) the terms of the Federal budget legislation that appropriated funds for the Hanford BWIP site characterization during the period of PETT eligibility; (3) the relevant grants to Indian Tribal Governments; and (4) the recalculation of Washington's PETT claim, based on the period of PETT eligibility determined in this Decision, with interest through July 31, 2002. The joint report should be submitted to the OHA within 45 days of the issuance of this Decision.

VII. Use of Alternative Dispute Resolution

With this determination, OHA has resolved the major legal issues regarding the State of Washington's eligibility for PETT for the B&O tax. We therefore provide a framework for the parties to use for negotiating with each other to reach a final resolution of this matter. There is a precedent in the PETT area for settlements: RW has settled with Nye County, with Nevada, and with Benton County. The Alternative Dispute Resolution Act, 28 U.S.C. § 651, encourages the use of ADR within the Federal court system. The Benton County settlement came about through mediation after a similar Decision by the OHA. The parties should contact the Director of the Office of Dispute Resolution in DOE's Office of General Counsel for assistance in finding a suitable mediator who can assist the parties to resolve remaining issues. The parties will be required to submit a status report to the OHA on the settlement negotiations that we direct them to initiate.

IT IS THEREFORE ORDERED THAT:

(1) The appeal filed by the State of Washington (State) Department of Revenue of the March 23, 1999 Determination by the Department of Energy Office of Civilian Radioactive Waste Management (RW) is hereby granted in part, and denied in part, as set forth in paragraph (2) below.

(2) The March 23, 1999 RW Determination is hereby reversed and set aside, except that:

(a) The period of PETT eligibility for the State shall be May 28, 1986 through March 21, 1988.

(b) Federal grants to Indian Tribal Governments shall not be counted as costs of the Hanford site characterization for purposes of computing the amount of B&O tax for the PETT grant to the State.

(3) No later than 45 days after the date of issuance of this Decision, the parties shall submit a joint report to the Office of Hearings and Appeals, addressing the following matters: (1) the DOE's treatment of business and income taxes in its PETT settlement with the State of Nevada; (2) the terms of the Federal budget legislation that appropriated funds for the Hanford BWIP site characterization during the period of PETT eligibility; (3) the grants to Indian Tribal Governments;

and (4) the recalculation of Washington's PETT claim, based on the period of PETT eligibility determined in this Decision, with interest through July 31, 2002.

(4) This matter is hereby remanded to RW, which shall confer with the State, and within 60 days of the date of this Decision and Order, implement the findings and conclusions set forth herein by issuing a revised determination granting the State PETT based on the Washington Business and Occupation Tax, computed by using the cost of the expenditures for the Hanford site characterization, as if the site characterization had been performed by a private general contractor. The amount of interest on the PETT grant shall be calculated through July 31, 2002.

(5) No later than 75 days after the date of issuance of this Decision and Order, the parties shall submit a joint report to the Office of Hearings and Appeals, explaining their progress toward a final, negotiated resolution on the amount of the State's PETT grant. If for some reason the parties are unable to reach a final resolution on the amount of the State PETT grant before submitting their 75 day report, the Office of Hearings and Appeals will proceed to issue a supplemental order fixing the amount of the PETT grant.

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 25, 2002

July 16, 2003

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Supplemental Order

Name of Petitioner: State of Washington

Date of Filing: July 14, 2003

Case Number: VPX-0001

On June 25, 2002, the Office of Hearings and Appeals (OHA) issued a decision on the State of Washington's appeal of a determination by the Office of Civilian Radioactive Waste Management (RW) denying its claim for a "payment equal to taxes" (PETT) grant based on the Washington Business and Occupation Tax ("B&O tax"). In that decision, we granted the appeal, held that RW erred in denying the State's PETT claim for the B&O tax, and remanded the case for further proceedings intended to assist the parties in achieving the final resolution of this matter. *State of Washington*, http://www.oha.doe.gov/cases/pett/vpa0001.htm. We are issuing this supplemental order to resolve the issues remaining in the case.

