

Notices

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This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Notice of Buy American Exception Under the American Recovery and Reinvestment Act of 2009

AGENCY: Rural Utilities Service, U.S. Department of Agriculture.

ACTION: Notice.

SUMMARY: The Rural Utilities Service (RUS) hereby gives notice of a nationwide exception to the Buy American requirements of Section 1605 of the American Recovery and Reinvestment Act of 2009 (“ARRA”) under the authority of Section 1605(b)(1) (public interest waiver) for *de minimis* incidental components of eligible water infrastructure projects using assistance provided under ARRA. This action permits the use of non-domestic iron, steel and manufactured goods when they occur in *de minimis* incidental components that may otherwise be prohibited under Section 1605(a). As used in this Notice, “*de minimis* incidental components” means those components otherwise prohibited under Section 1605(a) that cumulatively comprise no more than a total of 5 percent of the total cost of the materials used in a project funded in whole or in part with ARRA assistance.

DATES: *Effective Date:* September 25, 2009.

ADDRESSES: Send any correspondence regarding this notice to Jacqueline M. Ponti-Lazaruk, Assistant Administrator, Water and Environmental Programs, Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Washington, DC 20250–1548.

FOR FURTHER INFORMATION CONTACT: Benjamin Shuman, Senior Environmental Engineer, Engineering and Environmental Staff, (202) 720–1784, Rural Utilities Service, U.S.

Department of Agriculture, 1400 Independence Avenue, SW., Washington, DC 20250–1571.

SUPPLEMENTARY INFORMATION: In accordance with section 1605(c) of ARRA and Section 176.80 of the rules of the Office of Management and Budget (OMB) (2 CFR 176.80), RUS hereby provides notice that it is granting a nationwide exception to Section 1605 of the Recovery Act with respect to *de minimis* incidental components of eligible water infrastructure projects funded under the ARRA. The basis for this waiver is a public interest determination pursuant to Section 1605(b)(1) of ARRA.

I. Background

The American Recovery and Reinvestment Act of 2009 made available \$3,672,475,732 to RUS to make direct loans and grants for rural water, wastewater and waste disposal programs authorized by Sections 306 and 310B and described in Section 381E(d)(2) of the Consolidated Farm and Rural Development Act. Section 1605(a) of ARRA, the “Buy American” provision, states that “none of the funds appropriated or otherwise made available by this Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel and manufactured goods used in the project are produced in the United States.”

Section 1605(b) of ARRA authorizes the head of a Federal department or agency to waive the Buy American provision by one of the following three determinations: (1) Applying the Buy American provision would be inconsistent with the public interest; (2) the iron, steel, and relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) the inclusion of the iron, steel, and manufactured goods produced in the United States will increase the cost of the project by more than 25 percent. If a determination is made to waive the requirements of Section 1605(a) based on a finding under Section 1605(b), then Section 1605(c) requires the head of the department or agency to publish a detailed justification in the **Federal Register** as to why the provision is being waived. Finally, Section 1605(d)

requires that the Buy American provision must be applied in a manner consistent with the United States’ obligations under international agreements.

II. Public Interest Finding

RUS has determined that, as applied to water and wastewater projects, the application of the Buy American restrictions to *de minimis* situations would be inconsistent with the public interest.

Water and wastewater 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 facilities such as treatment plants, pumping stations and pipe networks. In bid solicitations for water and wastewater projects, these high-cost components are generally described in detail in project-specific technical specifications, and utility owners and their contractors are generally familiar with the conditions of availability, the potential alternatives for each detailed specification, the approximate cost and, most relevant to this Notice, the country of manufacture of such components.

Every water or wastewater infrastructure project also involves the use of thousands of miscellaneous, generally low-cost components that are essential for, but incidental to, construction of the project. During construction, these components (for example, nuts, bolts, fasteners, tubing, and gaskets), are incorporated into the physical structure of the project. For many of these incidental components, the country of manufacture and the availability of alternatives are not always readily or reasonably identifiable. More importantly, the miscellaneous character of these components, together with their low cost (both individually and when procured in bulk), characterize them as incidental to the facility or project.

RUS finds that it would be inconsistent with the public interest 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. While individual components may have the

same function (e.g., brackets), the specific manufacturer and configuration may vary from project to project, making the analysis and consideration of individual waiver requests for them, including determining whether or not U.S. made products exist, is expected to be time-consuming and labor intensive far out of proportion to the percentage of total project materials they comprise. Further, since the specific use of these low-cost components can be expected to be widely varied, formulating categorical waivers for specific types of components would be impractical. Because the situations described above, i.e. a high number of low-cost, miscellaneous components, can be effectively addressed by a comprehensive application of a nationwide *de minimis* waiver, RUS finds that it would be inconsistent with the public interest 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.

