

# U.S. Department of Energy Water Power Technologies Office Guidance on Implementing Section 242 of the Energy Policy Act of 2005

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## I. Purpose

This Guidance describes the application process and the information necessary for the Secretary of Energy to make incentive payments to owners and authorized operators of hydroelectric generation facilities pursuant to section 242 of the Energy Policy Act of 2005, Pub. L. No. 109-58 (section 242). Any determinations under section 242 with regard to a hydropower production incentive payment are not subject to the provisions of 10 C.F.R. Part 600, and any payment in connection with the section 242 program shall not be construed to be financial assistance.

## II. Authority

Congress established a program under section 242 to support the expansion of hydropower energy development at existing dams and conduits through an incentive payment procedure. *See* 42 U.S.C. § 15881. Section 242, reproduced in the italicized text below, directs the Secretary of Energy to provide incentive payments to the owners or authorized operators of hydroelectric generation facilities in accordance with the following requirements:

### ***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. The amount of such payment made to any such owner or operator shall be as determined under subsection (e) of this section. 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. Such application shall be in such form, and shall be submitted at such time, as the Secretary shall establish.
- (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 [(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.

*(3) Conduit.—The term “conduit” has the same meaning as when used in section 30(a)(2) of the Federal Power Act (16 U.S.C. 823a(a)(2)).*

*The terms defined in this subsection shall apply without regard to the hydroelectric kilowatt capacity of the facility concerned, without regard to whether the facility uses a dam owned by a governmental or nongovernmental entity, and without regard to whether the facility begins operation on or after the date of the enactment of this section [(August 8, 2005)].*

*(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 [(August 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.*

*(e) Amount of payment.—*

*(1) In General.—Payments made by the Secretary under this section 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 (adjusted as provided in paragraph (2)), subject to the availability of appropriations under subsection (g), except that no facility may receive more than \$750,000 in 1 calendar year.*

*(2) Adjustments.—The amount of the payment made to any person under this section as provided in paragraph (1) shall be adjusted for inflation for each fiscal year beginning after calendar year 2005 in the same manner as provided in the provisions of section 29(d)(2)(B) of the Internal Revenue Code of 1986, except that in applying such provisions the calendar year 2005 shall be substituted for calendar year 1979.*

*(f) Sunset.—No payment may be made under this section to any qualified hydroelectric facility after the expiration of the period of 20 fiscal years beginning with the first full fiscal year occurring after the date of enactment of this subtitle [(August 8, 2005)], and no payment may be made under this section to any such facility after a payment has been made with respect to such facility for a period of 10 fiscal years.*

*(g) Authorization of Appropriations.—There are authorized to be appropriated to the Secretary to carry out the purposes of this section \$10,000,000 for each of the fiscal years 2006 through 2015.*

### III. Definitions

*Added* means to install a turbine or other generating device where none existed before. In addition, “added” can mean to repair or replace an existing turbine or other electricity generating device that has been offline because of disrepair or dismantling for at least five consecutive years immediately prior to October 1, 2005, and is subsequently repaired or replaced on or after October 1, 2005, and on or before September 30, 2015.

*Calendar year* means a period beginning on January 1 and ending on December 31.

*Conduit* means any tunnel, canal, pipeline, aqueduct, flume, ditch, or similar manmade water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity. See 16 U.S.C. § 823a(a)(3)(A).

*Dam* means any structure for impounding water, including any diversion structure that is designed to obstruct all or substantially all of the flow of a natural body of water.

*DOE* means the U.S. Department of Energy.

*Existing dam or conduit* means any powered or non-powered 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 render a hydroelectric generation facility ineligible 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 does not render a hydroelectric generation facility ineligible for the hydroelectric production incentive.

*FERC* means the Federal Energy Regulatory Commission.

*First eligible for payment* means the first fiscal year after August 8, 2005, that a hydroelectric generation facility generates hydroelectric energy for sale.

*Fiscal year* means the period beginning October 1 and ending on September 30.

*Net electric energy* means the metered kilowatt-hours (kWh) generated and sold, and excludes electric energy used within the hydroelectric facility to power equipment such as pumps, motors, controls, lighting, heating, cooling, and other systems needed to operate the facility.

