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**NATEL ENERGY**

**September 6, 2022**

**Joint Comments of American Rivers, Association of State Dam Safety Officials, American Society of Civil Engineers, California Outdoors, Hydropower Reform Coalition, Low Impact Hydropower Institute, Natel Energy, and National Hydropower Association**

American Rivers, Association of State Dam Safety Officials, American Society of Civil Engineers, California Outdoors, Hydropower Reform Coalition, Low Impact Hydropower Institute, Natel Energy, and National Hydropower Association look forward to working with the U.S. Department of Energy (DOE) to ensure that the Infrastructure Investment and Jobs Act (“IIJA”), better known as the Bipartisan Infrastructure Law (BIL), lives up to its potential to accelerate the transition to a cleaner, more reliable electricity grid. We agree with Secretary Granholm’s comments that hydropower can help meet President Biden’s goals to reach 100 percent clean electricity by 2035 and net-zero emissions by 2050, and that new investments in hydropower should be made in environmentally responsible ways.

We commend the work by the DOE’s Grid Deployment Office and the Water Power Technologies Office to begin implementation of the “maintaining and enhancing hydroelectricity” incentives program, created as a new Section 247 under the Energy Policy Act of 2005 and are pleased to respond to the *Request for Information (RFI)*, #DE-FOA-0002762, *Energy Policy Act of 2005 Sections 243 and Section 247 Hydroelectric Incentive Programs*.

Fundamentally, we urge the DOE to design the new incentive program to be as flexible and inclusive as possible to encourage all eligible investments (e.g., improving grid resiliency, improving dam safety, and environmental improvements). While competitive grant processes are useful in many contexts, Section 247 was created to “maintain and enhance hydroelectricity.” As such, the DOE should not be attempting to pick winners and losers among eligible, qualifying applications. Referenced throughout this response, we propose a two-step process detailed in Appendix A.

**Signatories Role in Securing Section 243 and 247 of IIJA**

Our organizations forged an agreement in March 2021 in support of the *Twenty-First Century Dams Act*, an outgrowth of Stanford University’s Uncommon Dialogue process. This proposal, which received bipartisan, bicameral support (H.R. 4375, S.2356, S.2308), focused on accelerating the rehabilitation, retrofit, and removal (the “3Rs”) of the nation’s more than 90,000 dams, of which only 2,500 currently generate electricity. This legislative effort ultimately resulted in Congress making a down payment of \$2.4 billion in the IJA for the 3Rs, including \$553.6M to the DOE for the newly created Section 247 program.

In the RFI, the DOE repeatedly seeks input and feedback on “ways to prioritize the funding” and “which improvements should receive the highest priority.” From the perspective of the organizations that worked closely with Congress to secure funding for the 243 and 247 programs in IJA, the hydroelectric incentive program under Section 247 was intended to fund all eligible activities until funds are expended. We do not believe, and it was not the intention at the time this proposal was crafted, that the DOE should make value judgments about what is more or less important across the eligible investment categories or comparing investments within the categories. In fact, the diverse coalition of groups supporting the *Twenty-First Century Dam Act* and the creation of Section 247 as part of the IJA recognized that all three sets of activities were equally important. This understanding served as the foundation for the unusual coalition of industry, environmental, tribal, and dam safety advocates and the basis for the broad, bipartisan support for Section 247 on Capitol Hill. For the reasons set forth below, we believe that establishing Section 247, similar to a competitive grant program that prioritizes some eligible activities over others would be contrary to congressional intent and could be challenging and time-consuming to implement. Below we detail our concerns with a competitive process for Section 247, and offer instead a straight-forward, two-step qualification process.

***The DOE must fund all eligible investments.***

Had Congress desired to prioritize one category of improvements over another, or certain activities within individual categories, it would have done so, but did not. Instead, Section 247(b) states: “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 all loading conditions (including static, hydrologic, and seismic conditions)..., and 3) environmental improvements....” The authorization of appropriations under section 247(d) remains “available until expended.”