The present appeal is governed by the Notice of Interpretation and Procedures (NOIP) implementing the PETT provision in section 116(c)(3) of the Nuclear Waste Policy Act of 1982, (NWPA), 42 U.S.C. § 10101 *et seq*. Under the NOIP, the Department of Energy (DOE) will grant, to a State in which a candidate site for a high-level nuclear waste repository is located, a payment equal to the amount that State would receive if it were authorized to tax site characterization activities at that site. *See* 56 Fed. Reg. 42314 (August 27, 1991). The history of the PETT program and the Basalt Waste Isolation Project and Near Surface Test Facility (collectively referred to as the BWIP) for characterization of a candidate site for a repository on the Hanford reservation in Washington State is described at length in Benton County, Washington, 26 DOE ¶ 80,145 (1996), http://www.oha.doe.gov/cases/pett/lpa0001.htm.

Reporting Requirements in the June 25, 2002 Decision

In the June 25, 2002 decision, we directed the parties to confer, and submit a joint report to the OHA including the following matters: (1) the DOE's treatment of business and income taxes in its PETT settlement with the State of Nevada; (2) the terms of the Federal budget legislation that appropriated funds for the Hanford BWIP site characterization during the period of PETT eligibility; (3) the relevant grants to Indian Tribal Governments; and (4) the recalculation of Washington's PETT claim, based on the period of PETT eligibility determined in this Decision, with interest through July 31, 2002. Rather than the joint submission OHA envisioned, RW

submitted its own report addressing these matters, and the State submitted comments on the RW report. The ensuing portion of this supplemental order will discuss each element of the report in turn. As explained below, we hold for the State on each issue, direct RW to update the interest calculations through September 1, 2003 in accordance with our ruling on the proper interest rates, and order RW to pay the PETT grant to the State of Washington.

Several events occurred after OHA received the last of the post-decision submissions in the fall of 2002. In December 2002, OHA agreed to hold this matter in abeyance while RW pursued an attempt to revisit its determination in the 1991 PETT Notice that any PETT grants made to eligible jurisdictions would include interest. RW proposed to do this by requesting a ruling from the Comptroller General of the United States on RW's obligation, *vel non*, to include interest in PETT grants. On April 30, 2003, RW advised OHA that the Department decided against revisiting RW's interest obligation, and proposed the parties move forward immediately with mediation. The parties attempted to mediate a resolution of the appeal. The State, through its counsel, advised OHA on July 3, 2003 that the mediation was not successful and requested that we issue a final determination. That is where we are today.

(1) DOE's treatment of PETT business taxes in Nevada

Enclosure 1 to the report indicated that RW has made two types of PETT grants to the State of Nevada for business taxes: sales/use taxes, which are not at issue in the present appeal, and the Nevada Business Tax. RW indicated that it had made PETT grants to the State for the Nevada Business Tax, with interest, annually since that tax became effective July 1, 1991. RW points out that the Nevada Business Tax is not based on the gross receipts of the taxpayer, and it is not paid in a pyramided fashion like the Washington B&O tax. For these reasons, RW seems to imply that since the Nevada Business tax is relatively nominal in value, it may not be comparable to the B&O tax. Washington does not take issue with this aspect of the RW report, except to observe that equal treatment of the two states under the PETT statute requires payment of Washington's business tax. According to the State, it is immaterial that the B&O tax has greater importance in Washington's overall revenue-raising scheme than the Nevada Business tax does in Nevada. We agree with Washington, and we affirm our prior ruling that RW must make a PETT grant to Washington equivalent to the B&O tax, just as it paid the Nevada Business tax.

(2) The terms of the Federal budget legislation that appropriated funds for the Hanford BWIP site characterization during the period of PETT eligibility

RW has accurately reported on the Federal legislation appropriating money for the BWIP site characterization efforts during FYs 1986, 1987, and 1988. These acts appropriated "lump sums" for the site characterization activities and, as such, do not present a situation where Washington law requires bifurcation for the purpose of applying varying B&O tax classifications and rates. As the State observes in its comment on this aspect of the report, RW appears not to be advocating bifurcation; rather it argues for the first time in this long proceeding that one tax rate, that for government contracting, be applied to the whole of the adjusted BWIP expenditures. We

agree with the State that the conditions for bifurcation of the B&O tax have not been met, and a single tax rate should be used.

(3) Grants to Indian Tribal Governments

The State agrees with RW's report that a total of $12,464,206 paid over the three fiscal years constituted grants to Indian Tribal governments. Based on our determination in the June 25, 2002 decision that grants should not included in "gross revenues" (or the equivalent) for purposes of the B&O tax, this amount should be excluded from the BWIP expenditures used to calculate Washington's PETT grant. In its recalculation of the PETT amount, RW properly has excluded the amount of the grant funds.