*Not-for-profit electric cooperative* means a cooperative association that is legally obligated to operate on a not-for-profit basis and is organized under the laws of any State for the purpose of providing electric service to its members.

*Qualified hydroelectric facility* is a hydroelectric generation facility that (1) is located in a State or in U.S. jurisdictional waters; (2) has a turbine or other generating mechanism (including conventional or new and innovative technologies capable of continuous operation), the majority of which was developed through incorporation of new equipment, refurbished equipment, or both; (3) is owned or solely operated by a non-Federal entity; (4) began producing hydroelectric energy for sale on or after October 1, 2005; and (5) added generation capability to an existing dam or conduit that was completed before August 8, 2005.

*Qualified kilowatt-hours (kWh)* means the number of kWh identified by the Secretary to receive payment, as calculated based on the criteria set forth in section 242(e) and discussed in Part V of this Guidance.

*Sale* means a transfer of currency between two unrelated parties in exchange for delivered electrical current. Not-for-profit electric cooperatives and municipal utilities shall be considered unrelated to their members for purposes of hydroelectric production incentive payments.

*Secretary* means the Secretary of the U.S. Department of Energy or such officers or employees of the U.S. Department of Energy as designated by the Secretary of the U.S. Department of Energy.

*State* means the District of Columbia, Puerto Rico, and any of the States, Commonwealths, territories, and possessions of the United States.

#### **IV. Eligible Applicants and Facilities**

Any owner or authorized operator (with the written consent of the owner) of a hydroelectric generation facility may apply for incentive payments for net electric energy generated by and sold from its operation. In order to qualify for an incentive payment under section 242, a hydroelectric generation facility must meet all of the following criteria of a qualified hydroelectric facility:

1. Is located in a State or in U.S. jurisdictional waters.
2. Has a turbine or other generating mechanism (including conventional or new and innovative technologies capable of continuous operation), the majority of which was developed through incorporation of new equipment, refurbished equipment, or both.
3. Is owned by a non-Federal entity and operated by a non-Federal entity. The owner or authorized operator must be applying on behalf of (a) a FERC-jurisdictional hydroelectric facility, as the holder of a license or exemption issued by FERC for the operation of such hydroelectric facility; or (b) a non-FERC-jurisdictional hydroelectric facility, as the holder of the exclusive rights to the beneficial use of the hydroelectric facility, including legal title.
4. Began producing hydroelectric energy for sale on or after October 1, 2005. Payments may be made for net electric energy generated from a hydroelectric generating facility that begins operation at an existing dam or conduit during the inclusive period beginning October 1, 2005, and ending on September 30, 2015. Payments may be made for net electric energy generated from a hydroelectric generation facility that began operations at an existing dam or conduit prior to October 1, 2005, so long as the hydroelectric generation facility had been offline because of disrepair or dismantling for at least five consecutive years immediately prior to October 1, 2005,

restarted operations prior to September 30, 2015, and underwent significant changes consisting of incorporation of new equipment, refurbished equipment, or both. For example, significant changes may include, but are not limited to, the addition or installation of the mechanical equipment installed to enable the capture of kinetic energy from moving water, such as equipment used to transfer that energy; addition or installation of the electric generator driven by the energy transfer; and addition or installation of control equipment to manage the entire facility for safe and reliable electricity output. Other changes to existing facilities and equipment, such as maintenance that replaces damaged or worn equipment or causes incremental increases in energy output from facilities, do not qualify for payment under section 242.

5. Added generation capability to an existing dam or conduit that was completed before August 8, 2005.

## **V. Eligible Production**

### *Eligibility Window and Incentive Period*

Electrical power produced from the addition or installation of a generator or generation device that is placed in operation at an existing dam or conduit on or after October 1, 2005, and on or before September 30, 2015, is eligible for consideration of incentive payments. The period for payment under this program ends with fiscal year 2025. Subject to the availability of appropriated funds, a hydroelectric generation facility may receive payments for a period of 10 consecutive fiscal years. Such period shall begin with the first fiscal year in which the facility began producing hydroelectric energy for sale. Any year in which a hydroelectric generation facility does not operate partially or fully will be considered an eligible year if contained in the 10-year period starting with the first fiscal year in which the generator began operating a hydroelectric generation facility and the authorized operator sold the resulting electric energy, regardless of whether funds were appropriated in a given year for an incentive payment.

