

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

In the Matter of CS-Canal Hydro)	
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Filing Date: March 20, 2024)	Case No.: HEA-24-0010
)	
_____)	

Issued: June 27, 2024

Decision and Order

This Decision considers an appeal (Appeal) filed by CS-Canal Hydro, LLC, (Appellant) on March 20, 2024, relating to the Maintaining and Enhancing Hydroelectricity Incentives 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 Appeal, Appellant challenged a determination by the Department of Energy’s (DOE) Grid Deployment Office (GDO) that its facility was ineligible for the Program. The Appeal includes one enclosure (Appeal Encl.). GDO filed its Response to the Appeal (Response), which included two enclosures (Response Encls. 1–2), on May 17, 2024. For the reasons set forth below, we deny the Appeal.

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 (EPA Act 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). Section VII of the Program Guidance provides that “where authorizations have not yet been obtained, any awards would be conditioned upon successful completion of permitting.” *Id.* § VII.

B. Procedural History

Appellant submitted an application for incentive payments under the Program. The application indicated that “[t]he proposed repair work will require approval from the FERC regional office.” Response Encl. 1 at 259.² Accordingly, on March 11, 2024, GDO issued to Appellant a Determination Letter notifying Appellant that its application was denied because the “application did not provide documentation of FERC authorization of the proposed capital improvement.” Response Encl. 2. The Determination Letter included notice to Appellant of its right to file an appeal with OHA within ten (10) days of receiving the notice. *Id.*

On March 20, 2024, Appellant filed its Appeal raising three arguments:

- (1) Appellant “holds a valid FERC license which authorizes project operations” which includes “project operations and maintenance . . . related to dam safety . . .” Appeal.
- (2) The FERC Regional Engineer, “who has statutory authority to administer FERC’s dam safety program,” issued a May 26, 2023, “Conditional Construction Authorization . . .” *Id.* According to the Appellant, the scope of the “Conditional Construction Authorization” included repair to the solution cavity in the left embankment of the dam” and activities within “the proposed capital improvement plan included in the application” for incentive payments. *Id.* Appellant included the Conditional Construction Authorization as an attachment. Appeal

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).

² GDO submitted a folder comprised of individual PDFs and one Excel file entitled Enclosure 1 to the Office of Hearings and Appeals (OHA). OHA combined the individual PDFs into a single PDF. This Decision will refer to the pages of Enclosure 1 PDF in the order in which they appear, as if all of the individual PDFs were one sequentially numbered document, regardless of their internal pagination.

Encl.

- (3) The Program Guidance states that for “authorizations that have not yet been obtained, any award would be conditioned upon successful completion of permitting.” Appeal (citing Program Guidance § VII). Appellant argued that this provision must mean that it could be considered conditionally eligible for incentive payments subject to obtaining further authorizations. *Id.*

GDO filed its Response to the Appeal on May 17, 2024. In the Response, GDO noted that nothing in the Appeal alleged that GDO violated any law, rule, regulation, or delegation in denying the applications or that GDO acted arbitrarily or capriciously. Response at 3. GDO re-asserted that Appellant lacked eligibility for Section 247 incentive payments as Appellant neither “include[d] documentation of FERC authorization for the capital improvement, nor did it provide proof that a final application for authorization had been filed with FERC.” *Id.* at 4. Regarding Appellant’s first argument, GDO explained that “a project’s FERC license is a separate and distinct requirement from FERC authorization of [a] proposed capital improvement” and that Appellant’s own application stated that the “proposed repair work will require approval from the FERC regional office.” *Id.* (quoting Response Encl. 1 at 259) (emphasis in original). Regarding Appellant’s second argument, GDO indicated that the May 26, 2023, “Conditional Construction Authorization” was not submitted with the original application and that even if it had been submitted it would have been insufficient to establish Appellant’s eligibility for the Program. *Id.* at 5. According to GDO, the “May 26 Authorization only covers a temporary ‘concrete plug to backfill the sinkhole.’” *Id.* Appellant’s application indicated that this was a “first step in the ‘project timeline’ that had been completed prior to application submittal” and that “the incentive payment amount requested” in the application “did not include the short-term sinkhole repair.” *Id.* (emphasis added). Last, with respect to Appellant’s final argument, GDO concluded that Appellant “cherry-pick[ed]” language “from Section VII of the [Program] Guidance” and ignored the “requirement for FERC approval in Section VIII.” *Id.* at 5–6.

OHA invited Appellant to submit a reply to the Response 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

Appellant made three arguments: (1) that the Project had a FERC license which amounted to FERC authorization of the Project; (2) that the Project had a May 26, 2023, “Conditional Construction

Authorization” that amounted to FERC authorization; and (3) that Section VII of the Program Guidance allowed for applicants to be eligible conditioned upon successfully securing final FERC authorization. Appeal. As noted by GDO, Appellant failed to specify whether it believed that GDO acted arbitrarily, capriciously, or in violation of a law, rule, regulation, or delegation. Regardless, this Decision reviews the record to determine whether GDO acted in such a manner.