(4) Recalculation of Washington's PETT Claim, Based on the Period of Eligibility Determined by OHA, with Interest

Our June 25, 2002 decision determined that the period of the State's eligibility for PETT extended from May 28, 1986 until March 21, 1988. The original claim submitted by the State asserted a PETT entitlement from January 7, 1983 until December 22, 1987. In the claim, there is a breakdown between the periods January 7, 1983 through May 27, 1986 and May 28, 1986 through December 22, 1987. According to the State, after the decision in *Benton County* and well before the hearing in this case, the State sent a letter to RW's counsel asking for financial data so that it could calculate the amount of PETT due for the period December 23, 1987 through March 22, 1988. (State Ex. 4). Mr. Akerly testified that the State never received a response to this letter and thus he was unable to compute, prior to the hearing, the PETT due for what the State has dubbed the "stub period" of December 23, 1987 through March 22, 1988. Hearing Transcript (hereinafter cited as "Tr.") at 50-51. One of the reasons the June 25, 2002 decision directed RW to recalculate the PETT amount was to include the expenditures attributable to the "stub period."

However, RW's recalculation went beyond what OHA directed. That section of RW's report introduced a new set of numbers purporting to reflect the amounts spent on BWIP during the entirety of the eligibility period, not just for the "stub period." RW Report at 3-5. As the State observes, the newly revised BWIP expenditure amounts that RW's contractors produced are not part of the record of this case, they were "reconstructed" many years after the fact, they have not been subject to cross examination, and they are $11 million dollars less than the amount in the record. Since the B&O tax is based on the amount of BWIP expenditures, reducing the expenditures causes a corresponding reduction in the amount of the PETT grant before interest. We agree with the State that it is too late in the case, after years of position statements, briefing and an evidentiary hearing, for RW to try to inject a new set of recently "reconstructed" BWIP expenditure amounts into the record. Not only is there no evidentiary foundation for this information, but we are unable to understand where those numbers came from. Thus, we will require RW to recalculate the amount of Washington's PETT grant using the original BWIP expenditure figures for 1986 through1987 that were provided by Joanne Shadel of DOE to Frank Akerly of the Washington Department of Revenue (DOR), plus the newly presented BWIP expenditure amount for the "stub period."

In addition to the new BWIP expenditure figures for 1986-87, RW's recalculation used a B&O rate that RW has never before advocated at any point in the record of this proceeding. Instead of the "services and other activities" tax rate anticipated by the June 2002 OHA decision, RW now urges OHA to use the "government contracting" rate. The "government contracting" tax rate is 0.484 percent, about one-third of the "services and other activities" tax rate of 1.5 percent. This has the result of reducing the PETT amount before interest from $2,925,430 to $861,527. As the State points out in its comment, RW had many years in which to submit evidence and arguments about the proper tax rate for the BWIP site characterization, especially during the evidentiary hearing held in this case, and it chose not to offer any evidence on this issue. We agree that if RW wanted to preserve the argument it is now trying to raise at the eleventh hour, it should have presented alternative theories in the proceeding. Several of the witnesses (Akerly, Wiest, and Jaster) explained that the "government contracting" tax rate is normally used for government construction projects after construction has commenced, and that the BWIP site characterization encompassed only a small amount of temporary construction work, and primarily consisted of research and other activities. Thus, the record supports the State's position, which is also the result anticipated in the June 2002 OHA decision, that the "services and other activities" tax rate should properly be applied to the PETT recalculation.

Finally, RW's report uses an interest calculation that is inappropriate and cannot be sustained. The governing PETT Notice published by RW in 1991 states "Late payment shall include interest, if appropriate, in accordance with applicable requirements of the taxing jurisdiction." 56 Fed. Reg. at 42318. In *Benton County*, OHA recognized that interest on PETT amounts should be calculated according to applicable state law for the type of taxes involved. *Benton County*, slip op. at 15. Instead of using the interest rate required by Washington state law in RCW 82.32.050 for an ordinary taxpayer who is late in paying the B&O tax, RW's report used the rate used by the Federal courts for computing post-judgment interest. RW will be directed to recalculate the PETT amount using the appropriate interest rate prescribed by Washington State law, accrued from the dates when the B&O taxes were due initially. This result is necessary to carry out the language and the spirit of the PETT Notice and the governing statute.

