

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 projects with debt incurred on or after October 1, 2008 and before February 17, 2009 that are refinanced 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 eligible projects for which debt was incurred on or after October 1, 2008 and before February 17, 2009, the date of enactment of ARRA. 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: March XX, 2009.

FOR FURTHER INFORMATION CONTACT: Cynthia Dougherty, Director, Office of Ground Water and Drinking Water, (202) 564-3750 or Jim Hanlon, Director, Office of Wastewater Management, (202) 564-0748, 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 (SRF) has concluded or will conclude an assistance agreement using ARRA funds to refinance a debt incurred on or after October 1, 2008, and before February 17, 2009.

The basis for the nationwide waiver is the authorization in the SRF appropriations heading of ARRA for refinancing using ARRA funds of certain debt obligations, as follows:

That notwithstanding section 603(d)(2) of the Federal Water Pollution Control Act and section 1452(f)(2) of the Safe Drinking Water Act, funds may be used to buy, refinance or restructure the debt obligations of eligible recipients only where such debt was incurred on or after October 1, 2008.

In the ordinary course of SRF business, refinancing of any existing debt obligations of assistance recipients eligible for refinancing is an allowable type of assistance under the sections referenced in the ARRA provision above, largely irrespective of when the debt was incurred. As the purpose of the SRF provisions of ARRA was to stimulate economic recovery by funding current infrastructure construction, the purpose of this ARRA provision was not to provide more advantageous financing for any projects whose construction had substantially already occurred. Rather, with the House of

Representatives' passage of H.R. 7110 in late September 2008 giving notice of Congress' strong interest in economic recovery legislation, this refinancing provision was intended to include within the favorable financing terms of ARRA, eligible projects undertaken after that time (and within the Fiscal Year 2009 timeframe of ARRA as a supplemental appropriation) in anticipation of ARRA.

Moreover, as the debate on the legislation that ultimately became ARRA continued through November and December, 2008 into January and February, 2009, States and utilities increasingly reported that action on eligible projects that State SRFs wished to support and for which there was available funding under the base SRF program were being deferred, in the hope of obtaining more advantageous financing terms from the ARRA appropriation. In part because this deferral of financing and construction for genuinely "shovel ready" projects was in direct conflict with the most fundamental economic recovery purposes of ARRA, Congress adopted this refinancing provision to enable eligible projects which began creating jobs after October 1, 2008, to receive ARRA funding to recognize and support those projects' contribution to economic recovery. This is confirmed in the declaration of the Joint Explanatory Statement of the Conference (H. Rpt. 111-16, at 444) that "[t]o ensure that funds are used to create jobs, the bill also limits the use of the revolving funds to buy, refinance, or restructure debt incurred prior to October 1, 2008."

The proponents of projects that fall within the scope of this SRF refinancing provision for ARRA had, in order to obtain the initial financing, specified designs which may include elements which have limited or often no domestic availability, many may have solicited

bids from prospective contractors, and some subsequently awarded construction contracts, and in some cases began construction, prior to the February 17, 2009, enactment of ARRA. All of these actions were in fulfillment of Congress' intention in passing ARRA and in particular, adopting this SRF refinancing provision, to create jobs and spur economic recovery "by commencing activities and expenditures as expeditiously as possible." (See ARRA Section 3.)

Moreover, in all cases of initial financing prior to February 17, the project proponents were proceeding in good faith and without fair notice as to the existence and statutory scope of any Buy American requirement.

The imposition of ARRA's Buy American requirements on projects eligible for SRF assistance whose assistance applicants had already obtained financing on or after October 1, 2008 and prior to February 17, 2009, the date on which those requirements were imposed, would in all cases entail time-consuming delay and thus displace the "shovel ready" status of these projects. This would frustrate Congress' specific and explicit intent to allow for the use of ARRA funds to refinance those projects through the SRFs, as well as for expeditious construction generally. 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.

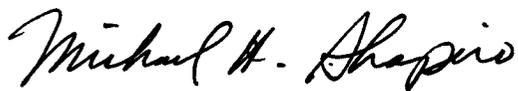
Therefore, for the foregoing reasons, imposing ARRA's Buy American requirements for the category of cases described herein is not in the public interest. This supplementary

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:

APR - 1 2009

A handwritten signature in cursive script that reads "Michael H. Shapiro".

Michael H. Shapiro,

Acting Assistant Administrator for Water.

BILLING CODE XXXX-XX-X.