

**United States Department of Energy  
Office of Hearings and Appeals**

In the Matter of Riverside Hydro I, LLC	)	
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Filing Date: November 13, 2017	)	Case No.: HEA-17-0003
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Issued: January 24, 2018

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**Decision and Order**

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This Decision considers an Appeal filed by Riverside Hydro I, LLC (“Riverside Hydro I”) relating to the hydroelectric production incentives program authorized by Section 242 of the Energy Policy Act of 2005 (“Section 242 Program”), being administered by the Office of Energy Efficiency and Renewable Energy (EERE) of the Department of Energy (DOE). In its Appeal, Riverside Hydro I contests a determination issued by the EERE denying its application for an incentive payment for hydroelectricity it produced in calendar year 2016. For the reasons discussed in this decision, we have determined that Riverside Hydro I’s Appeal should be denied.

**I. Background**

**A. Section 242 of the Energy Policy Act of 2005**

In the Energy Policy Act of 2005 (“EPAAct 2005”) (Pub. L. 109-58), Congress established a new program to support the expansion of hydropower energy development at existing dams and impoundments through an incentive payment procedure. Under Section 242 of the EPAAct 2005, the Secretary of Energy is directed to provide incentive payments to the owners or operators of qualified hydroelectric facilities for electric energy generated and sold by those facilities during a specified 10-year period. *See* 42 U.S.C § 15881. Section 242 states in relevant part:

*SEC. 242. HYDROELECTRIC PRODUCTION INCENTIVES.*

(a) INCENTIVE PAYMENTS. For electric energy generated and sold by a qualified hydroelectric facility during the incentive period, the Secretary shall make, subject to the availability of appropriations, incentive payments to the owner or operator of such facility. . . . Payments under this section may only be made upon receipt by the Secretary of an incentive payment application which establishes that

the applicant is eligible to receive such payment and which satisfies such other requirements as the Secretary deems necessary . . . .

(b) DEFINITIONS. For purposes of this section:

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

(2) EXISTING DAM OR CONDUIT. The term “existing dam or conduit” means any dam or conduit the construction of which was completed before the date of the enactment of this section [enacted Aug. 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 . . . .

(c) ELIGIBILITY WINDOW. Payments may be made under this section only for electric energy generated from a qualified hydroelectric facility which begins operation during the period of 10 fiscal years beginning with the first full fiscal year occurring after the date of enactment of this subtitle [enacted 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.

The 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 its appropriations bill for Federal fiscal year 2014, the 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). The 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, the DOE processed applications for hydroelectricity generated and sold in calendar year 2016. *See* 82 Fed. Reg. 36762 (August 7, 2017).

The DOE has developed, with public input, a Guidance Document to assist in administering the Section 242 Program.<sup>1</sup> *See* Guidance for EAct 2005 Section 242 Program (“Guidance

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<sup>1</sup> After receiving public input, the DOE finalized an initial version of the Guidance Document for use in determining eligibility for incentive payments for hydroelectricity generated in calendar year 2013. *See* 80 Fed. Reg. at 2685-86. The DOE subsequently issued a revised Guidance Document that it used in determining eligibility for incentive payments for calendar years 2014 and 2015. 80 Fed. Reg. at 78215; 81 Fed. Reg. at 24591. On August 7, 2017, the DOE issued a new Guidance Document, containing minor changes, for use in determining eligibility for calendar year 2016. 82 Fed. Reg. at 36762.

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 the DOE will use to make eligibility determinations, and how the amount of an incentive payment will be calculated. *See* Guidance Document at 2-8. In addition, the Guidance Document permits applicants to file an administrative appeal with the Office of Hearings and Appeals (OHA) in circumstances in which 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, the 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, Riverside Hydro I filed an application for an incentive payment for hydroelectricity that it produced at its Mora Drop Hydroelectric Facility (“the Facility”) in Kuna, Idaho. *See* Application from Dennis Daugherty, Riverside Hydro I, to DOE (August 29, 2017) (“Application”). The Application indicated that the Facility was a newly constructed hydroelectric facility that began operation on September 15, 2006. *Id.* at 1. In its Application, Riverside Hydro I sought an incentive payment for the electric energy that the Facility produced in calendar year 2016. *Id.* at 2.

