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Complying with ARRA Buy American Provisions for SRF-Funded Projects

June 22, 2009

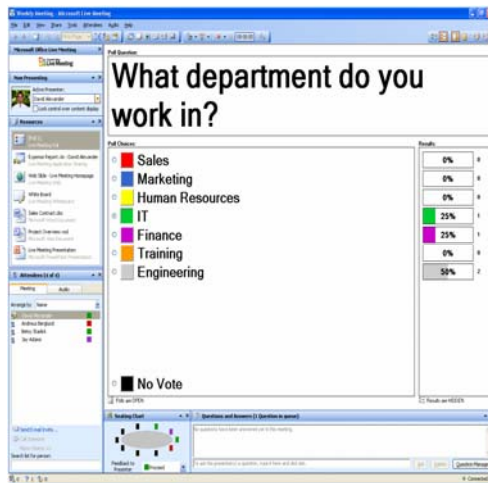


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Getting to Know Live Meeting



- Having problems with the audio or Web portion of today's event: Contact Customer Care by pressing *0 on your telephone keypad
- Press "control H" on your keyboard to toggle your screen between regular view and expanded view
- Want to submit a question? Send it to us via the Question and Answer console at any time
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Please Note

- Slides from this webcast, as well as previous webcasts, will be posted on EPA's recovery website:
www.epa.gov/water/eparecovery/
- Questions and Answers specific to the Buy American Provisions will also be posted soon



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Polling Question

- **How many folks do you have on the line with you today?**
 - A. 1-2
 - B. 2-4
 - C. 4-6
 - D. 6-10
 - E. 10 or more



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Polling Question

- **Which of the following best describes your role?**
 - A. Assistance Recipient/Utility
 - B. Contractor
 - C. Consultant
 - D. Manufacturer
 - E. State or Federal Government



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Polling Question

- **What is your biggest concern about the Buy American Provisions at this time?**
 - A. Waiver Request Process
 - B. Documentation and Compliance
 - C. Determination if a good is U.S.-produced
 - D. Lack of Availability of U.S.-produced goods



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Presenters for Today...

- Peter Shanaghan, Team Leader, DWSRF Team, U.S. EPA
- Bob Bastian, Senior Environmental Scientist, CWSRF Team, U.S. EPA

Additional Resources to Answer Questions...

Bill Anderson	–	Assoc Division Director, MSD/OWM, U.S. EPA
Jordan Dorfman	–	Attorney-Advisor, CWSRF Team, U.S. EPA
Elizabeth Corr	–	Assoc Division Director, DWPD/OGWDW, U.S. EPA
Phil Metzger	–	Attorney-Advisor, DWSRF Team, U.S. EPA
Kiri Kroner	–	Program Analyst, DWSRF Team, U.S. EPA



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OVERVIEW OF THE AMERICAN RECOVERY AND REINVESTMENT ACT (ARRA) OF 2009



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ARRA in the SRF Programs

- **Solid history of success**
 - Effective leveraging of Federal investment
 - Financial integrity
 - State leadership
 - Building infrastructure that delivers long-term environmental, public health and economic benefits
- **ARRA presents a new challenge**
 - Rapid assistance to “ready to construct” projects
 - Create/Preserve jobs
 - Provide additional subsidy to assist those impacted by recession
 - “Buy American”
 - Green projects
 - Davis-Bacon wage rates
 - Unprecedented transparency
 - Deadlines/Urgency



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SRF Provisions of ARRA

- Appropriation
 - DWSRF \$2B
 - CWSRF \$4B
- Unique provisions of ARRA that differ from base SRF program
 - Key objective is to preserve and create jobs and promote economic recovery
 - “Buy American” requirement for iron, steel, & manufactured goods
 - Davis-Bacon wage rates
 - 50% of funds for additional subsidy
 - 20% of funds for “green” projects
 - Within 1 year of enactment (buy 2/17/10), all funds must be committed to projects under construction or having awarded contracts for construction



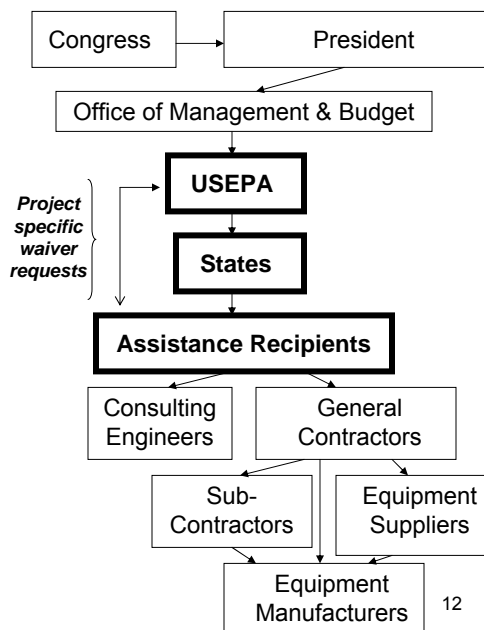
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Understanding Roles & Responsibilities Under ARRA

EPA's focus is on the Capitalization Grant Agreement with the States

State focus is on Assistance Agreement relationship with assistance recipients

Assistance Recipients are responsible for compliance with “Buy American” provisions of ARRA



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Relationship of ARRA to Base SRF Programs

- “The Conferees also expect the States to continue implementation of their base loan programs funded through the annual appropriations bill.”

