

**Comments received regarding EPAct 2005 Section 242  
Second draft Guidance on October 20, 2014**

**Commenting organizations or individuals:**

Douglas A. Spaulding, P.E  
President  
Nelson Energy, LLC

Paul Jacob  
Chief Commercial Officer  
Rye Development, LLC

Linda Church Ciocci  
Executive Director  
National Hydropower Association

Kurt Johnson  
President  
Colorado Small Hydro Association

Bryan Case  
General Manager/CEO  
Fall River Electric Cooperative

Ted S. Sorenson P.E.  
Owner  
Sorenson Engineering

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

Jim Price  
President  
W.V. Hydro, Inc.

**Comments and Responses:**

**1. The comments from Nelson Energy, LLC support the redrafted Guidance as proposed.**

*“The Nelson staff has reviewed the proposed revised guidance and believes that it accurately reflects the intent of the legislation and provides a clear definition of eligible projects and an equitable and realistic way to allocate available incentive funding.”*

DOE appreciates the comments from Nelson Energy, LLC.

**2. Nelson comments argue against the remuneration method suggested in the incremental payment approach.**

*"The key fact, however, is that the intent of the EPAct 2005 legislation was to encourage increased hydroelectric generation but not necessarily increased numbers of hydroelectric projects. For this reason the proposed concept of proportional allocation is appropriate and reflects the intent of the legislation. This method of allocation is contained in both the original guidance and the revised guidance. Nelson concurs with this provision."*

DOE appreciates the comments from Nelson Energy, LLC.

**3. Rye Development comments on the meaning of repair and reconstruction as it relates to intake structures or diversion channels with concern about their project eligibility. Sorenson Engineering comments supported Rye Development recommendations.**

*"Rye may be required to construct new or enlarge existing diversions (e.g., intake channels) which are incremental to the existing dam and diversion(s), for some of our planned projects. These channels will divert water from the dam to the proposed powerhouse. We understand that statute and the proposed and revised guidance from DOE make ineligible for participation in the Hydroelectric Production Incentive Program hydro projects that require construction or enlargement of diversion structures which are incremental to the existing dam and diversion(s, other than repair or reconstruction.*

*We learned from the National Hydropower Association that similar language was included in the original Renewable Electricity Production Credit (26 U.S.C. 45; EPACT05, Sec. 1301(c)(3)(C)(iii)), but was changed to allow this type of projects to qualify for the REPC by Public Law 110-343 (October 3, 2008).*

*We understand that projects that require construction or enlargement of diversion structures which are incremental to the existing dam and diversion(s) (e.g., intake channels), like some of Rye's portfolio, are ineligible to participate under the Hydroelectric Production Incentives Program as authorized by Sec. 242 and implemented by the revised guidelines issued by DOE on October 20, 2014. Is our understanding correct?*

*What criteria would DOE use to determine whether construction related to diversions constitutes "repair or reconstruction"?*

*We believe that a clear explanation of this eligibility requirement will improve the functioning of the program and help DOE to fulfill the intent of Congress. It would also identify language in the program's authorizing statute that should be updated in a reauthorization to conform to the requirements of other hydro programs, like REPC."*

Regarding Rye Development's first question, the section 242 hydroelectric production incentive only applies to a "qualified hydroelectric facility," which is defined as a turbine or other generating device owned or solely operated by a non-Federal entity that generates hydroelectric energy for sale and which is added to an existing dam or conduit. "Existing dam or conduit" means any dam or conduit the construction of which was completed before [August 8, 2005] and "which does not require any construction or enlargement of impoundment or diversion structures (other than repair or reconstruction) in connection with the installation of a turbine or other generating device." DOE interprets this to include diversion structures that are incremental to the existing dam/diversion.