On October 31, 2017 the EERE issued a determination finding that Riverside Hydro I was not eligible for the requested incentive payment. Letter from Timothy J. Welch, Wind and Water Power Technologies Office, EERE, to Terry Daugherty, Riverside Hydro I (October 31, 2017) at 1. In its letter to Riverside Hydro I, the EERE provided the following reason for the denial:

Mora Drop Hydroelectric Facility has exceeded the 10-year period of eligibility. As defined in the published guidance, the incentive period begins with the fiscal year in which electric energy generated from the facility is first eligible for such payments. Mora Drop’s eligibility began September 2006 and ended September 30, 2015.

*Id.* On November 13, 2017, Riverside Hydro I filed this Appeal. Appeal from Dennis Daugherty, Riverside Hydro I, to OHA (November 10, 2017) (“Appeal”). In its Appeal, Riverside Hydro I argues that the DOE’s determination that the Facility is no longer eligible for an incentive payment is based on an interpretation of Section 242 that is “outside of the plain language of the statute.” Appeal at 2. Riverside Hydro I argues that, due to the initial lack of Congressional funding for the Section 242 Program, its 10-year eligibility period could have begun no earlier than 2013, the first year for which the DOE provided incentive payments. It argues that it therefore remains eligible for an incentive payment for the hydroelectricity its Facility produced in calendar year 2016. *Id.*

After receiving this Appeal, we requested clarifying information from the Office of the Assistant General Counsel for Legislation, Regulation, and Energy Efficiency (“GC-33”), the office that serves as legal counsel to the EERE. *See* Memorandum from Gregory Krauss, OHA, to Amy Grace-Tardy, GC-33 (December 4, 2017). GC-33 issued a memorandum in reply. Memorandum from Ami Grace-Tardy, GC-33, to Gregory Krauss, OHA (December 14, 2017) (“GC-33

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Memorandum”). We provided that memorandum to Riverside Hydro I, which then submitted a reply. Letter from Riverside Hydro I to OHA (January 5, 2017) (“Riverside Hydro I Letter”).

## II. Analysis

Section 242 defines a “qualified hydroelectric facility” eligible for an incentive payment as “a turbine or other generating device . . . which generates hydroelectric energy for sale and which is added to an existing dam or conduit.” § 15881(b)(1). This Appeal asks us to consider whether the DOE has adopted a permissible interpretation of when such a facility loses its eligibility for an incentive payment. The DOE’s task in administering the Section 242 Program has been complicated by a lack of Congressional funding between 2005 and 2014. The question that the DOE faced in 2014 was whether to take into account that lack of funding when calculating a facility’s beginning and ending dates of eligibility. We believe that the interpretation the DOE chose was a reasonable one and within its discretion.

There are two relevant 10-year periods defined in Section 242. The first of these is the “eligibility window” established in Section 242(c). Under that provision, payments can only be made to a qualified hydroelectric facility 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 EAct 2005, including Section 242, was enacted on August 8, 2005, the beginning of the next fiscal year after that date is October 1, 2005. Thus, to receive an incentive payment under Section 242, the qualified hydroelectric facility must have begun operations between October 1, 2005, and September 30, 2015.

