

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

In the Matter of Eagle Creek Hydro)	
Power, LLC)	
)	
Filing Date: March 21, 2024)	Case Nos.: HEA-24-0050
)	HEA-24-0052-53
_____)	

Issued: June 13, 2024

Decision and Order

This Decision considers appeals (Appeals) filed by Eagle Creek Hydro Power, LLC (Appellant) on March 21, 2024, relating to the Maintaining and Enhancing Hydroelectricity Incentive Program (Program) authorized by Section 247 of the Energy Policy Act of 2005, as amended by Section 40333 of the Infrastructure Investment and Jobs Act of 2021 (IIJA), Pub. L. No. 117-58 (Section 247). In its Appeals, Appellant challenged determinations by the Department of Energy’s (DOE) Grid Deployment Office (GDO) that it was ineligible for the Program with respect to three hydroelectric projects. GDO filed its responses to the Appeals (Responses) each of which included two enclosures (Encls. 1–2) on May 17, 2024. For the reasons set forth below, we deny the Appeals.

I. Background

A. Section 247 of the Energy Policy Act of 2005

Pursuant to Section 247:

The Secretary shall make incentive payments to the owners or operators of qualified hydroelectric facilities for capital improvements directly related to . . . (1) improving grid resiliency . . . ; (2) improving dam safety to ensure acceptable performance under loading conditions . . . ; or (3) environmental improvements

42 U.S.C. § 15883(b). The IIJA authorized DOE to provide \$553,600,000 in incentive payments under the Program for fiscal year 2022. *Id.* § 15883(c).

To meet the definition of a “qualified hydroelectric facility” under Section 247, the hydroelectric project must be (A) “licensed by the Federal Energy Regulatory Commission [(FERC)]” or (B) “a hydroelectric project constructed, operated, or maintained pursuant to a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to the Federal Power

Act [FPA] (16 U.S.C. 791a et seq.)[.]” 42 U.S.C. § 15883(a)(1).¹ Any substantial changes to a FERC-licensed hydroelectric project require prior approval by FERC. 16 U.S.C. § 803(b); 18 C.F.R. § 4.200.

On June 13, 2023, GDO published guidance describing procedures for filing an application for incentive payments under the Program and the criteria that GDO would use to make eligibility determinations. *Application Guidance for the Maintaining and Enhancing Hydroelectricity Incentives – Section 247 of the Energy Policy Act of 2005 (EPAct 2005)*, U.S. DEP’T. OF ENERGY (June 13, 2023) (available at https://www.energy.gov/sites/default/files/2023-06/247-Final-Guidance_Modification_0001-0007_6-13-23.pdf) (Program Guidance). Among other criteria, the Program Guidance required applicants to submit “if applicable, documentation of FERC authorization of the capital improvement project, or if an amendment to the license is required, proof that a final application for authorization has been filed with FERC.” *Id.* § VIII(b)(8)(viii).

B. Procedural History

Appellant applied for incentive payments under the Program for three hydroelectric projects identified as applications 3088-1862 (Project 1), 3088-1863 (Project 2), and 3088-1865 (Project 3). For Project 1, Appellant provided a letter from FERC accepting Appellant’s “milestone schedule” for future submissions related to Project 1 as documentation of FERC authorization of the capital improvements. Project 1 Encl. 1 Project Plan at 6–7; 2022-10-21_NYRO_MRHS_DetailedSched_DesignAltsApproval. For Project 2, Appellant described its interactions with FERC related to Project 2 in the project plan included in its application and indicated that Project 2 “will satisfy the requirements established by [] FERC” Project 2 Encl. 1 Project Plan at 4. Appellant provided correspondence from FERC related to Project 3 indicating that FERC had directed it to submit additional documentation at a later date. *E.g.*, Project 3 Encl. 1 2023-02-27_NYRO_TNTO_GateHouseTowerInsp-Accept (requiring Appellant to submit “a detailed milestone plan and schedule” and identifying topics that the plan and schedule should address).

On March 11, 2024, GDO issued Determination Letters notifying Appellant that its applications were denied because the projects covered by the applications required FERC approval and Appellant had not provided documentation of FERC authorization. Project 1 Encl. 2; Project 2 Encl. 2; Project 3 Encl. 2. On March 21, 2024, Appellant filed timely Appeals of each of the Determination Letters. With respect to Project 1, Appellant asserted that “the design phase is currently underway[,] . . . FERC is well aware of [Project 1’s] design schedule[,] [and] [a]uthorization of the project is currently being processed by FERC.” Appeals at 1; *see also* Appeals Att. 4 (showing correspondence from FERC directing Appellant to submit additional documentation concerning Project 1 by May 31, 2024). Regarding Project 2, Appellant indicated that it was undertaking “a preliminary step in the design process” and that “final FERC approval has not yet been sought” Appeals at 1. With respect to Project 3, Appellant indicated that it had requested

