ENVIRONMENTAL PROTECTION AGENCY

[FRL XXXX-X]

Notice of nationwide waiver of Section 1605 (Buy America requirement) of American Recovery and Reinvestment Act of 2009 (ARRA) for projects that solicited bids on or after October 1, 2008 and prior to February 17, 2009 that are 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 America requirements of ARRA Section 1605 under the authority of Section 1605(b)(1) (public interest waiver) for eligible projects that solicited bids on or after October 1, 2008, and prior to February 17, 2009, the date of enactment of ARRA, and that did so in reasonable and prudent, specific anticipation of ARRA funding, or any other source of timely funding. This action permits the use of non-domestic iron, steel, and manufactured goods in 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, for eligible projects for which a Clean or Drinking Water State Revolving Fund will conclude or has concluded an assistance agreement using ARRA funds for projects that solicited bids on or after October 1, 2008 and prior to February 17, 2009.

The basis for the nationwide waiver is the requirement in the SRF appropriations heading of ARRA Title VII for giving priority to those projects that are ready to proceed to construction within 12 months of the enactment of ARRA, as follows:

> *That, notwithstanding the priority rankings they would otherwise receive under each program, priority for funds appropriated herein shall be given to projects on a State priority list that are ready to proceed to construction within 12 months of the date of enactment of this Act.*

This waiver also relies on the requirement in the SRF appropriations heading that all funds must be under contract or construction within 12 months of the enactment of ARRA, as follows:

> *That the Administrator shall reallocate funds appropriated herein for the Clean and Drinking Water State Revolving Funds (Revolving Funds) that are not under contract or construction within 12 months of the date of enactment of this Act.*

As authorized by the Federal Water Pollution Control Act and the Safe Drinking Water Act, base State programs (not appropriated under ARRA) are not required to meet a deadline for having appropriated funds under contract or under construction. States are required to commit funds appropriated to projects within 1 year. Binding commitments, in the context of the SRF programs, are typically executed in the form of loan agreements. Loan agreements, however, do not carry a particular statutory deadline for assistance recipients to enter contracts or to begin construction. For appropriations under ARRA, however, States are required to ensure that all funds are under contract or construction within 1 year of enactment of ARRA.

In order to meet the special requirements authorized by ARRA, most importantly the requirement to have all funds under contract or construction within 12 months of enactment, States began the development of priority lists and intended use plans (IUP) prior to, and in anticipation of, passage of the Act. Such advance planning was considered crucial by both States and EPA. EPA actively encouraged such planning in anticipation of possible deadlines for construction. Those States that effectively planned for such an eventuality took the additional step of encouraging potential assistance recipients to begin the planning and design phase of project construction, and in some cases, actually solicit bids on the plans and designs. Projects that have solicited bids are in most cases considered to be in a ready-to-proceed category as among projects listed on State IUPs. Under the exceptional emphasis on expeditious construction of ARRA's SRF language quoted above, States will generally give the highest priority for ARRA SRF funding to eligible projects that clearly qualify to be in a ready-to-proceed category. This statutory language also confirms the appropriateness of proactive steps States had taken

to encourage SRF projects' readiness for expeditious construction. Moreover, the ARRA SRF language cited in EPA's nationwide waiver for refinanced projects specified October 1, 2008 as the opening of the window within which initiation of relevant action can properly be considered done "in anticipation of ARRA" (74 FR 15722).

To be included under this waiver, potential assistance recipients must show a verifiable basis on which they believed it was reasonable and prudent to solicit bids for these projects prior to concluding an assistance agreement with the State SRF. Such verification will show some objective basis under which these actions were reasonably and prudently undertaken in specific anticipation of ARRA funding, or any other source of timely funding. Such action may include an affirmative communication from a funding source, such as a binding commitment, high placement on a priority list, or other indicative and verifiable communication from an SRF or other government funding source, or regarding any affirmative steps taken to secure private bond financing from an appropriate industry entity. Any such objective verification would show that bid solicitations were undertaken reasonably and prudently, in order to fulfill Congress' intent in passing ARRA and in particular to create jobs and spur economic recovery "by commencing activities and expenditures as expeditiously as possible" (See ARRA Section 3(b)).

The imposition of ARRA's Buy American requirements on projects eligible for SRF assistance whose assistance applicants had solicited bids on or after October 1, 2008 and prior to February 17, 2009, the date when those requirements were imposed, would require the time-consuming rebidding of those projects and potentially a redesign.

Specifically, those projects that can show a reasonable and prudent basis to solicit bids prior to the passage of the ARRA would be harmed by the imposition of these requirements post bid solicitation. This imposition would particularly conflict with the intentions and objectives of the bases on which those projects reasonably and prudently solicited bids for project construction prior to the passage of the ARRA: based on an affirmative communication by a State SRF program, or in order to meet requirements set forth or identified by a financing agency or source of funds in order to ensure receipt of financing for the project. This would clearly frustrate Congress' expressed intent for expeditious construction of projects supported by the State Revolving Funds or that had otherwise made themselves ready to proceed, and may imperil portions of States' ARRA funding if it renders them unable to meet ARRA's stringent time requirements for the entirety of their SRF appropriations. These projects are most likely to proceed to construction in a relatively short period of time, thereby creating jobs and stimulating the economy.

ARRA Section 1605(b)(1) authorized the Administrator to waive the requirements of Section 1605(a) in any case or category of cases in which she finds that applying subsection (a) would be inconsistent with the public interest. Therefore, for the foregoing reasons, applying Buy America requirements to projects that reasonably and prudently solicited bids prior to the passage of ARRA in specific anticipation of ARRA funding, or any other source of timely funding, would be inconsistent with the public interest.

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

Date: 5/22/09

Michael Shapiro

Michael Shapiro

Acting Assistant Administrator for Water