	DWSRF	CWSRF
Base FY'09	\$830M	\$689M
ARRA	\$2B	\$4B
TOTAL	\$2.83B	\$4.689B



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BUY AMERICAN PROVISIONS BACKGROUND



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ARRA Includes Buy American Requirement

- Section 1605(a) of ARRA requires assistance recipients to use domestic iron, steel, and manufactured goods that are produced in the U.S. This is the expected means of compliance.
- Section 1605(b) provides for a waiver of this requirement under circumstances identified and limited in that provision
- Section 1605(d) provides that this requirement must be implemented “consistent with U.S. obligations under international agreements”



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Using ARRA and non-ARRA Funding in a Project

- ARRA applies to “all I/S/MG used in a project,” so entire project must comply with §1605 if any ARRA funds used
- What is a “project”?
 - Analysis used by Department of Labor (DOL) since 1978 for Davis-Bacon
 - “All construction necessary to complete work so long as all contracts and assistance agreements are closely related in purpose, time, and place”
- Precludes intentional splitting of ARRA projects to avoid § 1605 coverage on part of a project
 - Allows major activities to be separate projects if clearly undertaken in distinct, segregable phases with separate contracts or assistance agreements



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What Does “Buy American” Mean?



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Assistance Agreement Recipients Comply With “Buy American” Requirements Through One or a Combination of 4 Pathways

1. Exclusively procure iron, steel, and manufactured goods that meet the definition of being “manufactured in the United States” (**This is the presumed pathway of compliance**)
2. Any non-domestically manufactured items are covered by a categorical (national) waiver
3. Project specific waiver for any non-domestically manufactured items not covered by a categorical (national) waiver
4. In very limited circumstances, an international trade agreement may apply



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Key Issue: Has a Good Been “Manufactured” in the U.S.?



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Definition of Manufactured Good

- “A good brought to the construction site for incorporation into the building or work that has been processed into a specific form and shape, or combined with other raw material to create a material that has different properties than the properties of the individual raw materials”
- “There is no requirement with regard to the origin of components or subcomponents in manufactured goods used in the project, as long as the manufacturing occurs in the United States.”

~OMB Guidance [§176.140, 176.70(a)(2)(ii)]



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“Substantial Transformation”

- “In the case of a manufactured good that consists in whole or in part of materials from another country, has been substantially transformed in the United States into a new and different manufactured good distinct from the materials from which it was transformed.”
 - This OMB Guidance term [§176.160] for international agreements applies to few SRF recipients
 - While term is binding on few if any SRF recipients, EPA believes it provides important guidance on this issue, rooted in well-established legal interpretations



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Applying “Substantial Transformation” Analysis: Assistance Recipients’ Role

- SRF assistance recipients are responsible to comply with §1605 (applies to “project”)
- Statutory expectation is that recipients will Buy American (§1605(a)) to comply – in OMB Guidance, waivers are “exceptions”
- Recipients, in conjunction with consultants, contractors, and others, are responsible to decide if products are U.S.-made per §1605(a)



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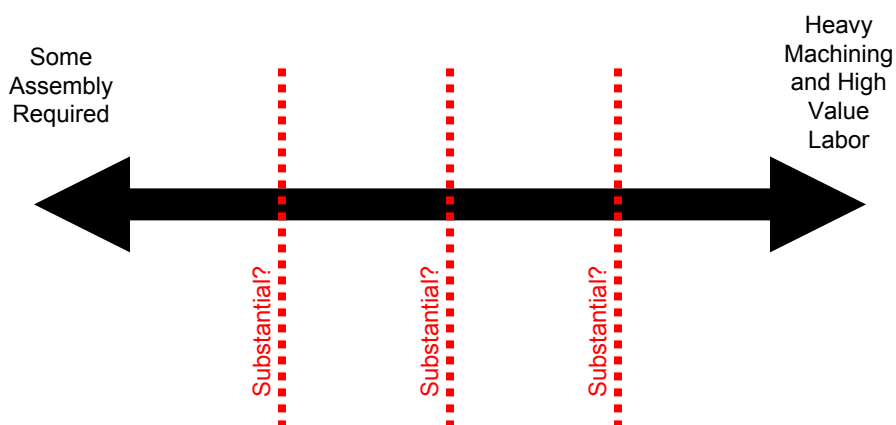
Applying “Substantial Transformation” Analysis: EPA Role

- EPA’s role is to do compliance oversight
- EPA §1605 role is to review waiver requests when recipient believes it cannot comply by buying U.S.-made good



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Has “Manufacturing” Occurred in the United States?



