

(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 EPAAct 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. 82 Fed. Reg. at 36762. During the application period, Cube Yadkin filed an application for an incentive payment for the incremental increase in hydroelectricity that it generated and sold in 2016 from two of its turbine generators located in central North Carolina. *See* Application from Cube Yadkin to DOE at 4 (September 6, 2017) (“Application”). According to the Application,

Cube Yadkin owns and operates the Narrows Development, which is a hydroelectric station that began operation in 1917. Statement of Application at 1 (September 6, 2017). The Narrows Development contains four turbines. *Id.* Between 2007 and 2009, Cube Yadkin replaced two generating devices with two state-of-the-art turbines and made extensive upgrades to the related equipment. Application at 4. As a result, the two new turbines generated an incremental increase in hydroelectric energy that totaled 8,000,000 kWh. *Id.* at 2.

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

Electricity produced from the Narrows Development facility did not result from the addition of a new generator or generation device placed in operation. Rather, electricity production resulted from maintenance or rehabilitation of the existing Narrows Development facility.

Notice at 1. On November 8, 2017, Cube Yadkin filed the present Appeal. In its Appeal, Cube Yadkin argues that the incremental hydroelectric energy generated at the Narrows Development qualifies for an incentive payment because it resulted from replacing two existing generating devices with two new turbine generators and from making additional significant improvements to the related mechanical equipment within the eligibility window. Appeal at 1, 3. Based on the information it supplied, Cube Yadkin argues that the significant improvements to the Narrows Development meet the following criteria outlined in Section III of the Guidance Document:

Payments may be made under this part only for net electric energy generated from a qualified hydroelectric facility that begins operation at an existing dam or conduit during the inclusive period beginning October 1, 2005 and ending on September 30, 2015. Improvements on an existing facility may be eligible for payment under Section 242, only if a new turbine or generating device included 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.

Guidance Document at 4.

II. Analysis

As correctly cited in Cube Yadkin’s Appeal, “[p]ayments may be made under [Section 242] only for electric energy generated from a qualified hydroelectric facility” 42 U.S.C. § 15881(c). 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.” *Id.* at (b)(1). The Guidance Document clarifies that a qualified hydroelectric facility is:

a turbine or other generating device . . . that: (1) began producing hydroelectric energy for sale on or after October 1, 2005; (2) is added to an existing dam completed before August 8, 2005 (“added” means new hydropower generation where none existed before, or where an existing facility had been offline because of disrepair or dismantling for at least five consecutive years prior to October 1, 2005 before new construction); and (3) the majority of which was developed through new construction incorporating new equipment, refurbished equipment, or both.

Guidance Document at 3.

Based on its Appeal, it appears that Cube Yadkin concluded that it was denied an incentive payment because DOE found that Cube Yadkin made only “[c]hanges to existing facilities and equipment, such as maintenance that replace[s] damaged or worn equipment or cause[s] incremental increases in energy output.” However, DOE informed us that the Application was denied for a different reason. Specifically, referring to the second element in the Guidance Document’s definition of “qualified hydroelectric facility,” DOE indicated that it denied the Application because the Narrows Development turbines were not “added” to an existing dam or conduit. *See* Memorandum from DOE to OHA at 2 (December 21, 2017) (“DOE Memo”).

We previously noted that 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.” 42 U.S.C. § 15881(b)(1). Further, Section 242 establishes an “eligibility window” for the installation of the turbine or other generating device, stating that it must be one that “begins operation during the period of 10 fiscal years beginning with the first full fiscal year occurring after the date of enactment of this subtitle.” 42 U.S.C. § 15881(c). Because the EPCA, including Section 242, was enacted on August 8, 2005, the beginning of the next fiscal year after that date is October 1, 2005. Accordingly, to receive an incentive payment under Section 242, the turbine or generating device must begin operations between October 1, 2005, and September 30, 2015.

The Guidance Document’s definition of “qualified hydroelectric facility” contains three main elements, the first of which implements this requirement. Under the first element, the turbine or other generating device must be one that “began producing hydroelectric energy for sale on or after October 1, 2005.” When Cube Yadkin installed two turbines that began operating between 2007 and 2009, those turbines began producing hydroelectric energy for sale on or after October 1, 2005. It is therefore clear that Cube Yadkin has satisfied the first element in the Guidance Document’s definition of “qualified hydroelectric facility.”

The second element in the Guidance Document’s definition of “qualified hydroelectric facility” provides that the turbine or other generating device must be “added.” This requirement comes directly from the definition of “qualified hydroelectric facility” in Section 242, which provides that the turbine or other generating device must be “added to an existing dam or conduit.” The Guidance Document elaborates on the meaning of “added” by describing two circumstances that will satisfy this element. One way a turbine or other generating device can qualify as “added” is if it represents “new hydropower generation where none existed before.” In the instant matter, the

two generating devices at the Narrows Development were taken offline in 2007 and 2008, respectively, and replaced; the turbines were not added to a dam where no hydropower generation had ever existed before. Consequently, based on the facts before us, we are unable to conclude that Cube Yadkin added new hydropower generation where none existed before.

The other circumstance in which the Guidance Document treats a turbine or other generating device as “added” is “where an existing facility had been offline because of disrepair or dismantling for at least five consecutive years prior to October 1, 2005 before new construction.” Given that a “qualified hydroelectric facility” is a turbine or generating device, we interpret the term “existing facility” to mean a turbine or generating device, not an entire hydropower plant. We believe that the second element in the Guidance Document’s definition of “qualified hydroelectric facility” could be satisfied if any turbine or generating device at a hydropower plant was offline for five consecutive years immediately prior to October 1, 2005, and that turbine or generating device was subsequently replaced on or after October 1, 2005. *See Steels Pond Hydro, Inc.*, Case No. HEA-16-0003 (2016). After reviewing Cube Yadkin’s Application and Appeal, we cannot find that Cube Yadkin has demonstrated that its two turbines were offline for five consecutive years before October 1, 2005.¹ Accordingly, we find that Cube Yadkin has not demonstrated that its two new turbines qualify as “added.”

Because Cube Yadkin has not shown that it “added” a turbine or other generating device, we agree with DOE that Cube Yadkin did not install equipment that meets the Guidance Document’s definition of a “qualified hydroelectric facility.” Consequently, Cube Yadkin is not eligible for an incentive payment under the Section 242 Program for the hydroelectricity its site produced in calendar year 2016.²

It Is Therefore Ordered That: The Appeal filed by Cube Yadkin Generation, LLC on November 8, 2017, OHA Case No. HEA-17-0001, 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

¹ As a part of the appeal process, we provided Cube Yadkin the opportunity to respond to the DOE Memo submitted to OHA by DOE in response to our request for additional information. Email to Cube Yadkin from OHA (December 28, 2017). Cube Yadkin chose to not provide a response.

² The DOE Memo also provided insight into the agency’s rationale for its conclusion contained in the Notice that the electricity generated “resulted from maintenance or rehabilitation of the existing Narrows Development facility” despite the various improvements that Cube Yadkin detailed in its Application. However, we need not reach a determination on the validity of that conclusion because it is not dispositive of the issue before us on Appeal.