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Dated: July 31, 2009.

Ginger Potter,

Designated Federal Officer.

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ENVIRONMENTAL PROTECTION AGENCY

[FRL-8939-1]

Notice of Revised Nationwide Waiver of Section 1605 (Buy American Requirement) of American Recovery and Reinvestment Act of 2009 (ARRA) Based on Public Interest for *de minimis* Incidental Components of Projects Financed Through the Clean or Drinking Water State Revolving Funds Using Assistance Provided Under ARRA

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA is hereby granting a nationwide waiver of the Buy American requirements of ARRA Section 1605 under the authority of Section 1605(b)(1) (public interest waiver) for *de minimis* incidental components of eligible water infrastructure projects funded by ARRA. This action revises the terms under which incidental components qualify for coverage under the public interest *de minimis* waiver signed and effective on May 22, 2009, and permits the use of non-domestic iron, steel, and manufactured goods when they occur in *de minimis* incidental components of such projects funded by ARRA that may otherwise be prohibited under section 1605(a).

DATES: *Effective Date:* July 24, 2009.

FOR FURTHER INFORMATION CONTACT:

Jordan Dorfman, Attorney-Advisor, Office of Wastewater Management, (202) 564-0614, or Philip Metzger, Attorney Advisor, Office of Ground Water and Drinking Water, (202) 564-3776, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION: In accordance with ARRA Section 1605(c), the EPA hereby provides notice that it is granting a nationwide waiver of the requirements of section 1605(a) of Public Law 111-5, Buy American requirements, based on the public interest authority of section 1605(b)(1), to allow the use of non-domestic iron,

steel, and manufactured goods when they occur in *de minimis* incidental components of eligible projects for which a Clean or Drinking Water State Revolving Fund (SRF) has concluded or will conclude an assistance agreement using ARRA funds where such components cumulatively comprise no more than a total of 5 percent of the total cost of the materials used in and incorporated into a project.

Among the General Provisions of the American Recovery and Reinvestment Act of 2009 (ARRA), Section 1605(a) requires that “all of the iron, steel, and manufactured goods used in” a public works project built with ARRA funds must be produced in the United States, unless the head of the respective Federal department or agency determines it necessary to waive this requirement based on findings set forth in Section 1605(b). In addition, expeditious construction of SRF projects is made a high priority by a provision in the ARRA Title VII appropriations heading for the SRFs, which states “[t]hat the Administrator shall reallocate funds * * * where projects are not under contract or construction within 12 months of” ARRA enactment (February 17, 2010). The finding relevant to this waiver is that “applying [ARRA’s Buy American requirement] would be inconsistent with the public interest” (1605(b)(1)).

EPA originally issued this waiver on May 22, 2009. This notice revises the terms under which that waiver may be applied, and, in accordance with the requirements of Section 1605(c) that all waivers granted must include a “detailed written justification”, adds new information and repeats relevant information that continues to justify this revised waiver.

In implementing ARRA section 1605, EPA must ensure that the section’s requirements are applied consistent with congressional intent in adopting this section and in the broader context of the purposes, objectives, and other provisions of ARRA applicable to projects funded under the Clean Drinking Water State Revolving Funds (SRF), particularly considering the SRFs’ 12 month “contract or construction” requirement. Further, in the context of ARRA’s SRF “contract or construction” deadline, Congress’ overarching directive to

[t]he President and the heads of Federal departments and agencies [is that they] shall manage and expend the funds made available in this Act so as to achieve the purposes [of this Act], including commencing expenditures and activities as quickly as possible consistent with prudent management. [ARRA Section 3(b)]

Water infrastructure projects typically contain a relatively small number of high-cost components incorporated into the project that are iron, steel, and manufactured goods, such as pipe, tanks, pumps, motors, instrumentation and control equipment, treatment process equipment, and relevant materials to build structures for such facilities as treatment plants, pumping stations, pipe networks, *etc.* In bid solicitations for a project, these high-cost components are generally described in detail via project specific technical specifications. For these major components, utility owners and their contractors are generally familiar with the conditions of availability, the potential alternatives for each detailed specification, the approximate cost, and the country of manufacture of the available components.

Every water infrastructure project also involves the use of literally thousands of miscellaneous, generally low-cost components that are essential for, but incidental to, the construction and are incorporated into the physical structure of the project, such as nuts, bolts, other fasteners, tubing, gaskets, *etc.* For many of these incidental components, the country of manufacture and the availability of alternatives is not always readily or reasonably identifiable prior to procurement in the normal course of business; for other incidental components, the country of manufacture may be known but the miscellaneous character in conjunction with the low cost, individually and (in total) as typically procured in bulk, mark them as properly incidental.

EPA undertook multiple inquiries to identify the approximate scope of these *de minimis* incidental components within water infrastructure projects. EPA consulted informally with many major associations representing equipment manufacturers and suppliers, construction contractors, consulting engineers, and water and wastewater utilities, and a contractor performed targeted interviews with several well-established water infrastructure contractors and firms who work in a variety of project sizes, and regional and demographic settings. The contractor asked the following questions:

- What percentage of total project costs were consumables or incidental costs?
- What percentage of materials costs were consumables or incidental costs?
- Did these percentages vary by type of project (*drinking water vs. wastewater treatment plant vs. pipe*)?