Recalculation of PETT per OHA's decision

The State has recalculated the amount it claims for PETT based on OHA's June 2002 decision. Like RW, the State has calculated interest through December 31, 2002. The same format used by RW is followed; the data on page 8 of the RW report reflecting the State's claim are the same except for the extension of interest through the end of the year. As shown below, the total amount due the State for PETT for B&O taxes, with interest through December 31, 2002, is $6,759,964.

State's Current Position & Methodology	5/28-12/31/86	1/1-12/31/87	1/1-3/21/88	TOTALS
Akerly's Original Schedules Amount	$78,987,025	$114,028,162	0	$193,015,187
Additional Costs for 90 Days Prorated	0	1,127,376	10,146,387	11273763
Original Schedule Plus Costs for 90 Days	78,987,025	115,155,538	10,146,387	204,288,950
Less: Only Indian Grants Prorated	2,755,620	5,935,069	569,619	9,260,308

Akerly's Total Taxable Amounts	76,231,405	109,220,470	9,576,768	195,028,643
Service & Other Activity B & O Tax Rate	0.015	0.015	0.015	
B & O Tax @1.5 %	$1,143,471	$1,638,307	$143,652	$2,925,430
Total Interest Percent thru 12/31/02	136.99%	128%	119%	
Akerly Interest Amount thru 12/31/02	1,566,555	2,097,033	170,946	3,834,534
State's Sum as Currently Proposed 11/01/02	2,710,026	3,735,340	314,598	$6,759,964

We agree with this calculation. It uses the "original" BWIP expenditure amounts for 1986 and 1987 that are well established in the record, and RW's newly submitted amount for the so-called 90-day "stub period" after the 1987 Amendments to the NWPA were enacted into law on December 22, 1987. It eliminates the grants to Indian Tribes, it uses the B&O tax rate for "services and other activities," and it uses the interest rate dictated by Washington state law for late B&O tax payments.

Conclusion

As explained above, we have considered the post-June 2002 decision submissions from RW and the State, and determined that RW's recalculation of the PETT grant for the Washington B&O tax is erroneous in using (1) new numbers for the 1986 and 1987 BWIP expenditures that are unsupported by the record; (2) the B&O tax rate for "government contracting" which is unsupported by the record; and (3) the statutory interest rate applicable to judgments of Federal district courts. RW should have used the established numbers for the 1986 and 1987 BWIP expenditures; the B&O tax rate for "services and other activities," and the interest rate for late payment of B&O taxes under Washington law. The table above represents a proper recalculation of the State's PETT grant, with interest cumulated as of December 31, 2002. We will direct RW to update the interest calculation to determine the final amount of Washington's PETT grant as of September 1, 2003, and to pay that amount to the State without further delay.

It is Therefore Ordered that:

(1) The appeal filed by the State of Washington Department of Revenue of the determination by the DOE Office of Civilian Radioactive Waste Management (RW) denying its claim for a "payment equal to taxes" (PETT) grant based on the Washington Business and Occupation Tax ("B&O tax") is hereby granted as set forth above, and in our previous decision of June 25, 2002, *State of Washington*, http://www.oha.doe.gov/cases/pett/vpa0001.htm.

(2) RW shall update the interest calculation in accordance with the table in this supplemental order to determine the amount of Washington's PETT grant on September 1, 2003.

(3) RW shall forthwith pay the amount determined under paragraph (2) to the State of Washington in the manner specified in the Nuclear Waste Policy Act of 1982, as amended.

(4) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 16, 2003

April 30, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Supplemental Order

Names of Petitioners:Benton County, Washington

Office of Civilian Radioactive Waste Management

Date of Filing: April 28, 1997

Case Number: VPX-0011

This Supplemental Order is being issued to adopt a Joint Stipulation of Benton County, Washington and the Department of Energy, through its Office of Civilian Radioactive Waste Management (OCRWM), in which they agree to settle any and all disputes concerning DOE's liability to Benton County for "payments-equal-to-taxes" (PETT) under the Nuclear Waste Policy Act of 1982, as amended (NWPA).