The other relevant 10-year period is the “incentive period” defined in Section 242(d). This provision states that a qualified hydroelectric facility may receive incentive payments for a period of 10 fiscal years. 42 U.S.C. § 15881(d). It further provides that a facility’s incentive 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(d) (emphasis added). Consequently, to receive an incentive payment, a qualified hydroelectric facility must begin operations during the 10-year eligibility window. The facility can then receive an incentive payment for 10 years, starting with the fiscal year in which the electric energy it produces is “first eligible” for such a payment.<sup>2</sup>

As observed, Congress did not fund the Section 242 Program until 2014. The availability of funding in 2014 prompted the DOE to create a Guidance Document. As it developed the Guidance Document, the DOE took up the question of when a qualified hydroelectric facility should be considered “first eligible” for an incentive payment, thereby starting the incentive period. In an initial draft of the Guidance Document, the DOE provided that the incentive period “shall begin with the fiscal year in which application for payment for electricity generated by the facility is first made and the facility is determined by DOE to be eligible for and receives an incentive payment.” Draft Guidance for EAct 2005 Section 242 Program (July 2, 2014) at 3-4. This language tied the

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<sup>2</sup> Given that some qualified hydroelectric facilities would not begin operating until the end of the eligibility window, triggering a 10-year incentive period, the Section 242 Program is structured to last well beyond 2015. Section 242 ends incentive payments under the program after 20 fiscal years. *See* 42 U.S.C. § 15881(f).

start of a facility's incentive period to when funding became available for the Section 242 Program and when a facility first applied for and received funding. Under this approach, owners or operators that had previously installed turbines or generating devices during the eligibility window, but that had not collected an incentive payment due to a lack of funding, would still have a chance to receive up to 10 years of payments.

However, in a revised draft of the Guidance Document issued on October 20, 2014, the DOE adopted a different approach. The revised draft Guidance Document added a definition of the term "first eligible for payment" and defined that term as "the first Federal fiscal year after August 8, 2005, that a qualified hydroelectric facility generates hydroelectric energy for sale." Guidance for EAct 2005 Section 242 Program (October 20, 2014) ("October 2014 Guidance Document") at 2; *see also* 79 Fed. Reg. 62608-09 (October 20, 2014) (announcing the new definition of "first eligible for payment"). The revised draft further stated that the incentive period for each facility would run for 10 consecutive fiscal years, beginning with "the first Federal fiscal year in which the generator began operating a qualified hydroelectric facility and the operator sold the resulting electric energy." October 2014 Guidance Document at 4. Under this approach, qualified hydroelectric facilities that had begun operation early in the eligibility window, during the years without Congressional funding, would be treated as having been eligible for an incentive payment during that time. Because their incentive periods had started running, these facilities likely would not be able to receive 10 years of incentive payments.

On January 20, 2015, the DOE issued a final version of the Guidance Document for use in awarding incentive payments for calendar year 2013. Guidance for EAct 2005 Section 242 Program (January 20, 2015). In that version, the DOE maintained the definition of "first eligible for payment" that it had adopted in the draft Guidance Document of October 20, 2014. *Id.* at 2. The DOE at that time also published a summary of the comments it had received on its October 20, 2014, draft. In that summary, the DOE responded to a concern expressed by a commenter regarding the definition of the initial year of incentive eligibility, stating:

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

Comments Received Regarding EAct 2005 Section 242 (January 20, 2015) at 4. Accordingly, the history of the development of the Guidance Document shows that the DOE considered linking the start of the incentive period to when funding first became available, but then made a deliberate decision not to do so. The DOE has maintained the same approach in the versions of the Guidance Document that it has issued concurrently with subsequent funding rounds. Importantly, the most recent Guidance Document again provides that a qualified hydroelectric facility is "first eligible for payment" starting with "the first Federal fiscal year after August 8, 2005, that a qualified hydroelectric facility generates hydroelectric energy for sale." Guidance Document at 2.

In the instant matter, we find that the EERE correctly calculated the start and end of the Facility's incentive period, based on the Guidance Document's definition. We have verified that the Facility

first began generating electric energy for sale on September 15, 2006, in Federal fiscal year 2006. Email from Dennis Daugherty, Riverside Hydro I, to Gregory Krauss, OHA (January 16, 2018). The Facility's 10-year incentive period therefore began to run on October 1, 2005, at the beginning of fiscal year 2006, and ended on September 30, 2015, or 10 fiscal years later. Consequently, under the Guidance Document, the Facility is not eligible for an incentive payment for the electric energy it produced in calendar year 2016.

