



## Department of Energy

Washington, DC 20585

JUL 23 2009

### DECISION AND ORDER OFFICE OF HEARINGS AND APPEALS

#### EECBG Appeal

Case Name: Cumberland County, Maine

Date of Filing: July 10, 2009

Case Number: TGA-0001

This decision considers an Appeal filed by Cumberland County, Maine (Cumberland County) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Cumberland County seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an “eligible unit of local government” to receive block grant funding under the EECBG Program. If the present Appeal were granted, Cumberland County would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

#### I. Background

##### A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.<sup>1</sup> For the purpose of the EECBG program, an “eligible unit of local government” was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an “eligible unit of local government” to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the “eligible units of local government,” Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: <http://www.eecbg.energy.gov/>). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

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<sup>1</sup> The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.



as “eligible unit of local government” for the purpose of the EECBG Program. A city or county is an “eligible unit of local government” under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an “eligible unit of local government” was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city’s eligibility and again in determining a county’s eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an “eligible unit of local government,” DOE determined that a geographical subdivision also must have a “functional government” with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has “relatively few [governmental] responsibilities,” or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local “government” for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an “eligible

unit of local government” is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

### B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department’s determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

### C. The Present Appeal

In its Appeal, Cumberland County states that it believes it was denied eligibility to apply for EECBG Program funding based on a determination that it is incapable of carrying out activities prescribed by the EISA. Cumberland County asserts in its Appeal, however, that this finding is incorrect and that “[o]ur county does, in fact, have the jurisdiction and functional capabilities to implement the broad range of programs identified by EISA.” Appeal at 1. Cumberland County further contends that it otherwise meets the requirements for EECBG eligibility, specifically that the county (1) is a unit of local government identified in 2007 GID, (2) meets the required EISA population threshold based upon 2007 U.S. Census estimates, and (3) has a governance structure consisting of elected officials and a governing body.

## II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Cumberland County and have determined that its Appeal should be granted. For the reasons discussed below, we find that Cumberland County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

### (1) Incorporated Unit of Local Government

Cumberland County is one of 16 county governments in the State of Maine listed in the 2007 Governments Integrated Directory. See [http://harvester.census.gov/gid/gid\\_07/options.html](http://harvester.census.gov/gid/gid_07/options.html). Cumberland County therefore meets this criterion.

### (2) Population

As noted in its Appeal, Cumberland County is the most populous county in the State of Maine, with a population of 275,374 according to 2007 U.S. Census county population data. Under the State and Local Grant Allocations listing published by DOE on April 15, 2009, there are four cities within Cumberland County that have been determined eligible to receive EECBG funding. See Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A. These are the cities of Town of Brunswick (2007 Census population 21,806), Portland (2007 Census population 62,825), Town of Scarborough (2007 Census population 18,983), and South Portland (2007 Census population 23,748). Cumberland County notes correctly in its Appeal, however, that “[e]ven subtracting the populations of our four municipalities receiving EECBG funds we are the 2<sup>nd</sup> most populous county in the state of Maine.” Appeal at 1.<sup>2</sup> We, therefore, find that Cumberland County satisfies the population requirement of the EISA.

### (3) Governance Structure

Cumberland County states in its Appeal that it has a “Commission-Manager” governance structure. More specifically, Cumberland County states that it has three County Commissioners, elected by popular vote to four-year staggered terms in each of three single member districts. According to Cumberland County, the Commission is “the policy-making body of the county.” Appeal at 1. In addition, Cumberland County has a County Manager who manages the activities of more than 400

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<sup>2</sup> Excluding the populations of its four eligible cities, Cumberland County would have a 2007 balance population of 148,012 second only to York County which has a 2007 Census population of 158,495 after excluding the populations of two cities situated in York County (Biddeford and Town of Sanford) which have been determined eligible for the EECBG program.

county employees. *Id.*<sup>3</sup> Based upon this information, we find that Cumberland County has the requisite governance structure to receive EECBG funds.

#### (4) Functional Capability

In its Appeal, Cumberland County argues that the county was initially denied EECBG eligibility based upon DOE's supposition that it does not have the functional capability to administer one or more of the broad range of activities specified in the EISA. As stated in the implementing DOE Federal Register Notice: "As defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds." 74 Fed. Reg. at 17462. However, we find that Cumberland County has presented sufficient supporting information and evidence in its Appeal to rebut that presumption.

Cumberland County has an annual budget of \$38 million. According to its Appeal, the county's jurisdiction and responsibilities include a 500-bed jail, two of the largest Registries of Probate and Deeds in New England, the District Attorney's Office, a county- and federally-funded Domestic Violence Program, and a 6,500 seat County Civic Center. Appeal at 2. In addition, Cumberland County provides law enforcement for 14 of its 28 municipalities and emergency management services for the entire county. Cumberland County is also responsible for the management of over 300,000 square feet of public facilities including the regional court. *Id.*<sup>4</sup>

Perhaps most significant, however, is that Cumberland County already receives and administers federal block grant funds from the U.S. Department of Housing and Urban Development (HUD). Cumberland County states in its Appeal that it is the only New England county that has been designated an Urban Entitlement County. Cumberland County states that, in this capacity, the county receives over \$2 million annually in Community Development Block Grant (CDBG) and HOME funds from HUD. Appeal at 3. Cumberland County asserts that "[t]hrough this program, the County has funded dozens of municipal projects, as well as created region-wide programs for weatherization, housing and homelessness . . . [and] also provides grants totaling several hundred thousands of dollars annually to social service agencies." *Id.* Cumberland County further states that, during the past five years, it has created a regional Public Health Council and a regional board to oversee distribution of CDBG and HOME funds. *Id.*

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<sup>3</sup> Cumberland County also notes that it has six other officials who are elected county-wide: District Attorney, Sheriff, Judge of Probate, Registrar of Probate, Registrar of Deeds and Treasurer. Appeal at 2.

<sup>4</sup> On July 17, 2009, Cumberland County supplemented its submission with a copy of its 2009 County Budget which corroborates the financial data summarized in its Appeal.

Based upon the foregoing, we are satisfied that Cumberland County has the functional capability to carry out one or more of the broad activities outlined in the EISA.<sup>5</sup>

It Is Therefore Ordered That:

(1) The Appeal filed by Cumberland County, Maine, on July 10, 2009, is hereby granted.

(2) Cumberland County will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 00003. This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.

(3) This is a final Order of the U.S. Department of Energy.



Poli A. Marmolejos  
Director  
Office of Hearings and Appeals  
Date:

JUL 23 2009

<sup>5</sup> The EISA authorizes a broad range of activities including, *inter alia*:

- 1) Development of an energy efficiency and conservation strategy;
- 2) Building energy audits and retrofits, including weatherization;
- 3) Financial incentive programs for energy efficiency, such as energy savings performance contracting, on-bill financing, and revolving loan funds;
- 4) Transportation programs to conserve energy;
- 5) Building code development, implementation, and inspections;
- 6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
- 7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
- 8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
- 9) Installation of energy efficient traffic signals and street lighting;
- 10) Installation of renewable energy technologies in or on government buildings;
- 11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

*See generally* 42 U.S.C. 17154.