Example 1. A hydroelectric generation facility that began producing hydroelectric energy for sale on September 30, 2015, and continued to produce and sell hydroelectric energy through September 30, 2025, would be eligible for incentive payments, subject to future appropriations, for fiscal year 2015 through the end of fiscal year 2024 but not beyond that time period.

Example 2. A hydroelectric generation facility that began producing hydroelectric energy for sale on October 1, 2006, and continued to produce and sell hydroelectric energy for 10 consecutive years would be eligible for incentive payments through the end of fiscal year 2016 but not beyond that time period.

Example 3. A hydroelectric generation facility that began producing hydroelectric energy for sale on October 1, 2010, stopped producing hydroelectric energy for sale on September 30, 2012, and again began producing hydroelectric energy for sale on September 30, 2015, would be eligible for incentive payments through the end of fiscal year 2020 but not beyond that time period.

Example 4. A hydroelectric generation facility that began producing hydroelectric energy for sale on June 1, 2008, and continued to produce and sell hydroelectric energy for 10 consecutive years would be eligible for incentive payments through the end of fiscal year 2017 but not beyond that time period.

### *Payment Calculation*

Hydropower incentive payments are calculated as follows: the amount of eligible kWhs produced by the hydroelectric generation facility is multiplied by the statutory incentive rate of \$0.018/kWh, which is adjusted as required by 42 U.S.C. § 15881(e)(2) in accordance with data similar to that used by the Internal Revenue Service in its annual Publications of Inflation Adjustment Factor and Reference Prices for other code sections of the Internal Revenue Code.

A payment to a qualified hydroelectric facility shall not exceed the statutory limit of \$750,000 per applicant per calendar year. Should total appropriations for the DOE hydropower incentive program be insufficient to make full payments on all eligible production to all successful applicants, payments shall be adjusted using the following calculation:

$$\frac{\text{Total appropriations for the 242 program in a given calendar year}}{\text{Total dollar amount for all qualified kWhs}} \times \text{Statutory rate, as adjusted for inflation} = \$/\text{kWh rate}$$

In the equation above, “Total dollar amount for all qualified kWhs” refers to the total dollar value for all qualified kWhs at the statutory rate, as adjusted for inflation.

### *Documenting Eligible Production*

The net electric energy generated and sold (kWh) by the owner or authorized operator of a hydroelectric generation facility must be measured by a metering device sensor that:

1. Meets generally accepted industry standards;
2. Is maintained in proper working order according to the instructions of its manufacturer; and
3. Is calibrated according to generally accepted industry standards.

As evidence of a hydroelectric generation facility’s eligible production, applicants shall provide the specific information outlined in bullet number 7 of the “Content” section in Part VI of this Guidance.

In the event that a hydroelectric generation facility’s eligible production is not specifically metered or is metered in a manner that is different from the requirements listed above, an applicant must submit a reasonable, reliable, alternative method to document eligible production. Alternative methodologies must be reviewed, confirmed, and documented by a third party with valid and relevant industry experience and credentials and be submitted to DOE in accordance with bullet number 7 of the “Content” section in Part VI of this Guidance. DOE reserves the right to determine whether the alternative methodology sufficiently identifies the new electric energy generated to qualify under this program.

## VI. Application Requirements

### *Where and when to apply*

An application for an incentive payment for electric energy generated and sold in a calendar year must be filed during the application period defined by DOE in the *Federal Register* for a given year of incentive payments in which DOE will announce the schedule for accepting application and will establish a deadline for application submissions. Applicants are required to report all net electric energy production from hydroelectric facilities for the calendar year immediately preceding the year applications are submitted. Failure to timely file an application for any eligible year for payment for energy generated in the preceding year shall disqualify the owner or authorized operator from eligibility for any incentive payment for energy generated and sold from a hydroelectric generation facility in that preceding year.

Applications for incentive payments must be properly completed and submitted to DOE each year. Each application must include all of the information set forth in the “Content” section below. DOE will not consider previously submitted application materials. Applications that refer to previous application materials or statements in lieu of submitting current information will not be considered. Receipt of payment in any calendar year does not guarantee payment or automatically qualify an applicant in any subsequent year. DOE will not assume that any incentive recipient intends to apply in a subsequent year. DOE will accept applications and make payments to hydroelectric generation facilities in years when appropriations are available for this purpose.

