



Department of Energy
Washington, DC 20585
SEP - 4 2009

**DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS**

EECBG Appeal

Case Name: Northeastern Vermont Development Association

Date of Filing: July 24, 2009

Case Number: TGA-0028

This decision considers an Appeal filed by Northeastern Vermont Development Association (NVDA) 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, NVDA 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. Although we do not find that NVDA qualifies as an eligible unit of local government, two of the counties within the area served by NVDA, Orleans County, Vermont, and Caledonia County, Vermont, do so qualify for the reasons set forth below, and will therefore 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

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



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 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 the April 15, 2009, Federal Register notice, DOE found that, “[a]s 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 FR at 17462. The Executive Director of Northwest Regional Planning Commission, Vermont, Catherine Dimitruk, filed the present appeal on behalf of all of Vermont’s regional planning commissions (RPCs), including NVDA. She contends that RPCs are proper substitutes for counties as eligible units of local government under the EISA, “as they perform many

of the same functions as fully-authorized counties do in other states, and particularly that they are perfect candidates for [EECBG funds] because of their expertise, contacts, experience, and effectiveness.” Appeal at 2. In essence, under Vermont state law, the RPCs perform many of the traditional governmental functions performed by counties. Vt. Stat. Ann. tit. 24, §§ 4341-4351. These RPCs, in turn, are comprised of one or more counties, all of which are recognized by the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html.

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by NVDA. We do not find that NVDA is a “proper substitute” as an eligible unit of local government for the counties within its jurisdiction. However, two of the counties within the area served by NVDA, Orleans County, Vermont, and Caledonia County, Vermont, have each authorized NVDA to represent it in the current Appeal process, and to receive and administer on its behalf any grants it may be eligible to apply for under the EECBG program. Further, as we discuss below, both Orleans County and Caledonia County meet all of the criteria for eligibility to receive EISA funding under the EECBG Program.²

(1) Incorporated Unit of Local Government

Orleans County and Caledonia County are two of 14 county governments in the State of Vermont listed in the 2007 Governments Integrated Directory. *See* http://harvester.census.gov/gid/gid_07/options.html. Both Orleans County and Caledonia County therefore meet 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. According to 2007 U.S. Census data, after subtracting the population of the ten Vermont cities eligible to receive EECBG funding from their respective counties, *see* Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A, Caledonia County is the 8th most populous

² The other county within the jurisdiction of NVDA, Essex County, Vermont, has a population of 6,495, according to 2007 U.S. Census data, making it the 14th most populous county in the state of Vermont. Annual Estimates of the Population for Counties of Vermont: April 1, 2000 to July 1, 2007 (<http://www.census.gov/popest/counties/tables/CO-EST2007-01-50.xls>), Population Division, U.S. Census Bureau (March 20, 2008). As such, Essex County does not meet the population thresholds required for it to be considered an “eligible unit of local government” under the EISA. However, as noted in the April 15, 2009, Federal Register notice, county governments that do not meet the eligibility requirements for direct formula grants from DOE are eligible for program funds through the State in which they are located. 74 FR at 17462. Thus, Essex County will be eligible to apply for EECBG funds through the State of Vermont.

county in the State of Vermont, and Caledonia County is the 10th most populous county in the state. We, therefore, find that Orleans County and Caledonia County satisfy the population requirement of the EISA.

(3) Governance Structure

The Appeal filed on behalf of NVDA states that Vermont counties “are run by Assistant Judges, elected every four years at the General Election.” Appeal at 2. The 2007 Census of Governments describes these assistant or “side” judges as the “principal administrative officers” of counties in the State of Vermont. See <http://www.census.gov/govs/www/cog2007.html>. Based upon this information, we find that both Orleans County and Caledonia County have the requisite governance structure to receive EECBG funds.

(4) Functional Capability

As noted above, the 2007 Census of Governments states that county governments in Vermont perform “very limited” functions. *Id.* However, in providing for the current appeal process, DOE recognized that “the characterization of city and county governments in the 2007 Census data was not in the context of the EECBG Program” and that, therefore, “the characterization of the governing structure of a city or county may not have been sufficiently informative for the purpose of determining eligibility under the EECBG Program.” 74 FR at 30063. This is clearly the case with respect to the State of Vermont, where as noted in the present Appeal, “laws and government systems have developed in different ways, particularly in the allocation of power among political subdivisions.” Appeal at 2.