Regarding Rye Development's second question, in DOE's proposed guidance it stated that construction should not require any permanent enlargement of impoundment or diversion structure when installed. In the October 2014 version of the draft guidance, we directly addressed concerns regarding temporary changes:

"Existing dam or conduit means any dam or conduit the construction of which was completed before August 8, 2005, and which does not require any construction or enlargement of impoundment or diversion structures (other than repair or reconstruction) in connection with the installation of a turbine or other generating device. An increase in dam height, expansion of reservoir topographic area or expansion of a previously existing conduit cross-section, other than generator penstocks associated with a new generator, after August 8, 2005 would eliminate facilities from eligibility for the hydroelectric production incentive. A temporary increase in dam height that does not expand reservoir topographic area and is for purposes of flood control, hydroelectric generation efficiency improvement, and/or health and safety improvements do not eliminate facilities from eligibility for the hydroelectric production incentive." In other words, the repair or reconstruction of impoundments or diversion structures should not result in permanent, larger impoundments or diversion structures than existed before the repair or construction.

- 4. NHA had general comments on the value of the hydropower production incentive program and the approach DOE was using to implement the Guidance. No changes were submitted. NHA suggested that some member of the organization would be submitting their own comments.**

DOE appreciates the review and consideration of the National Hydropower Association of both the July and October draft guidance related to Section 242.

- 5. The Colorado Small Hydro Association commented on the payment scheme DOE proposed in the draft Guidance in July and again asks that we consider a payment approach that pays the smallest generator first. Bowersock Mills's comments expand on the reasoning and approach being recommended. Three other organizations supported this approach for allocating payments.**

DOE understands the concerns of smaller hydropower production facilities. Section 242(e)(1) of EPAct 2005, however, explicitly states that payments made by the Secretary to the owner or operator of a qualified hydroelectric facility “shall be based on the number of kilowatt hours of hydroelectric energy generated by the facility during the incentive period. For any such facility, the amount of such payment shall be 1.8 cents per kilowatt hour.” Section 242(e)(e)(1) goes on to describe how that amount should be adjusted for inflation, that the amount is subject to the availability of appropriations, and that there is a cap of \$750,000 on any one facility in one calendar year. The statute does not direct DOE to apportion the funding in any way other than as stated and DOE believes establishing a payment system as envisioned by the commenters would run contrary to the statutory language.

**6. Fall River Electric Cooperative raises a concern about the decision DOE proposes to establish facility eligibility for payment by setting the first Federal fiscal year of electricity production and sale as the initial year of incentive eligibility. They argue an alternate interpretation and suggest language changes.**

DOE has carefully examined the language in EPAct 2005 Section 242 and, as described in the final guidance, find the interpretation included in the draft guidance released on October 20, 2014 to be fully consistent with the law. We recognize the concern expressed by Fall River Electric Cooperative and agree that the guidance will limit payments if a facility is considered eligible in years when appropriations are not available.

**7. W.V. Hydro, Inc. expresses a concern about the scope of equipment replacement required at an existing dam to qualify as new generation and therefore eligibility for payment under the guidance for section 242. They request clarification in the final guidance.**

DOE has included a definition in the Section 242 guidance to expressly state the scope of a facility which would qualify for an incentive payment. “Qualified hydroelectric facility means a turbine or other generating device owned or solely operated by a non-Federal entity which generates hydroelectric energy for sale and which is added to an existing dam or conduit. Turbines and other electric generation devices shall include conventional or new and innovative technologies capable of continuous operation. Construction should not require any permanent enlargement of impoundment or diversion structure when installed.”

The intention of Section 242 is to support new qualified hydroelectric facilities at existing dams and not to make payments for incremental increases in energy output from existing facilities. The new turbine or generating device required to qualify for a Section 242 payment would have to include significant changes to the mechanical equipment installed to capture kinetic energy from moving water, equipment used to transfer that energy, the electric generator driven by the energy transfer, and control equipment to manage the entire facility for safe and reliable electricity output. Each applicant’s application will be evaluated

and when the DOE find a new qualified hydroelectric facility has been installed and operated at an existing dam, payment will be made if all other requirements in the guidance are met.