Section 247(b) explicitly requires that the Secretary “shall” make incentive payments. Unless funds have been fully expended, we believe the DOE does not have authority to deny an incentive payment to an otherwise qualifying applicant. The statement in the RFI that “a qualified facility may be eligible to receive an incentive payment, issued by the Secretary...” appears at odds with the plain reading of the statute.

And, in fact, congressional support for the inclusion of this provision in the IIJA was grounded on the recognition that additional investment was needed in all three areas and that no one activity would be prioritized over another. As such, the DOE's RFI questions about how to prioritize between these categories would appear inconsistent with the explicit language and the legislative intent of this provision.

***A competitive grant program is at odds with the intent and structure of Section 247.***

There are three policy reasons why a competitive grant program is at odds with Section 247. First, the DOE is not best situated to choose the relative value of investments in grid resilience versus dam safety versus environmental improvements. As noted above, Congress recognized in enacting the IIJA that critical investment is needed in all three areas as the existing hydropower fleet ages.

Second, establishing a competitive grant process would undermine investment certainty. By definition, a competitive grant process means that some eligible projects get funded and other eligible projects do not, depending on the Department's judgment. The uncertainty created by such a competitive process will significantly reduce the program's effectiveness by discouraging eligible entities from applying for grants.

Finally, a competitive process is unwarranted since the incentive payment is limited to 30% of project costs, up to \$5 million. This requirement effectively creates a cost-share obligation of at least 70%. This cost-share requirement serves as a built-in, market-based mechanism that will ensure viable projects.

***A competitive grant program will delay the timely funding of qualified projects.***

We believe that structuring Section 247 similar to a competitive grant program will be administratively challenging, time-consuming and is inconsistent with the realities of the corporate budget cycle. Based on feedback that we have already received, interest in this incentive program is high. We anticipate that the DOE will receive hundreds of detailed applications for projects ranging from the simple to the very complex. It will take time and resources to review whether any given application meets the eligibility criteria.

Going beyond an eligibility screen to impose an additional, substantive review of the merits of each proposal with a comparative analysis to determine funding would appear administratively challenging and time-consuming. In short, we anticipate too many applications for the DOE to substantively compare applications and still get awards out in a timely manner. Any delays, and the additional uncertainty that would come with a comparative analysis based on the DOE's judgment, would also negatively impact corporate capital budget planning and decision making, particularly as there is already high internal competition for capital investment dollars.

**Five Recommendations for Organizing the Section 243 and Section 247 Hydroelectric Incentive Programs**

**1. All the DOE-determined eligible projects should receive funds without imposed prioritization.** In alignment with the statute, all capital improvements that meet the statutory eligibility requirements for the incentive programs, particularly for the new Section 247 program, should receive payments.

As discussed above, additional prioritization or comparison of proposed projects across the categories (grid resilience, dam safety, and environmental improvements) or within eligible categories (e.g. water quality projects vs. fish passage projects) is not warranted. We urge the DOE to design the Section 247 program to be as flexible and inclusive as possible.

The Section 243 and 247 programs should mirror the implementation of the Section 242 program, which has been operating successfully for several years. We encourage the DOE to create a check-list application, with supporting documentation, which will demonstrate an application, and the facility, are eligible according to the statute. See attached *Appendix A* for our proposal for a straightforward, two-step process and application details.

**2. The DOE should utilize 2 rounds of applications to disburse the \$553.6 million in Section 247 funding.** In alignment with the appropriations of the funding, there should be 2 rounds of funding applications. Half of the funds should be made available in the first round (\$276.8 million) with the remaining half available in the second round. Because we believe that all categories are equally important and that all eligible improvements should receive payment, the DOE should set minimum funding levels of 20 percent for each category. The remaining 40% of funding would be available to fund applications in any category. We believe the applications themselves (particularly with the 70% cost-share) will dictate the needs of the industry, with applicants seeking funding for their highest priority activities.