The responses were consistent across the variety of settings and project types, and indicated that the percentage of

total costs for drinking water or wastewater infrastructure projects represented by these incidental components is generally not in excess of 5 percent of the total cost of the materials used in and incorporated into a project. In drafting this waiver, EPA has considered the *de minimis* proportion of project costs generally represented by each individual type of these incidental components within the hundreds or thousands of types of such components comprising those percentages, the fact that these types of incidental components are obtained by contractors in many different ways from many different sources, and the disproportionate cost and delay that would be imposed on projects if EPA did not issue this waiver.

Subsequent to the issuance of the original public interest *de minimis* waiver on May 22, 2009, EPA has received many, similar waiver requests from numerous assistance recipients (located in a few States that have issued a substantial number of SRF assistance agreements funded by ARRA) on a variety of low-cost components whose national origin can be identified. Even as typically procured in bulk (several dozen for small projects), the total cost of these components is much less than 5 percent of the total materials cost of these projects. These types of components would properly be considered subject to the previous nationwide public interest *de minimis* waiver but for the requirement in that waiver that the national origin of these low-cost, miscellaneous components “not [be] readily or reasonably identifiable prior to procurement in the normal course of business.” It also appears that when EPA inquired of various parties to develop the percentage limit on the waiver, the percentages were identified with the inclusion of these types of components in mind.

Due to the diverse characteristics of the specific configurations of these individually low-cost components, the analysis and consideration of waiver requests for them—and particularly of ascertaining whether U.S.-made products exist or can be made to meet these diverse configurations—is already becoming a demanding and time-consuming task far out of proportion to the percentage of total project materials cost they comprise. As a rapidly increasing number of States begin to issue numerous assistance agreements, EPA recognizes the prospect of considering dozens of differently framed waivers in most if not all States for each of these types of components, in addition to those for major components

that are most appropriately the focus of the waiver process set forth in Section 1605. Because the established practices of specification and use of these low-cost components appear to be widely varied by Region and to some extent by State and individual recipient, it is unlikely to be practicable to formulate categorical waivers for such components, even if justified. If this pattern of waiver requests is allowed to expand to a national scale, the resources and capacities of the waiver program, for EPA and assistance recipients alike, will be so consumed by necessary analysis of the minute variations in circumstances among these low-cost items that this will become a serious obstacle to ensuring that all recipients will be able to sign construction contracts by February 17, 2010.

Assistance recipients who do not have their compliance with respect to section 1605 clarified may in many cases be unable to sign contracts by the February 17, 2010 date, causing these communities to lose their ARRA assistance and requiring EPA to reallocate to other States all ARRA funds not under contract by that date. This in turn will lead to further delay in placing the reallocated funds into other projects, which is inconsistent with the public interest and the intent and purpose of ARRA. It would be further inconsistent with ARRA to deprive of ARRA assistance these States and communities whose funds are reallocated due to a waiver process that would have become backlogged under the complexity of investigating waiver requests for incidental components costing a fraction of the 5 percent of the materials cost of a project.

Under these circumstances, EPA must place the highest priority on enabling States and their assistance recipients to meet this February 17, 2010 deadline set by Congress for the SRFs specifically. As the situations described above would be effectively addressed by a more comprehensive application of the *de minimis* waiver, EPA has found that it would be inconsistent with the public interest—and particularly with ARRA’s directives to ensure expeditious SRF construction consistent with prudent management, as cited above—to apply the Buy American requirement to incidental components when they in total comprise no more than 5 percent of the total cost of the materials used in and incorporated into a project. Accordingly, EPA is hereby issuing a national waiver from the requirements of ARRA Section 1605(a) for any components described above as incidental that comprise in total a *de minimis* amount of the project, that is,

for any such incidental components up to a limit of no more than 5 percent of the total cost of the materials used in and incorporated into a project.

Assistance recipients who wish to use this waiver should in consultation with their contractors determine the items to be covered by this waiver, must retain relevant documentation as to those items in their project files, and must summarize in reports to the State the types and/or categories of items to which this waiver is applied, the total cost of incidental components covered by the waiver for each type or category, and the calculations by which they determined the total cost of materials used in and incorporated into the project.

In using this waiver, assistance recipients should consider that all SRF-funded construction projects by definition require the expenditure of a certain amount of project funds on the literal “nuts and bolts”-type components whose origins cannot readily be identified prior to procurement. As described above, EPA has determined the 5 percent limit based on research and informed professional judgment as to the maximum total amount of incidental goods used in most water and wastewater projects. In a few, exceptional cases, assistance recipients using this waiver may have multiple types of low-cost components which, when combined and in conjunction with those literal “nuts and bolts”-type components, may total more than 5 percent. Assistance recipients in such cases will have to choose which of these incidental components will be covered by the waiver and which will not, and will include the type and amount of such items covered in the reports to the State as required above. Components which the recipient is unable to include within the 5 percent limit of this waiver must comply with the requirements of section 1605 by appropriate means other than coverage under this waiver.

Therefore, for the foregoing reasons, imposing ARRA’s Buy American requirements for the category of *de minimis* incidental components described herein is not in the public interest. This supplementary information constitutes the “detailed written justification” required by Section 1605(c) for waivers “based on a finding under subsection (b).”

Authority: Public Law 111–5, section 1605.

Dated: July 24, 2009.

Michael H. Shapiro,
Acting Assistant Administrator for Water.
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