



Department of Energy

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AUG 20 2009

DECISION AND ORDER OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Merrimack County, New Hampshire

Date of Filing: July 24, 2009

Case Number: TGA-0021

This decision considers an Appeal filed by Merrimack County, New Hampshire (Merrimack 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, Merrimack 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, Merrimack 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. §§ 17151-17158.¹ 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

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



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, Merrimack 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. Appeal at 2. Merrimack County asserts in its Appeal, however, that this finding is incorrect and that it “clearly has a governance structure with the type of responsibilities and jurisdiction capable of implementing the programs contemplated by” the EECBG Program. *Id.* at App. C.

II. Analysis

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

(1) Incorporated Unit of Local Government

Merrimack County is one of ten county governments in the State of New Hampshire listed in the 2007 Governments Integrated Directory. See http://harvester.census.gov/gid/gid_07/options.html. Merrimack County therefore meets this criterion.

(2) Population

As noted above, the EISA definition of “eligible unit of local government” includes a county with a population which causes the county to be one of the ten highest populated counties of the State. Because there are only ten counties in the State of New Hampshire, Merrimack County is one of the ten highest populated counties of the State. We, therefore, find that Merrimack County satisfies the population requirement of the EISA.

(3) Governance Structure

Merrimack County states in its Appeal that it “is governed by 3 elected County Commissioners.” Appeal at 1. The 2007 Census of Governments describes boards of county commissioners as the “governing body” of counties in the State of New Hampshire. See <http://www.census.gov/govs/www/cog2007.html>. Based upon this information, we find that Merrimack County has the requisite governance structure to receive EECBG funds.

(4) Functional Capability

In its April 15, 2009, Federal Register Notice, the DOE found that, 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, as discussed below, we find that Merrimack County has presented sufficient supporting information and evidence in its Appeal and supplementary material to rebut that presumption.

Merrimack County has an annual budget of over \$72 million. Appeal at 2. The county's jurisdiction and responsibilities include a 235-inmate correctional facility, a 291-bed nursing home, and offices for a Treasurer, Attorney, Sheriff, Register of Deeds, and Administrator. *Id.* With 761 county employees, the county maintains 14 buildings totaling over 584,102 square feet. *Id.* at 4.

Merrimack County has previously implemented energy efficiency programs, including the construction of its 220,000 square foot nursing home, which features geothermal heating and cooling, efficient lights, and Energy Star-rated appliances. *Id.* at 4.

Regarding Merrimack County's ability to administer federal grants, the county "has administered a variety of grants – primarily for affordable housing, public facilities, infrastructure, education, corrections, economic development, and human services." E-Mail from Kathy Bateson, County Administrator, Merrimack County, to David M. Petrush, Attorney-Examiner, OHA, Aug. 12, 2009.

Since 1999, the county has administered approximately \$7 million in grants acquired through competitive application processes. The grants are from various state agencies, the US Department of Justice, and private foundations. The dollar amounts of the grants range from \$20,000 to \$500,000, but most are between \$250,000 and \$400,000. The grant periods range between 12 and 24 months. *Id.*

Based upon the foregoing, we are satisfied that Merrimack County has the functional capability to carry out one or more of the broad activities outlined in the EISA.²

² 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.

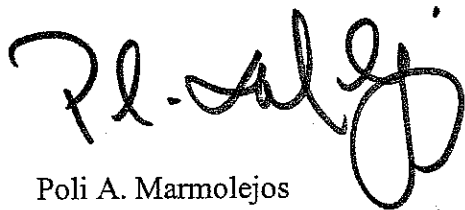
See generally 42 U.S.C. § 17154.

It Is Therefore Ordered That:

(1) The Appeal filed by Merrimack County, New Hampshire, on July 24, 2009, is hereby granted.

(2) Merrimack 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: **AUG 20 2009**