For example, under a 20 percent scenario, the DOE would hold a first round of applications for \$276.8 million of funding in 2023 with a minimum of \$55.36 million sought for each category (grid resilience, dam safety, and environmental improvements). The total of the per category levels would equal \$166.08 million, with the remaining 40 percent of the funding equaling \$110.72 million to be used in any category.

Because of the anticipated high level of response to the incentive programs, both Section 243 and 247, the programs may be oversubscribed. Should the DOE receive applications for projects in excess of the amount of funding available in the first round, we believe that the department should reduce awards for all applicants, similar to what it has done in the implementation of the Section 242 program. From the industry's perspective, the certainty of knowing eligible capital improvements will receive some grant – even if it is not the full amount – allows asset owners to secure financing and implement projects. In the case that a category is under-subscribed, but the program overall is oversubscribed, the applications in the under-subscribed category would receive full funding and the projects in the remaining categories would receive reduced awards.

**3. The incentive programs should be open to proposed projects as well as projects completed after November 15, 2021, with funding disbursed to successful applicants upon completion of the capital improvement.** The IIJA was signed into law by President Biden on November 15, 2021. We recommend that the DOE accept applications for projects that were completed after this date. For these already completed projects, award payments should be made as soon as possible after application approval, similar to the Section 242 program. For proposed projects, award payments should be made upon completion of the project. However, the determination of a successful application by the DOE should preserve the funding amount for the applicant for disbursement at the later date. This would provide certainty to the owner at the time of the application decision of the payment amount due and that it will be available and released upon project completion. “Payment upon completion” reduces the complexity of the incentive programs, minimizing the amount of post application monitoring and other compliance requirements by the DOE. At the same time, by allocating the funding to the successful applicant to be disbursed at a later date, the DOE would provide the certainty that owners seek along with financial institutions or other investors that may be involved in the financing of the improvement, while ensuring the project is successfully completed before funds are actually disbursed.

**4. The DOE should adopt a broad definition of eligible hydroelectric projects for both Section 243 and Section 247 programs.** Under the Section 243 language, the DOE is required to “make incentive payments to the owners or operators of hydroelectric facilities at existing dams...”<sup>[1]</sup> The text is broad and does not contain any restrictions related to jurisdiction under the Federal Energy Regulatory Commission (FERC) (e.g. FERC licenses) or by other agencies. As such, we believe that projects that are FERC licensed, FERC exempt projects, qualifying conduits under the Hydropower Regulatory Efficiency Act of 2013 (HREA), and any non-FERC jurisdictional projects regardless of when they were built, are eligible for the program.

Under Section 247, the language states that a “qualified hydroelectric facility” is one that is “...licensed by the Federal Energy Regulatory Commission...” or “...constructed, operated, or maintained pursuant to a permit or valid existing right-of-way granted prior to June 10, 1920.”<sup>[2]</sup> We recommend that the DOE interpret “license” in the Section 247 context to include projects that have received other types of FERC authorizations.<sup>[3]</sup> This includes FERC-issued exemptions as well as projects FERC has determined to be qualifying small conduit facilities under the Hydroelectric Regulatory Efficiency Act of 2013 (HREA). Holders of FERC small hydro exemptions are subject to FERC dam safety oversight as well as environmental protections set by federal and state fish and wildlife agencies. Small conduit exempted projects are similarly subject to oversight by federal and state fish and wildlife agencies. FERC must affirmatively certify both of these types of projects as meeting the qualifying criteria, which includes opportunity for public comment on the application. As such, it is unnecessary to limit the assistance under Section 247 to only those projects that have received a FERC license versus these other authorizations.

**5. The DOE should establish a streamlined, two-step process for implementing section 247 -** To avoid unnecessary practical and legal pitfalls, we suggest that the DOE adopt a streamlined,

two-step implementation process. The below proposal, while simplistic, is intended to illustrate an alternative approach that may be more efficient and avoid the difficulties inherent in prioritizing between eligible activities.