The question that Riverside Hydro I raises in its Appeal is whether the Guidance Document's interpretation of Section 242 is outside the plain meaning of the statute. Due to the fact that it was not until recently that some recipients of incentive payments reached the end of their incentive periods, we have not had occasion to address this issue.<sup>3</sup> The EERE maintains, as it did when drafting the Guidance Document in 2014 and 2015, that its interpretation is reasonable and consistent with the language in the statute. *See* GC-33 Memorandum at 3. We agree. If Congress had consistently funded the Section 242 Program from the outset, and if the DOE had prepared the Guidance Document in 2006, there is no doubt that it would have been reasonable to tie the start of the incentive period to the start of the fiscal year in which a hydroelectric facility first begins generating electric energy for sale. This interpretation would align with the first sentence of Section 242, which directs the Secretary of Energy to make incentive payments “[f]or electric energy generated and sold by a qualified hydroelectric facility.” 42 U.S.C. § 15881(a).

We do not believe that an absence of Congressional funding could have rendered the DOE's interpretation outside the plain meaning of the statute. Indeed, Section 242 makes clear that a qualified hydroelectric facility is not guaranteed to receive an incentive payment for the electric energy it produces during its incentive period. Section 242(a) states that the DOE “shall make [incentive payments], *subject to the availability of appropriations.*”<sup>4</sup> 42 U.S.C. § 15881(a) (emphasis added). Moreover, Section 242 limits funding for qualified hydroelectric facilities to 10 fiscal years, but it does not guarantee 10 years of funding. Section 242(d) provides that “[a] qualified hydroelectric facility *may* receive payments under this section for a period of 10 fiscal years.” 42 U.S.C. § 15881(d) (emphasis added). Accordingly, it is evident that Congress anticipated that sufficient funding might not be available for the Section 242 Program in all years and that qualified hydroelectric facilities might receive a reduced incentive payment or none at all.

As to how the DOE should award incentive payments in the face of limited funding, much less multiple years without any funding, Section 242 does not provide instructions; such details are left to the DOE to decide. As a general matter, Section 242 grants the DOE considerable discretion to design and manage the Section 242 Program. *See* 42 U.S.C. § 15881(a) (providing that incentive payment applications must satisfy “such other requirements as the Secretary [of Energy] deems necessary”). This discretion includes the authority to make judgments regarding how to allocate limited funds so as to best accomplish the program's goals. We note, for example, that the

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<sup>3</sup> Although its incentive period ended on September 30, 2015, Riverside Hydro I received an incentive payment for the hydroelectricity it produced in October, November, and December of 2015. The EERE stated that the payment for these months was made in error. GC-33 Memorandum at 2 n.2.

<sup>4</sup> Likewise, Section 242(e) sets the amount of the incentive payment at 1.8 cents per kilowatt hour, adjusted for inflation, but provides that this amount is “subject to the availability of appropriations.” 42 U.S.C. § 15881(e)(1).

Guidance Document provides that the DOE will make proportional payments to qualified recipients when there are insufficient funds to pay the full incentive payment. Guidance Document at 7.

In allocating funds under the Section 242 Program, another important judgment that the DOE needed to make was whether to count, as part of each facility's 10-year incentive period, those years in which Congress does not provide funding. The DOE, in its discretion, chose to treat these years as part of each facility's incentive period. In this regard, we observe that the incentive period, as defined in the Guidance Document, lasts 10 *consecutive* years and not 10 total years. The Guidance Document's treatment of the incentive period means that in the future, should a qualified hydroelectric facility not receive an incentive payment due to a lack of Congressional funding, the DOE will not extend the incentive period of that facility. The DOE's interpretation of when a qualified hydroelectric facility is "first eligible for payment" is reasonable in that it allows the DOE to adopt a uniform approach; it ensures that a lack of Congressional funding does not extend the incentive period for owners or operators such as Riverside Hydro I, but not for owners or operators that miss incentive payments later in the program. The EERE notes that "while Riverside Hydro I did not receive payments during the first years of its eligibility, it is possible that other facilities will not receive payments during the last years of their eligibility." GC-33 Memorandum at 3. The EERE makes a persuasive case that "no facility is unfairly advantaged or disadvantaged" by the DOE's interpretation of the start of the incentive period. *Id.*