In some instances, the Rural Utilities Service and the Environmental Protection Agency's (EPA) Clean Drinking Water State Revolving Funds (SRF) program jointly fund water infrastructure projects. The EPA undertook inquiries to identify the approximate scope of incidental components within its SRF water infrastructure projects. The responses were consistent and indicated that the percentage of total costs for drinking water or wastewater treatment infrastructure projects represented by these incidental components is generally not in excess of 5 percent of the total costs of the materials used in and incorporated into a project.

As a result of its research and analysis, EPA published two **Federal Register** notices of *de minimis* waivers. The first was published on Tuesday, June 2, 2009 (FR Vol. 74, No. 104, pp. 26398 and 26399), and set forth the EPA's determination with respect to a public interest finding on *de minimis*. The second notice, which revised the first, was published on Monday, August 10, 2009 (FR Vol. 74, No. 152, pp. 39959 and 39960). By these waivers the EPA has also determined that imposing ARRA's Buy American requirements for the category of *de minimis* incidental components is not in the public interest.

While the authorizing statutes and funding sources for the EPA and RUS borrowers are different, the types of projects that EPA finances under its SRF program are substantially similar in size, scope and purpose as those funded by RUS and, as stated above, some

projects are jointly funded by RUS and EPA. The Rural Utilities Service has decades of experience in financing water and wastewater projects in rural America and shares the EPA's rationale with respect to incidental components used in similar projects. With respect to jointly-funded projects, it is desirable to avoid disparate treatment of components based on whether or not ARRA funds come from EPA or RUS. Section 1605 should be administered consistently, both within a particular Federal agency and, to the extent possible, between agencies. Promoting consistent treatment and avoiding unnecessary delays in committing ARRA financing to projects around the country are crucial to the success of ARRA. Requiring individual waivers for incidental components would be time prohibitive and overly burdensome for applicants and RUS. The purpose of ARRA is to stimulate economic recovery by funding current infrastructure construction, not to delay projects that are "shovel ready." Therefore, a *de minimis* waiver of incidental components totaling no more than 5 percent of total project costs is in the public interest.

III. Waiver

Based on the public interest finding discussed above and pursuant to Section 1605(c), USDA hereby issues a national waiver from the requirements of ARRA Section 1605 for any incidental components of the type described above that comprise in total a *de minimis* amount of the project, specifically, 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 elect to use this waiver shall, in consultation with their contractors, determine the items to be covered by this waiver, retain relevant documentation as to those items in their project files, and be able to summarize in reports to RUS, if so requested, 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 must consider that there may be circumstances where there are multiple types of low-cost components which, when combined with the incidental components described above, 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. Components that the recipient is unable to include within the 5 percent limit of this waiver must comply with the requirements of section 1605 of ARRA by appropriate means other than reliance on this waiver.

Further, as described above, in some cases RUS and EPA jointly fund projects. Both RUS and EPA have issued *de minimis* waivers that have a cap of a total of 5 percent of project costs. In the case of a jointly funded project, these waivers shall not be combined to create a waiver of greater than 5 percent of total project costs.

This supplementary information constitutes the "detailed written justification" required by Section 1605(c) of ARRA and Section 176.80 of the Office of Management and Budget's rules for waivers of the Buy American provisions.

Authority: Public Law 111-5, Section 1605.

Dated: September 21, 2009.

Thomas J. Vilsack,
Secretary.

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DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

Prop Canyon Watershed, Site 1 (Big Draw Dam), Cibola County, NM

AGENCY: Natural Resources Conservation Service, USDA.

ACTION: Notice of a Finding of No Significant Impact.

SUMMARY: Pursuant to Section 102 (2) (C) of the National Environmental Policy Act of 1969, the Council on Environmental Quality Regulations (40 CFR part 1500); and the Natural Resources Conservation Service Regulations (7 CFR part 650); the Natural Resources Conservation Service, U. S. Department of Agriculture, gives notice that an environmental impact statement is not being prepared for the Prop Canyon Watershed, Site 1, Grant County, New Mexico.

FOR FURTHER INFORMATION CONTACT: Roger Ford, State Conservation Engineer, Natural Resources Conservation Service, 6200 Jefferson Street, NE., Albuquerque, New Mexico 87109, Telephone 505-761-4430, E-mail roger.ford@nm.usda.gov.