

(b) Definitions. For purposes of this section:

(1) Qualified hydroelectric facility. The term “qualified hydroelectric facility” means a turbine or other generating device owned or solely operated by a non-Federal entity which generates hydroelectric energy for sale and which is added to an existing dam or conduit.

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(c) Eligibility Window. Payments may be made under this section only for electric energy generated from a qualified hydroelectric facility which begins operation during the period of 10 fiscal years beginning with the first full fiscal year occurring after Aug. 8, 2005.

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

42 U.S.C. § 15881.

DOE did not initially make incentive payments under the Section 242 Program due to a lack of Congressional appropriations. However, after Congress provided funding for the program in 2014, DOE solicited applications and awarded incentive payments for hydroelectricity generated and sold by qualified hydroelectric facilities in calendar year 2013. *See* 80 Fed. Reg. 2685 (January 20, 2015). DOE subsequently processed second and third rounds of applications for hydroelectricity generated and sold in calendar years 2014 and 2015. *See* 80 Fed. Reg. 78215-16 (December 16, 2015); 81 Fed. Reg. 24591 (April 26, 2016). In the most recent round, DOE processed applications for hydroelectricity generated and sold in calendar year 2016. 82 Fed. Reg. 36762-63 (August 7, 2017).

DOE also developed, with public input, a Guidance Document for use in administering the Section 242 Program. *See* Guidance for EPAct Section 242 Program (Guidance Document) (August 7, 2017). The Guidance Document sets forth procedures for the filing of an application for a Section 242 Program incentive payment, the criteria that DOE will use to make eligibility determinations, and the manner in which the amount of an incentive payment will be calculated. *See* Guidance Document. In addition, the Guidance Document permits applicants to file an administrative appeal with the Office of Hearings and Appeals (OHA) if an application for an incentive payment is denied in whole or in part. *Id.* at 8-9.

B. The Present Appeal

Between August 7, 2017, and September 6, 2017, DOE accepted applications for incentive payments under the Section 242 Program for hydroelectricity generated and sold in calendar year 2016. *Id.* at 36762. During the application period, Littlewood filed an application for an incentive payment for the net hydroelectricity that it generated and sold at its hydropower plant near Shoshone, Idaho, in 2016. *See* Application from AJMS to DOE (August 30, 2017) (Application).

According to the Application, Littlewood's facility consists of a turbine and generator which generates hydroelectricity energy for sale, and it began operation on October 9, 2015. *Id.* at 1.

On October 31, 2017, DOE issued a notice finding that Littlewood was not eligible for an incentive payment. Letter from DOE to AJMS (October 31, 2017) (Notice). In denying Littlewood's Application, DOE stated the following:

Electricity produced from the facility did not result from the addition of a new generator or generation device placed in operation during the period of eligibility, or inclusive period, beginning October 1, 2005 and ending on September 30, 2015, as required in the published guidance. [Littlewood] did not meet the eligibility criteria window described above as commercial operation began October 9, 2015.

Notice. On November 13, 2017, Littlewood filed this Appeal. Appeal from AJMS to OHA (November 13, 2017). In its Appeal, Littlewood provides three arguments for overturning DOE's Notice. First, Littlewood states that the "guidance does not define what specifically qualifies as 'beginning operations'" and that Littlewood "began operations prior to the listed commercial operation date." *Id.* Second, Littlewood states that the Notice should be overturned because the power purchaser, Idaho Power, did not provide Littlewood with a commercial operation date until October 9, 2015. *Id.* Finally, Littlewood states that the Notice should be overturned because its commercial operation date would have been earlier "if [Littlewood's] concrete contractor had not been required to cease operations at the Project site while completing contracts for needed public works." *Id.*

II. Analysis

Under Section 242, a "qualified hydroelectric facility" eligible for an incentive payment is "a turbine or other generating device . . . which generates hydroelectric energy for sale and which is added to an existing dam or conduit." The Guidance Document clarifies that the turbine or other generating device must have "began producing hydroelectric energy for sale on or after October 1, 2005" Guidance Document at 3. The Guidance Document further clarifies that such incentive payments "may be made . . . only for net electric energy generated from a qualified hydroelectric facility that begins operations . . . during the inclusive period beginning October 1, 2005 and ending on September 30, 2015." *Id.* at 4. Thus, to qualify for an incentive payment, a facility must establish that it met the definition of a qualified hydroelectric facility during the above inclusive period. Therefore, in order to be eligible for an incentive payment in this case, Littlewood must establish that it began generating hydroelectric energy for sale between October 1, 2005, and September 30, 2015.

Littlewood's Application listed the date it began operations as October 9, 2015. Therefore, DOE correctly determined that the date Littlewood provided in its Application fell outside of the inclusive period.

On appeal, we provided Littlewood the opportunity to describe the operations that it began prior to October 9, 2015. Littlewood stated that its turbines were operational and prepared to produce hydroelectric energy on September 28, 2015. Memorandum of Telephone Conversation between

Littlewood and OHA (December 4, 2017). However, Littlewood could not begin generating hydroelectric energy until after the facility was connected to the power purchaser's grid. *Id.* In order to be connected to the purchaser's grid, Littlewood first needed to request a grid-connection date from Idaho Power. *Id.* The grid-connection date is also known as the First Energy Date. *Id.* Littlewood requested its First Energy Date from Idaho Power on September 28, 2015. AJMS Engineer Letter to OHA (November 9, 2017). Littlewood was connected to Idaho Power's grid on October 6, 2015. *See* Email Chain between AJMS and OHA (November 28, 2017). Based on the foregoing, Littlewood has not demonstrated that it began generating hydroelectric energy for sale by September 30, 2015. Thus, Littlewood has not demonstrated that it met the definition of a qualified hydroelectric facility within the inclusive period.

Turning to Littlewood's remaining arguments, we conclude that Littlewood has not provided a basis for overturning DOE's Notice. The fact that Idaho Power did not provide a First Energy Date or commercial operation date until after the inclusive period does not provide a basis for extending the inclusive period. Similarly, the failure of Littlewood's concrete contractor to timely complete the Littlewood project does not provide a basis for extending the inclusive period.

Because Littlewood has not shown that it began generating hydroelectric energy during the inclusive period, we agree that Littlewood did not meet the eligibility requirements of Section 242. Consequently, Littlewood is not eligible for an incentive payment under the Section 242 Program for the hydroelectricity its site produced in calendar year 2016.

It Is Therefore Ordered That: The Appeal filed by AJMS, LLC on November 13, 2017, OHA Case No. HEA-17-0002, is hereby denied.

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

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 8, 2018