### *Content*

In order to be able to determine eligibility and to calculate the amount of individual hydroelectric generation facility payments, DOE needs sufficient information about owners, authorized operators, and the hydroelectric generation facility. An application for an incentive payment must be signed by an authorized executive official of the owner or operator claiming the payment and shall provide the following information:

1. A statement indicating that the applicant is the owner of the hydroelectric generation facility or is the authorized operator of the hydroelectric generation facility and has the written consent of an authorized executive official of the generator owner to file an application;
2. The name of the hydroelectric generation facility or other official designation;
3. A FERC docket number (if applicable) and FERC application or conduit exemption request that was submitted for the hydropower project;
4. The location and address of the hydroelectric generation facility and description of the type of hydropower energy source;
5. A detailed description of the new hydroelectric generation facility, including, but not limited to: the state of the site before construction, a listing of the equipment that has been installed (which includes the manufacturer, and whether the equipment is new or refurbished), the type of turbine that has been installed, and the capacity of the turbine;

6. If the application is for new hydropower capability at an already existing hydroelectric generation facility, the date and circumstances the old hydroelectric generation facility went off-line;
7. Details on how the electricity generated from the new unit(s) is metered. This can include, but is not limited to: the meter manufacturer, industry standards the meter meets, independent verification of meter data, requirements for metering under power purchase agreements, interconnection tariffs, or other mandates;
8. The name, mailing address, and telephone number and email address of a point of contact to respond to questions or requests for additional information;
9. A clear statement of how the applicant hydroelectric generation facility satisfies all of the eligibility criteria described in this Guidance, including the criteria of a qualified hydroelectric facility as set forth in Part IV;
10. A statement/invoice/bill of sale for the annual and monthly metered net electric energy generated and sold during the application period defined by DOE in the Federal Register for a given year of incentive payments by the hydroelectric generation facility, measured in kWh, for which an incentive payment is requested;
11. The total amount of electric energy for which payment is requested;
12. Copies of permit authorizations if the date of first use is based on permit approvals;
13. Supporting documentation, such as an invoice/statement/bill of sale, that provides the date of the first sale of electricity from the hydroelectric generation facility;
14. A tax identification number of the hydroelectric generation facility;
15. A statement agreeing to retain records for a period of three (3) years which substantiate the annual and monthly metered number of kWh generated and sold and to provide access to or copies of, such records, for possible audit within 30 days of a written request by DOE;
16. Confirmation, in the form of a Data Universal Numbering System (DUNS) number, of creation of a Federal System for Award Management (SAM) account (each payment requester must go to sam.gov where they will Create User Account and Register/Update Entity);
17. A statement signed by an authorized executive official certifying that the information contained in the application is accurate; and
18. A statement from the owner or authorized operator indicating what the incentive has been used for in previous years and, if awarded, what the incentive will be used for in the upcoming year. Note: The response will not affect the eligibility decision or the amount of the incentive to be received.

## *Processing applications*

Applications and notifications to the Department shall be submitted to the Hydropower Incentive Program, at [hydroincentive@ee.doe.gov](mailto:hydroincentive@ee.doe.gov). Following submission of an application, DOE will review and consider the completeness of the application data and may request supplementary information relating to the application. When DOE has been satisfied that sufficient information has been reported, the application will be reviewed for eligibility consistent with this Guidance. Timely response to allow all applications to be considered in a reasonable period is required. Delays exceeding 10 business days in response to DOE requests for information shall constitute the basis for classifying a hydroelectric generation facility as ineligible.

DOE may require the applicant to conduct at its own expense and submit an independent audit, or DOE may conduct an audit, to verify the number of kWh claimed to have been generated and sold by the hydroelectric generation facility and for which an incentive payment has been requested or made.

The Secretary will determine the extent to which appropriated funds are available to be obligated under this program. Upon evaluating each application and any other relevant information, DOE shall further determine:

1. Eligibility of the applicant for receipt of an incentive payment, based on the criteria for eligibility specified in this guidance;
2. The number of kWh to be used in calculating a potential incentive payment, based on the net electric energy generated and sold from a hydroelectric generation facility during the prior calendar year; and
3. The adjusted payment rate, as determined in accordance with the calculation set forth in Part V of this guidance.