On December 19, 1996, the Office of Hearings and Appeals (OHA) issued a Decision and Order on an appeal filed by Benton County under OCRWM's Notice of Interpretation and Procedures implementing the PETT provisions of the NWPA. Benton County, Washington, 26 DOE ¶ 80,145 (1996). In its appeal, Benton County had challenged the amount of the PETT grant initially awarded to it by the DOE's Richland Operations Office (DOE/RL). Our December 19, 1996 Decision considered and resolved many disputed legal and factual issues, but it did not fix the amount of Benton County's PETT grant. Instead, that Decision concluded by directing DOE/RL to confer in good faith with Benton County and apply the approach used to negotiate a PETT settlement with Nye County, Nevada to resolve this case within a specified time period, according to the principles of alternative dispute resolution applicable to government agencies. Id. at 80,625; 80,641-642.

The parties took our suggestion to heart, and entered into settlement negotiations with a mediator. The time period specified in our December 19, 1996 Decision for concluding settlement negotiations was twice extended at their request. On April 28, 1997, the parties advised the OHA that they had reached agreement on a Joint Stipulation which fully resolves any and all disputes concerning DOE's PETT liability to Benton County. On April 30, 1997, the parties filed an executed copy of the Joint Stipulation which has been approved by their respective principals. We have considered and will adopt the Joint Stipulation, which is appended hereto and incorporated by reference in this Supplemental Order. This Supplemental Order and the incorporated Stipulation shall have the same force and effect as if this Order had been entered without a Stipulation and after a hearing in this matter. Since this matter has been settled by the Stipulation, the appeal filed by Benton County on November 4, 1993 shall be dismissed with prejudice.

IT IS THEREFORE ORDERED THAT:

(1) The Joint Stipulation of Benton County, Washington and the Department of Energy appended hereto is hereby incorporated by reference, and the terms and conditions of that Stipulation are made a part of this Supplemental Order.

(2) The terms and conditions of the incorporated Stipulation are hereby adopted and issued as a final order of the Department of Energy.

(3) This Supplemental Order and the incorporated Stipulation shall have the same force and effect as if this Order had been entered without a Stipulation and after a hearing in this matter.

(4) The appeal filed by Benton County on November 4, 1993, OHA Case No. LPA-0001, is hereby dismissed with prejudice.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 30, 1997

JOINT STIPULATION OF BENTON COUNTY, WASHINGTON, AND

OFFICE OF CIVILIAN RADIOACTIVE WASTE MANAGEMENT OF THE DEPARTMENT OF ENERGY FOR INCORPORATION IN AN ORDER OF THE

OFFICE OF HEARINGS AND APPEALS IN CASE NO. LPA-0001

Pursuant to the December 19, 1996, Order of the Office of Hearings and Appeals in case no. LPA- 0001, the Office of Civilian Radioactive Waste Management (OCRWM) of the Department of Energy (DOE) and Benton County hereby agree, stipulate, and request that the Office of Hearings and Appeals of DOE (OHA) enter a final order adopting the following terms and conditions:

In full satisfaction of any and all liability to Benton County for Payments-Equal-to-Taxes pursuant to 42 U.S.C. 10136 for all periods of time, OCRWM shall owe Benton County $6,020,709, of which $5,250,000 remains unpaid at the date of the entry of the Order by OHA incorporating this Stipulation. The remaining liability of $5,250,000 shall be discharged in accordance with the schedule of principal, interest, and ancillary terms set forth below.

1. A payment of $2,250,000, plus interest, shall be made by OCRWM to the Benton County Treasurer within approximately thirty (30) days of the entry of an Order by OHA incorporating this Stipulation. Interest at the twelve-month Treasury Bill rate in effect as of the date of the OHA Order, compounded annually, shall accrue from the date of entry of the OHA Order until the date of payment. Any deficiency or overpayment of interest on this principal amount, as a result of the need to estimate the interest in advance of issuance of the check, shall be reflected in the payment of the remaining balance.
2. A payment, in full, of the remaining principal balance of $3,000,000, plus interest (and any adjustment for interest associated with the initial payment above), shall be made by OCRWM within approximately thirty (30) days of the earlier to occur of the enactment of OCRWM's Fiscal Year 1998 Congressional appropriation or December 31, 1997. Interest will accrue on the $3,000,000 balance from the date of the entry of the OHA Order adopting this Stipulation to the date of payment, at the rate in effect as of the date of the entry of OHA's Order.
3. The terms and conditions of this Stipulation were arrived at through the process of negotiation in light of all the facts and circumstances, and the sums which are due and payable under this Stipulation were arrived at without agreement on any particular property valuation methodology that may have been put forward by either party during the course of these proceedings.
4. The Order entered by OHA pursuant to this Stipulation shall have the same force and effect as if the Order had been entered without a stipulation and after a hearing in this matter.