Step 1 would be pre-approval screening. All interested applicants would submit an application that 1) identifies the facility, proposes a specific activity, and explains (with appropriate documentation) why the proposal meets the eligibility requirements, and 2) provides projected capital investment expenditures (See Appendix A). The DOE would conduct a screening analysis to confirm eligibility. The DOE would provide notice of pre-authorization for an incentive payment to all projects determined to be eligible until funds have been fully allocated.

Step 2 would be the final grant disbursement. At this stage, applicants whose capital investments were pre-approved would provide documentation to show that they made the capital investments as indicated in their pre-authorization. They would also document their final costs and outline how, as a project within one of the qualifying categories, the final project will benefit the public. The DOE would then provide the incentive payment.

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Thank you for your consideration of our joint comments. We look forward to working with you and the team at the DOE's Grid Deployment Office as we work together to maximize the opportunity provided by the hydroelectric production incentives of section 247 of the Bipartisan Infrastructure Law.<sup>1</sup>

For questions regarding this proposal, please contact either Will Pisano at the National Hydropower Association ([will@hydro.org](mailto:will@hydro.org)) or Shannon Ames at the Low Impact Hydropower Institute ([sames@lowimpacthydro.org](mailto:sames@lowimpacthydro.org)).

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<sup>1</sup> These comments do not address the questions regarding environmental justice or labor but acknowledge the importance of these issues. We encourage the DOE to give careful consideration to these issues when implementing the program.

**APPENDIX A**  
**OUTLINE OF SECTION 247 TWO STEP APPLICATION PROCESS**  
**FOR ILLUSTRATIVE PURPOSES ONLY**

Step One: Pre-Approval of Activity Qualification and Acceptance

Facility Qualifications:

1. Is the project FERC licensed or exempted?
  - a. Demonstration must include:
    - i. Attestation that facility is licensed or exempted, along with license number or exemption number and electronic link or other documentation as appropriate.
2. Was the facility in place before Nov 2021
  - a. Demonstration must include:
    - i. Attestation of when facility was commissioned, along with electronic link or other documentation as appropriate.
3. Is the facility in compliance with all laws?
  - a. Demonstration must include:
    - i. Permit – electronic link or other documentation as appropriate; or
    - ii. Relevant documents from regulatory agencies; and
    - iii. Attestation from applicant of lack of violations
4. If not in compliance, demonstrate how the project would bring it into compliance
  - a. Demonstration could include:
    - i. Narrative from applicant; and
    - ii. Relevant documents from regulatory agencies, as appropriate

Activity Qualifications:

1. Location of Activity
2. Description of Activity
  - a. Activity Abstract – short (3-sentence) description of project activities and expected outcomes.
  - b. Narrative describing activity, including explanation of which category or categories (grid resiliency, dam safety, environmental improvements) and how the activity proposed serves the public benefit by being a part of the category (grid resiliency, dam safety, environmental improvements).
3. Does the activity have all the required permits and /or license amendments?
  - a. Narrative describing required permits and/or license amendments and status.
  - b. Electronic link to permit or other documentation as appropriation.
4. If the activity is not yet fully permitted,
  - a. Describe the path for receiving all necessary permits
  - b. Describe the timeframe
  - c. Where public participation and/or other consultation is required, describe outreach efforts to date
  - d. Other additional support and/or information as appropriate
5. Activity Budget
  - a. Provide copy of budget
  - b. Provide a short budget narrative describing and justifying budget items
  - c. Include copies of bids/contracts for service if available

## Step Two: Approval of Payment at Conclusion of Activity

1. Demonstrate the Activity was completed as expected
  - a. Narrative describing project activities, outcomes, and public benefits as a part of one of the qualifying categories
  - b. Commissioning documentation, etc.
2. Provide demonstration of final costs
  - a. Financial statement showing budget versus actual
  - b. Bills, invoices
3. Formal request for funds
  - a. Invoice demonstrating 30% of Activity costs