¹ Section 247 further requires that the hydroelectricity facility be placed into service before November 15, 2021. 42 U.S.C. § 15883(a)(2); *see also* Program Guidance § V(b). Additionally, it requires that the facility comply with all applicable Federal, Tribal, and State requirements, or would be brought in compliance, as a result of incentive payments. 42 U.S.C. § 15883(a)(3); *see also* Program Guidance § V(c).

approval for the project on March 19, 2024, and that FERC “may consider this project maintenance and not issue any approval.” Appeals at 1. Shortly after filing the Appeals, Appellant submitted e-mails exchanged between Appellant and FERC in March 2024 in which Appellant described changes to its proposed approach to the work covered in Project 3 and a FERC representative determined that FERC approval was not required based on Appellant’s description of the changes. Project 3 Post-Appeal Submission, Att. 1 (Mar. 21, 2024).

GDO filed its Responses to the Appeals on May 17, 2024. In each of the Responses, GDO noted that Appellant had not alleged that GDO violated any law, rule, regulation, or delegation in denying the applications or that GDO acted arbitrarily or capriciously. Response to Project 1 Appeal at 3; Response to Project 2 Appeal at 4; Response to Project 3 Appeal at 3. GDO further argued that it had acted reasonably in denying each of the applications because Appellant failed to provide documentation of FERC approval as required under the Program Guidance. Response to Project 1 Appeal at 4; Response to Project 2 Appeal at 4; Response to Project 3 Appeal at 4. Finally, GDO asserted that GDO would have denied the applications even if Appellant had provided the documentation of its engagement with FERC that it attached to the Appeals because none of the documentation constituted approval of the projects by FERC or a final application for authorization by Appellant. Response to Project 1 Appeal at 4; Response to Project 2 Appeal at 4; Response to Project 3 Appeal at 4–5.

OHA invited Appellant to submit a reply to the Responses on or before May 31, 2024. Reply Briefing Order (May 17, 2024). Appellant did not submit a reply.

II. Standard of Review

Appeals of denials of applications to the Program are evaluated under OHA’s procedural regulations codified at Part 1003 of Title 10 of the Code of Federal Regulations (Part 1003). 10 C.F.R. § 1003.1(a) (indicating that OHA’s procedural regulations apply to proceedings not covered under any other DOE regulations); Program Guidance § XIV(a) (indicating that appeals of denials of applications to the Program will be decided under the Part 1003 regulations). An appeal of a denial of an application to the Program will be granted only “upon a showing that the DOE acted arbitrarily, capriciously, or in violation of a law, rule, regulation, or delegation” 10 C.F.R. § 1003.17(b).

III. Analysis

An agency action is arbitrary and capricious if it:

relied on factors . . . [it was] not intended to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983). As noted by GDO, nothing in the Appeals alleges that GDO acted arbitrarily or capriciously in denying Appellant’s applications. Even if the Appeals had done so, the documentation provided by

Appellant with the applications showed that each of the projects covered by the applications was in the process of seeking FERC approval, but that Appellant had not obtained that approval or submitted a final application for any of the projects at any time relevant to GDO's decision making process. With respect to Project 1 and Project 2, the Appeals indicated that Appellant was still in the process of providing documentation to FERC and that Appellant had not yet submitted a final application or received approval for either project.

As to Project 3, Appellant submitted evidence that FERC approval is no longer required. Appellant's March 2024 description of the project upon which FERC's assessment of the need for approval was based is completely different from the description provided by Appellant in its application for Project 3, which provided documentation showing that FERC required Appellant to submit documentation pertaining to then pending work. In its March 2024 communications with FERC, Appellant indicated that Project 3 had "changed from a rather significant and challenging . . . effort to a more routine . . . project." Post-Appeal Submission, Att. at 3. While circumstances related to Project 3 may well have changed in the seven months between Appellant's submission of its application concerning Project 3 and its Appeals, these events were not reasonably foreseeable based on the application submitted by Appellant, and it was neither arbitrary nor capricious for GDO to rely on Appellant's characterization of its own project when determining that Project 3 required proof of FERC approval or a final application for approval. Accordingly, Appellant has not established that GDO acted arbitrarily or capriciously in denying its applications.

IV. Conclusion

It is hereby ordered that the Appeals filed by Eagle Creek Hydro Power, LLC on March 21, 2024, are denied.

This is a final decision and order of the Department of Energy from which Eagle Creek Hydro Power, LLC may seek judicial review in the appropriate U.S. District Court.

Poli A. Marmolejos
Director
Office of Hearings and Appeals