Dated: 4/30/97

Office of Civilian Radioactive Waste Management:

Samuel Rousso
On Behalf of Office of Civilian
Radioactive Waste Management

Benton County, Washington:
L. Graeme Bell, III
Attorney for the Benton County
Board of Commissioners

Case Nos. VPZ-0022 and VPZ-0023

March 9, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Interlocutory Order

Name of Case: State of Washington

Dates of Filing: February 15, 2001

February 26, 2001

Case Numbers: VPZ-0022

VPZ-0023

This decision will consider two motions for partial summary judgment that the Department of Energy (DOE) Office of Civilian Radioactive Waste Management (OCRWM) filed with the Office of Hearings and Appeals (OHA) on February 15 and 26, 2001, respectively, in connection with an appeal that the State of Washington Department of Revenue (DOR) filed on April 26, 1999.

1. Procedural Background

The underlying appeal, OHA Case No. VPA-0001, was filed under the Notice of Interpretation and Procedures (NOIP) implementing the "payments-equal-to-taxes" (PETT) provisions of the Nuclear Waste Policy Act of 1982, as amended (NWPA), 42 U.S.C. § 10101 *et seq*. Under the NOIP, the Department of Energy will grant, to a local jurisdiction in which a candidate site for a high-level nuclear waste repository is located, a payment equal to the amount that jurisdiction would receive if it were authorized to tax Federal site characterization activities at that site. *See* 56 Fed. Reg. 42314 (August 27, 1991). The payment authorized by the NWPA is known as a "PETT grant." The history of the PETT program and the Basalt Waste Isolation Project (BWIP) at the Hanford site is described at length in Benton County, Washington, 26 DOE ¶ 80,145 (1996), and will not be repeated here.

By letter dated March 23, 1999, DOE denied the State's application for a PETT grant based on Washington's Business and Occupation ("B&O") Tax. The amount in controversy is substantial; with interest from a claimed PETT eligibility starting date of January 7, 1983 through September 30, 1998, the State calculated the value of its claim as $13,083,694. The fundamental dispute between the State and OCRWM can be summarized as follows for purposes of the present decision. The B&O tax is based on the taxpayer's gross revenue. Since the BWIP did not have any gross revenue, the State based its PETT claim on "the most comparable surrogate, the amount of expenditures associated with site characterization at Hanford." Petitioner's Statement of Position at 7. In the Statement of Position that it filed in connection with this appeal, OCRWM reiterated that since the BWIP had no gross revenue, its site characterization activities cannot form the basis for taxation under the Washington B&O tax, and no PETT payment is due under the theory advanced by the State. OCRWM characterized the State's PETT claim as depending on "a legal fiction," and maintained that a similarly-situated private taxpayer would not owe any B&O tax. *See generally* Respondent's Statement of Position. The present appeal to OHA challenges OCRWM's

denial of the State's PETT claim based on the B&O tax.

OHA and the parties have held many telephonic conferences on procedures, completed discovery, exchanged witness lists and written reports from some witnesses, and set a hearing date for March 28-29, 2001 in Seattle, Washington. The hearing site was chosen for its accessibility to the witnesses, all of whom are current or former employees of the DOR.

On January 30, 2001, OCRWM sought leave to file a motion for partial summary judgment. In a conference call held on February 2, 2001, we granted OCRWM leave to file the motion by February 15, and permitted the State to file a response by March 6. The first motion for partial summary judgment was filed on February 15. In addition, on February 26, OCRWM filed a second motion for partial summary judgment regarding an additional issue not mentioned in the first motion. The exchange of pleadings was completed when the State filed a response to the OCRWM's second motion on March 9, 2001. We now address the motions.

The OHA regulations governing appeals in 10 CFR Part 1003, Subpart C, do not prescribe procedures and standards governing summary judgment motions. The Federal Rules of Civil Procedure provide that such a motion shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Though the Federal Rules do not govern this proceeding, they may be used for reference, and Rule 56 presents a logical framework for evaluating the present motions. Thus, OHA will not grant the motions absent a showing by OCRWM that, upon the undisputed facts in the record, it is entitled to prevail as a matter of law upon the issue presented.(1) For the reasons discussed below, because we do not find clear and convincing evidence that OCRWM is entitled at this point in the proceeding to prevail as a matter of law, we deny the motions for partial summary judgment.