After calculating the amount of the incentive payment, the Secretary shall issue a written notice of the determination to each applicant and for each hydroelectric generation facility with the following content:

1. Disapproving or approving the application as eligible for payment in whole or in part; and
2. Setting forth the applicant's incentive payment.

If the application does not meet the requirements of this program or if some of the kWh claimed in the application are disallowed as ineligible for payment, the Secretary or designee shall issue a written notice denying the application in whole or in part with an explanation of the basis for denial.

## VII. Administrative Appeals

### *General*

In order to exhaust administrative remedies, an applicant who receives a notice denying an application in whole or in part must file an appeal with the DOE Office of Hearings and Appeals, 1000 Independence Avenue, S.W., Washington, D.C. 20585, in accordance with the procedures set forth below.

If an applicant does not file an appeal in accordance with these requirements, the determination of the Secretary or designee shall become final. If an applicant files an appeal on a timely basis in accordance with these requirements, the decision and order of the Office of Hearings and Appeals shall be final. If the Office of Hearings and Appeals orders an incentive payment, the Director of the Office of Hearings and Appeals shall send a copy of such order to the DOE Finance Office with a directive to make the required payment.

### *What must the appeal contain?*

The appeal shall contain: (1) a concise statement of the ground(s) upon which the applicant contests the written notice of the Secretary; (2) a copy of the DOE notice; (3) contact information (i.e., name, telephone number, mailing and e-mail addresses) for a representative able to respond to questions and provide information relevant to the appeal; and (4) any data, documentation, or other relevant information supporting a showing by the appellant that the denial of eligibility or disallowance of payment, either in whole or in part, is arbitrary and capricious.

### *How should the appeal be filed?*

The appeal, including attachments, should be electronically filed with the Office of Hearings and Appeals (OHA), U.S. Department of Energy, at: [OHA.filings@hq.doe.gov](mailto:OHA.filings@hq.doe.gov). Upon filing, OHA will confirm receipt of the appeal and assign the appeal a case number.

### *What matters are not appealable?*

The following matters are not subject to appeal: (1) the denial of an application on the basis of untimeliness and (2) a proportional award of an incentive payment based upon DOE's determination that insufficient appropriated funds are available to make payments on all eligible production to all qualified applicants.

### *What are the steps in the process?*

1. An appeal under these procedures must be filed within ten (10) days of an applicant receiving the determination by the Secretary or designee denying eligibility or a claim for payment, in whole or in part.

2. In evaluating an appeal, OHA may require the submission of additional information by the appellant regarding any statement, data, documentation, or other information included in an appeal. OHA may also solicit and accept submissions of relevant information from other sources, including DOE, provided that the appellant is afforded an opportunity to respond to all such submissions. OHA may, on its own initiative, convene a conference or hearing if, in its discretion, it considers that such conference or hearing will advance its evaluation of the appeal. OHA will determine the scope and format of any conference or hearing convened under these procedures, as well as the parties allowed to participate.
3. OHA may issue an order summarily dismissing an appeal if: (a) the appeal is not filed in a timely manner, unless good cause is shown; (b) the appeal is defective on its face; (c) the appellant fails to provide additional information requested by OHA within the time specified by OHA; or (d) for any other reason that the appeal would be subject to dismissal under the OHA procedural regulations codified at 10 C.F.R. Part 1003.
4. OHA will provide DOE with the opportunity to submit a written response to an appeal within a period of time specified by OHA. OHA will provide the appellant with a copy of DOE's response and allow the appellant to submit a reply within a period of time specified by OHA.
5. Within thirty (30) days of receiving all required information, including additional information requested by OHA subsequent to the submission of the appeal, OHA shall issue a written decision granting or denying the appeal, in whole or in part. The decision shall include a written statement setting forth the relevant facts and basis for the determination. Upon issuance, OHA shall serve an electronic version of the decision upon the appellant and the DOE Office of Energy Efficiency and Renewable Energy. The decision will also be published on the OHA website: <http://www.energy.gov/oha>. The decision of OHA shall constitute the final agency action and the appellant's final right of administrative review under the Hydropower Incentive Program.
6. All expenses incurred by the appellant in pursuing any appeal before OHA shall be borne exclusively by the appellant.