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

EECBG Appeal

Case Name: Bennington County Regional Commission

Date of Filing: July 24, 2009

Case Number: TGA-0035

This decision considers an Appeal filed by Bennington County Regional Commission (BCRC) 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, BCRC 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.

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-000013, 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 The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.



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. Northwest RPC’s Executive Director, Catherine Dimitruk, filed the present appeal on behalf of all of Vermont’s regional planning commissions (RPCs). 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.

II. Analysis

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).²

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 Vermont county governments lack the functional capability to, on their own, carry out activities as outlined in the EISA, Vermont's RPCs generally do have the necessary functional capability to carry out EISA activities on behalf of the counties they serve, and indeed already act in that capacity in administering similar programs. 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).

Recognizing this unique allocation of power among Vermont's state and local governments, we have found that a regional planning commission, as a governmental body recognized by the State of Vermont, can be an appropriate vehicle to receive and administer EECBG Program funds that an eligible county is entitled to receive under the EISA. *See, e.g., Northwest Regional Planning Commission*, Case No. TGA-0026 (2009).³ This achieves the objective of the EISA while fulfilling the DOE's added requirement that the county have the functional capability to administer the grant

² 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.

³ Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

funds. It is clear from the statute that Congress' intent was to make direct funding available to all counties that meet the population requirements of the statute. 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 an RPC to act on behalf of a county government to be fully consistent with that requirement.

In the present case, however, Bennington County, Vermont, the only county in the area served by BCRC, does not meet the population requirement specified by Congress in the EISA. As noted above, for a county to be considered an "eligible unit of local government" under the EISA, it must either have a population of at least 200,000, or be one of the ten highest populated counties of the State. According to 2007 U.S. Census data, the population of Bennington County is 36,452. 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). Further, after subtracting the population of the ten Vermont cities eligible to receive EECBG funding from their respective counties, Bennington County, with a net population of 21,297 after subtracting the population of Town of Bennington, is the 12th most populous county in the State of Vermont.⁴

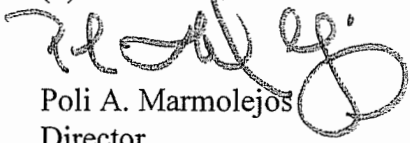
Because Bennington County does not satisfy the population requirement of the EISA, BCRC cannot receive and administer EECBG Program funds under the EISA on behalf of an eligible county, or otherwise be considered a proper substitute for an eligible unit of local government under the EISA. Therefore, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Bennington County Regional Commission on behalf of Bennington County, Vermont, on July 24, 2009, is hereby denied.

⁴ See Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A (listing Town of Bennington, Town of Brattleboro, Burlington, Town of Colchester, Town of Essex, Village of Essex Junction, Town of Hartford, Town of Milton, Rutland, and South Burlington, as the ten Vermont cities eligible to receive EECBG funding); Annual Estimates of the Population for Minor Civil Divisions in Vermont, Listed Alphabetically Within County: April 1, 2000 to July 1, 2007 (<http://www.census.gov/popest/cities/tables/SUB-EST2007-05-50.xls>), Population Division, U.S. Census Bureau (July 10, 2008) Annual Estimates of the Population for Minor Civil Divisions in Vermont, Listed Alphabetically Within County: April 1, 2000 to July 1, 2007 (<http://www.census.gov/popest/cities/tables/SUB-EST2007-05-50.xls>), Population Division, U.S. Census Bureau (July 10, 2008); Annual Estimates of the Population for Incorporated Places in Vermont, Listed Alphabetically: April 1, 2000 to July 1, 2007 (<http://www.census.gov/popest/cities/tables/SUB-EST2007-04-50.xls>), Population Division, U.S. Census Bureau (July 10, 2008).

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



Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: SEP 10 2009