2. The First Motion for Summary Judgment

In its first motion, OCRWM requests that OHA grant partial summary judgment with respect to the following legal proposition:

> *That a private taxpayer, operating in a similar factual context, would not be subject to B&O tax under Washington law.*

Motion at 1. According to OCRWM, the responses of the State's witnesses David J. Wiest and Kenneth Capek to hypothetical questions posed to them in depositions by OCRWM's counsel, and the State's answers to OCRWM's requests for admissions, prove that a private taxpayer, "operating in a similar factual context," would not be subject to B&O tax under Washington law. First Motion at 1, 3-4 (admissions), 5-9 (Wiest and Capek depositions).

The State's response concedes the validity of the legal proposition underlying OCRWM's first motion, but argues, in essence, that it begs the question in this case. Response at 1-2. The State maintains that "there is not now and never has been a private taxpayer in the State ?in a similar factual context' to BWIP, *i.e.* subject to § 116(c)(3) of the [NWPA], mandating that PETT for BWIP be calculated as if BWIP were ? industrial activity' in the State, virtually all of which pays the State's B&O tax." *Id.* at 1. According to the State, the requested finding "places in issue what is a ?similar factual context.'" State's Reply to Respondent's Rejoinder. The State disputes OCRWM's characterization of the BWIP project as "a private taxpayer in Washington who, on its own behalf and using its own money, does site characterization work in its own backyard to determine the yard's suitability for some future purpose," pointing out that under an equally plausible characterization of the BWIP, "gross revenues derived by a company performing site characterization activities for another are indisputably subject to B&O tax" under Washington law. Response at 2, citing the attached Declaration of David J. Wiest, ¶ 4. The difference between these two characterizations of the facts makes it clear that the State disputes the aptness of the analogy of the BWIP

to the fictional "New York corporation" in OCRWM's hypothetical questions in the Wiest and Capek depositions. The State goes on to argue at length why, in its view, OCRWM's interpretation of the PETT provision in the NWPA would produce a result, *i.e.* no PETT payment for B&O tax on industrial activity at the BWIP during site characterization, that is inconsistent with Congressional intent, and DOE's own interpretation of the NWPA in the NOIP.

We agree with the State's characterization of OCRWM's first motion, and find that it misses the mark. OCRWM has postulated an analogy which would yield the result that it advocates, but its analogy does not comport exactly with the facts. No summary judgment is thus appropriate, even on the narrow issue carved out in the OCRWM first motion, since there is a material dispute whether that analogy is applicable to the BWIP. More fundamentally, there is a clear dispute over which party's view of the legal consequences of the facts is more appropriate in the context of the PETT claim at issue in the present appeal. This dispute goes to the ultimate issues in the case.

OCRWM attempted to rescue its first motion in rejoinders it submitted after reviewing the State's response. In its latest submissions, OCRWM emphasizes the narrow scope of its motion, which is that a private taxpayer, "operating in a similar factual context," would not be subject to the B&O tax under Washington law. As indicated above, we find that this proposition begs the question at the heart of this case. The State vigorously disputes the proposition that the BWIP site characterization was "operating in a similar factual context" as the fictional "New York corporation" described in OCRWM's hypothetical. For these reasons, the first motion does not form a basis for granting partial summary judgment in favor of OCRWM.

3. The Second Motion for Partial Summary Judgment

OCRWM's second motion requests that OHA grant partial summary judgment with respect to the following:

> *That the time period for measuring the Petitioner's entitlement for payments equal to taxes (PETT) under section 116(c)(3) of the Nuclear Waste Policy Act of 1982 (NWPA) commenced on May 28, 1986, and ended on December 22, 1987.*

Motion at 1. This motion notes that the State's original PETT claim for the B&O tax calculated its PETT entitlement by reference to an eligibility commencement date of January 7, 1983, rather than May 28, 1986 when the President approved the BWIP as a candidate site for site characterization as a potential repository. OCRWM correctly points out our determination in the Benton County decision that PETT eligibility did not begin until May 28, 1986 when the BWIP was approved as a candidate site under § 116(c)(3) of the NWPA. Motion at 2, citing 26 DOE ¶ 80,145 at 80,618 (1996).(2)

Unfortunately, OCRWM's second motion got it only half right. On the very next page of the Benton County decision cited in the motion, we determined, *sua sponte*, that

> the termination date of Benton County's PETT eligibility should be March 21, 1988, the effective termination date for BWIP site characterization activities figured according to the NWPA Amendments of 1987. 42 U.S.C. § 10172. In specifying that Benton County's PETT eligibility ended on December 22, 1987, the NOIP erred by failing to consider that the statute directed DOE to terminate all site characterization activities at the BWIP 90 days after December 22, 1987. *Id.* Section 116(c)(3) of the NWPA specifies that PETT grants ?shall continue until such time as all [site characterization] activities ... are terminated at such site.'