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). Again, Appellant made no specific allegations as to whether GDO acted arbitrarily or capriciously. Instead, it is readily apparent that GDO strictly adhered to the terms of the Program Guidance in determining that Appellant failed to provide either FERC authorization or proof that it had filed a final application for FERC authorization.

Appellant’s first argument that its FERC license amounted to FERC authorization lacks support in the record. Appellant’s own application acknowledged that, despite its status as a licensee, the “proposed repair work will require approval from the FERC regional office.” Response Encl. 1 at 259. It was neither arbitrary nor capricious for GDO to rely on Appellant’s characterization of its own Project when determining that it required proof of FERC authorization or a final application for authorization. Accordingly, Appellant’s first argument does not establish that GDO acted arbitrarily or capriciously in denying its application.

Appellant’s second argument regarding “Conditional Construction Authorization” also provides no indication that GDO acted arbitrarily or capriciously. Indeed, the May 2023 “Conditional Construction Authorization” was not submitted to GDO despite pre-dating the application deadline in October 2023. *See generally* Response Encl. 1. Furthermore, Appellant’s own application indicated that further FERC authorization would need to be obtained in contradiction to its claim on appeal that “Conditional Construction Authorization” satisfied the requirement for FERC authorization. By relying on the evidence before it in the Appellant’s own application, GDO rendered its decision without arbitrariness and capriciousness.

Last, Appellant selectively quotes from Section VII of the Program Guidance that for “authorizations that have not yet been obtained, any award would be conditioned upon successful completion of permitting” for the proposition that its Project could be selected for conditional eligibility despite not having FERC authorization or proof of a final application for FERC authorization. Appeal. However, this interpretation divorces Section VII from the necessary context and the rest of the Program Guidance. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596 (2004) (“[L]anguage must be read in context since a phrase gathers meaning from the words around it.”). Without selective omissions, Section VII reads as follows:

An owner or authorized operator of a qualified hydropower project is eligible to apply for an incentive payment *after they have applied for (or the[y] have already*

received) all Federal, State, and/or Tribal authorizations including but not limited to the National Environmental Policy Act of 1969 (NEPA) and National Historic Preservation Act of 1966 (NHPA). Where authorizations have not yet been obtained, any awards would be conditioned upon successful completion of permitting.

Program Guidance § VII (emphasis added). Furthermore, to be eligible for Section 247 incentive payments, the Program Guidance explicitly states that applicants were to provide “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) (emphasis added). With respect to NHPA review, the Program Guidance provides that an application must include documentation “demonstrating compliance with . . . [the NHPA review process] has been completed *or is currently ongoing* as described in Section VII.” *Id.* § VIII(b)(8)(x) (emphasis added). The Program Guidance thus distinguishes between circumstances in which final approvals must be provided to establish eligibility, such as when FERC authorization is required without an amendment to a FERC license, and circumstances in which eligibility can be established prior to final approval, such as projects requiring amendments to a FERC license with a final application for authorization or projects for which NHPA review is ongoing.

Section VII of the Program Guidance does not provide that projects, regardless of their stage in the FERC approval process, are eligible for incentive payments. Concluding otherwise would essentially nullify GDO’s choices in structuring the Program in Section VIII(b)(8)(viii) and would force GDO to adopt “contradictory” meanings between Sections VIII(b)(8)(viii) and VII, when instead the provisions can be construed as a “harmonious whole.” *Humane Soc’y of the United States v. McCarthy*, 209 F. Supp. 3d 280, 285 (D.D.C. 2016) (quoting *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93 (2012)). Appellant’s interpretation also overlooks the significance of the fact that the Program Guidance expressly permits applicants to be in any stage of the NHPA review process but in contrast requires final FERC authorization or a filed final application for FERC authorization. *Meritor, Inc. v. EPA*, 966 F.3d 864, 871 (D.C. Cir. 2020) (finding that “[w]here an agency includes particular language in one section of a [document] but omits it in another[,] [courts] generally presume[] that the agency acts intentionally and purposely in the disparate inclusion or exclusion”) (quoting *Yonek v. Shinseki*, 722 F.3d 1355, 1359 (Fed. Cir. 2013)). That an award “would be conditioned upon successful completion of permitting” in Section VII thus can most logically be read as applying to those applicants who submitted “proof that a final application for authorization has been filed with FERC” as required by Section VIII(b)(8)(viii). Program Guidance §§ VII, VIII(b)(8)(viii). Accordingly, in determining that Appellant’s project was ineligible, GDO followed the criteria it established in the text of its Program Guidelines and, as such, acted without arbitrariness or capriciousness.

In conclusion, Appellant failed to specify how GDO acted arbitrarily and capriciously. Instead, after considering Appellant’s arguments, the record reflects that GDO denied Appellant’s application based on the evidence before it and in adherence to the explicit Program Guidance. Accordingly, there is no basis to conclude that GDO relied on factors it was not intended to consider, offered an explanation that runs counter to the evidence, or made a determination so implausible that it could not be ascribed to a difference in view.

IV. Conclusion

It is hereby ordered that the Appeal filed by CS-Canal Hydro, LLC, on March 20, 2024, is denied.

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

Poli A. Marmolejos
Director
Office of Hearings and Appeals