Riverside Hydro I nevertheless argues that the DOE has adopted an unreasonable interpretation of the phrase "first eligible for such payments" in Section 242(d). It argues that under the plain meaning of Section 242, its Facility "was not 'eligible for payments' until there were actual payments to be made." Appeal at 1-2. It further contends that Section 242(a), by requiring the submission of an incentive payment application, indicates that eligibility cannot exist until the owner or operator of a facility has filed an application. Riverside Hydro I Letter at 1. According to Riverside Hydro I, the Facility's incentive period could not have begun to run "prior to DOE even establishing an application process for the incentive payments." *Id.* at 2.

Although these arguments are worthy of consideration, they are ultimately without merit. We find it reasonable to regard Riverside Hydro I as having been "eligible" for an incentive payment during the years when Congress did not provide funding for the Section 242 Program. The word "eligible" does not imply certainty that a benefit is available to be granted; it implies only that criteria have been established for selection. *See* Black's Law Dictionary (10th ed. 2014) (defining "eligible" as "[f]it and proper to be selected or to receive a benefit.") The approval of Section 242 by Congress established the architecture of the Section 242 Program. Given that Section 242 became law in 2005, it was reasonable for the DOE to determine that Riverside Hydro I was eligible for an incentive payment for the electric energy the Facility began producing in September 2006. Riverside Hydro I did not receive such a payment because funding was unavailable.

We further disagree with the meaning that Riverside Hydro I attaches to the incentive payment application procedure described in Section 242(a). The relevant sentence states that "[p]ayments under this section may only be made upon receipt by the Secretary [of Energy] of an incentive payment application which establishes that the applicant is eligible to receive such payment and which satisfies such other requirements as the Secretary deems necessary." 42 U.S.C. § 15881(a).

We interpret this provision as referring only to the procedure that must be followed for an applicant to demonstrate eligibility. We find it unlikely that Congress intended this provision to mean that the filing of an application is a prerequisite to a facility becoming “first eligible” for an incentive payment. In addition, as observed, Section 242(a) requires applications to satisfy “such other requirements as the Secretary [of Energy] deems necessary.” We interpret Section 242(a) as a provision that grants more, not less, discretion to the DOE to make eligibility determinations. It is doubtful that Congress decided to substantially limit the DOE’s discretion in this same provision.

As a final matter, this is not a circumstance in which the DOE’s interpretation will lead to an impractical or unreasonable result. If the DOE were to calculate the start of the incentive period in the way it initially considered when drafting the Guidance Document in 2014, most qualified hydroelectric facilities would remain eligible for an incentive payment through 2023. A large number of facilities would be required to split a limited amount of funding. Given the unreliability of past funding, it was a reasonable choice by the DOE not to attempt to squeeze 20 years of incentive payments into 12 or 13 years. Moreover, nothing in Section 242 implies that Congress preferred that the DOE attempt to do so. In fact, Congress’s decision not to fund the Section 242 Program between 2005 and 2014 suggests the opposite.

Although owners or operators such as Riverside Hydro I may wish to recoup incentive payments they did not receive due to a lack of Congressional funding, the DOE was under no obligation to try to make up for that lack of funding by extending their eligibility. The DOE adopted a reasonable interpretation, one that was within its discretion, of when the incentive period begins. Consequently, Riverside Hydro I is not eligible for an incentive payment under the Section 242 Program for the hydroelectricity that the Facility produced in calendar year 2016.

### **III. Order**

It hereby ordered that the Appeal filed by Riverside Hydro I, LLC on November 13, 2017, OHA Case No. HEA-17-0003, 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 24, 2018