26 DOE ¶ 80,145 at 80,619. Thus, there is no predicate for granting partial summary judgment on this issue, since we have already considered the same facts in the previous PETT appeal, and held as a matter of law that PETT eligibility for the BWIP ended on March 21, 1988. The second motion will therefore be denied.

4. Final Thoughts Before the Hearing

This PETT case presents more difficult issues than the Benton County case, where the authority of the county to levy property taxes on the BWIP site characterization activities was not in dispute. It was clear that a private landowner would owe those taxes to the county. The Benton County PETT appeal concerned only the amount of those property taxes. The eligibility of the State to collect B&O tax from the DOE for the BWIP site characterization activities in the present case is more problematical because it does not follow automatically when we analyze the BWIP as if it had changed from a tax-exempt Federal activity to a fictional "private" business activity subject to taxation. The sticking point is how properly to characterize the political and corporate structure of the BWIP site characterization venture and analogize it to an "industrial activity" undertaken by private business entities subject to the B&O tax under Washington law within the policy context of the PETT provision in the NWPA. We have yet to find a perfect analogy. The positions espoused by both parties to the dispute have weaknesses. OCRWM clings to an interpretation that glosses over legislative policy considerations in order to deny the PETT claim altogether. The State resorts to a legal fiction in order to bootstrap itself into a position to capitalize on those same legislative policy considerations.

In all fairness to the parties, we recognize that this task is not an easy one. This is a case of first impression, where we are charged with finding a way to integrate NWPA policy with reality. It defies a facile solution. At the hearing and argument stages of this case, the parties should focus on giving further support for their respective views, and showing why we should reject the opposing points of view. To prevail in this appeal, the State has the burden of showing that OCRWM's initial DOE determination was erroneous in fact or in law, or that it was arbitrary and capricious. 10 CFR § 1003.36(c)(1).

IT IS THEREFORE ORDERED THAT:

(1) The First Motion for Partial Summary Judgment filed by the Office of Civilian Radioactive Waste Management is hereby denied.

(2) The Second Motion for Partial Summary Judgment filed by the Office of Civilian Radioactive Waste Management is hereby denied.

(3) This is an interlocutory order of the Department of Energy.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 9, 2001

(1) In addition, prior OHA decisions caution that a motion dismissing a claim should only be granted if it is supported by "clear and convincing" evidence. *Fluor Daniel Fernald*, 27 DOE ¶ 87,532 at 89,163 (1999) (motion to dismiss should only be granted where there are clear and convincing grounds for dismissal); *see also Boeing Petroleum Services*, 24 DOE ¶ 87,501 at 89,005 (1994) (dismissal is "the most severe sanction that we may apply" and should be used sparingly).

(2) The State raised two points in its opposition to OCRWM's second motion. First, the State argued that, in view of a reference to ongoing "site characterization activities" in the legislative history of the NWPA, the beginning date for PETT eligibility should be January 7, 1983. Second, the State argued that in Benton County, OHA determined the termination date for PETT eligibility was March 21, 1988. See Petitioner's Response to Respondent's Second Motion for Partial Summary Judgment. Regarding the starting date for

PETT eligibility, the State has reargued a position that we previously considered and ultimately rejected in Benton County. In the prior PETT appeal, we held that the so-called "site characterization" activities that took place before the enactment of the NWPA did not constitute "site characterization by a candidate site" as that term was defined in the statute, notwithstanding the fact that the legislative history contained a reference to the "grandfather clause" sponsored by Sid Morrison, the Congressman whose District included Benton County. Benton County, *supra*, at 80,617-80,619. While we are willing to reconsider our previous holdings, the starting date for PETT eligibility is a settled area for purposes of the instant summary judgment motion. Finally, as noted in the text of this decision, we agree with the State on the termination date for PETT eligibility.