ENVIRONMENTAL PROTECTION AGENCY

[FRL XXXX-X]

Notice of nationwide waiver of Section 1605 (Buy American requirement) of American Recovery and Reinvestment Act of 2009 (ARRA) 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 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).

EFFECTIVE DATE: May 22, 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 P.L. 111-5, Buy American requirements, allowing 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 comprise no more than 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)).

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 and Drinking Water State Revolving Funds (SRF), particularly considering the SRFs' 12 month "contract or construction" requirement.

Further, also 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 clearly described via project specific technical specifications. For these major components, utility owners and their contractors are generally familiar with the conditions of availability, the approximate cost, and the country of manufacture of 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. These incidental components are subject to the Buy American requirement of ARRA Section 1605(a), as stated above.

In contrast with the situation applicable to major components with regard to country of manufacture, availability, and procurement process, the situation applicable to these incidental components is one where the country of manufacture and the availability of alternatives are not readily or reasonably identifiable prior to procurement in the normal course of business. Particular under the time constraints outlined above, it would be laborious, likely unproductive as to feasible alternatives, and disproportionate to the costs and time involved for an owner or their contractor to pursue such inquiries.

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 comprised 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.

Under such specific circumstances associated with these particular types of incidental components, 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 require that the national origins of these components be identified in compliance with Section 1605(a). Accordingly, EPA is hereby issuing a national waiver from the requirements of ARRA Section 1605(a) for the incidental components described above as a *de minimis* factor in the project, where such components comprise 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.

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: P.L. 111-5, section 1605.

Date: 5/22/09

Michael H. Shapiro

Acting Assistant Administrator for Water.