Thus, even if the governments of Orleans County and Caledonia County lack the functional capability to, on their own, carry out activities as outlined in the EISA, each county has authorized NVDA to “receive and administer any grants for which it may be eligible to apply under the EECBG program.” Letter from Honorable Robert Goodby and Honorable Benjamin M. Batchelder, Orleans County, to Steven Goering, OHA (August 26, 2009); Letter from Honorable Roy Vance and Honorable William, Caledonia County, to Steven Goering, OHA (undated, received by OHA September 1, 2009). We note here that, under Vermont law, RPCs are required to “assist and advise . . . authorities within the region to facilitate economic development programs for the appropriate development, improvement, protection and preservation of the region's physical and human resources.” Vt. Stat. Ann. tit. 24, § 4345a(1). Further, as explained below, we find that NVDA clearly has the necessary functional capability to carry out EISA activities on behalf of Orleans County and Caledonia County, and indeed already acts in that capacity in administering similar programs.

In the present Appeal, Ms. Dimitruk states that Vermont’s RPCs “are authorized by statute to perform a variety of functions, including regional planning for a number of topics including energy, land use, transportation, housing, etc., promoting mutual cooperation among municipalities, advising them on public financing, and providing technical and legal support to the towns and cities of

Vermont, among other duties.” Appeal at 1-2 (citing Vt. Stat. Ann. tit. 24, § 4345a). She states that the RPCs have been involved in energy planning for many years and that “[e]nergy planning is one of the required elements of a regional plan under Vermont law.” *Id.* at 2 (citing Vt. Stat. Ann. tit. 24, §§ 4347, 4348).³

Regarding its ability to administer federal grant funding, NVDA states that it “already receives substantial funding support from numerous federal agencies.” Letter from Steven H. Patterson, Executive Director, NVDA, to Steven Goering, OHA (August 20, 2009). For a number of years, two of NVDA’s largest sources of federal funding have been the U.S. Department of Agriculture and the Federal Highway Administration. *Id.* at 2. In addition, in fiscal year 2008, NVDA administered two grants from the U.S. Department of Housing and Urban Development, including a Community Development Block Grant, received through Vermont’s Agency of Commerce and Community Development and the Towns of Lyndon and St. Johnsbury, Vermont. *Id.* (attaching schedule of federal expenditures). In the same year, NVDA also administered two Brownfields grants from the U.S. Environmental Protection Agency, and a grant from the U.S. Small Business Administration, received through the Vermont Small Business Development Center. *Id.* Thus, NVDA clearly has demonstrated experience in utilizing federal funding to conduct various programs on behalf of the citizens of Orleans County and Caledonia County.

Based upon the foregoing, we are satisfied that NVDA has the functional capability to carry out, on behalf of Orleans County and Caledonia County, one or more of the broad activities outlined in the EISA.⁴ We believe that granting EECBG Program eligibility to Orleans County and Caledonia

³ We also note that, under Vermont law, RPC members are appointed by, and “serve at the pleasure” of, the legislative bodies of the municipalities represented by the RPC. Vt. Stat. Ann. tit. 24, §§ 4343.

⁴ 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;

County achieves the objective of the EISA while fulfilling the DOE's added requirement that the counties have the functional capability to administer the grant funds. It is clear from the statute that Congress' intent was to make direct funding available to all counties, such as Orleans County and Caledonia County, that meet the population requirements, i.e., a population of greater than 200,000 or one of the ten most populous counties in the State. While we deem it a reasonable interpretation by the agency that the county also have the functional capability to carry out EISA activities, we find the jurisdiction and authority of NVDA to act on behalf of Orleans County and Caledonia County to be fully consistent with that requirement. NVDA is a governmental body recognized by the State of Vermont, and authorized by Orleans County and Caledonia County, and thus is the appropriate vehicle to receive and administer EECBG Program funds that Orleans County and Caledonia County are entitled to receive under the EISA.

It Is Therefore Ordered That:

(1) To the extent that the Appeal filed by Northeastern Vermont Development Association on July 24, 2009, is filed on behalf of Orleans County, Vermont, the Appeal is hereby granted, as set forth in paragraph (2) below.

(2) Orleans County, Vermont, 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) To the extent that the Appeal filed by Northeastern Vermont Development Association on July 24, 2009, is filed on behalf of Caledonia County, Vermont, the Appeal is hereby granted, as set forth in paragraph (4) below.

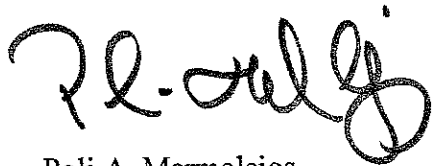
(4) Caledonia County, Vermont, will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application 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.

11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

See generally 42 U.S.C. 17154.

(5) To the extent that the Appeal filed by Northeastern Vermont Development Association on July 24, 2009, is filed on behalf of Essex County, Vermont, or any unit of government other than Orleans County, Vermont, or Caledonia County, Vermont, the Appeal is hereby denied.

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

A handwritten signature in black ink, appearing to read "Poli A. Marmolejos". The signature is stylized and cursive.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date:

SEP - 4 2009