Substantial Transformation?



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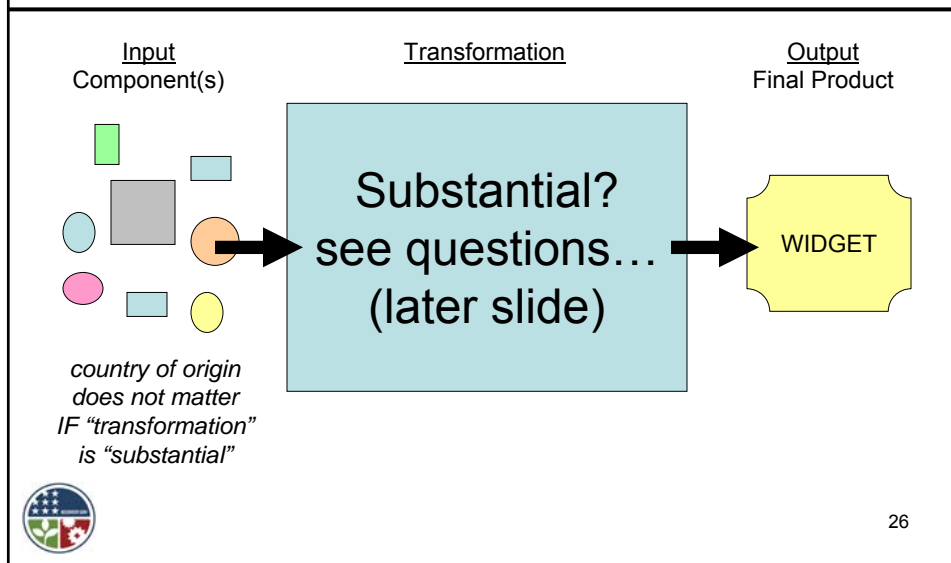
Basic Principles in “Substantial Transformation” Analysis

- Determination of whether “substantial transformation” has occurred is always case-by-case
- No good “satisfies substantial transformation test by ... having merely undergone ‘[a] simple combining or packaging operation.’”
- “Assembly operations which are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation.”



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Transformative Process



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Questions for Determining Whether Substantial Transformation Has Occurred in the U.S.

Question	Yes	No
1. Were all of the components of the manufactured good manufactured in the United States, and were all of the components assembled into the final product in the U.S.? (If the answer is yes, then this is clearly manufactured in the U.S., and the inquiry is complete)		
2. Was there a change in character or use of the good or the components in America? (These questions are asked about the finished good as a whole, not about each individual component) <i>[Questions 2.a., 2.b., and 2.c. shown on next slide]</i>		
3. Was(/were) the process(es) performed in the U.S. (including but not limited to assembly) complex and meaningful? <i>[Questions 3.a., 3.b., 3.c., 3.d, and 3.e. shown on later slide]</i>		



Substantial transformation has occurred in the U.S.
if answer yes to either Question 1, 2, or 3

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To Answer Question 2, Ask the Following:

Question	Yes	No
2. Was there a change in character or use of the good or the components in America? (These questions are asked about the finished good as a whole, not about each individual component)	✓	
a. Was there a change in the physical and/or chemical properties or characteristics designed to alter the functionality of the good?		
b. Did the manufacturing or processing operation result in a change of a product(s) with one use into a product with a different use?		
c. Did the manufacturing or processing operation result in the narrowing of the range of possible uses of a multi-use product?	✓	



If answer yes to any of 2a, 2b, or 2c,
then answer to Question 2 is yes
(checked answers are for illustration only)

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To Answer Question 3, Ask the Following:

Question	Yes	No
3. Was(/were) the process(es) performed in the U.S. (including but not limited to assembly) complex and meaningful?	✓	
a. Did the process(es) take a substantial amount of time?	✓	
b. Was(/were) the process(es) costly?		
c. Did the process(es) require particular high level skills?	✓	
d. Did the process(es) require a number of different operations?		
e. Was substantial value added in the process(es)?		



If answer yes to at least two of 3a, 3b, 3c, 3d, or 3e,
then answer to Question 3 is yes
(checked answers are for illustration only)

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Established Interpretations Disqualify Some Actions Under Any Circumstances

- Cosmetic or surface changes (e.g., painting, lacquering, or cleaning)
- Simply cutting a material to length or width (e.g., cutting steel pipe to particular length)
- If all pieces are shipped by one company with the intent of providing all components necessary to be assembled into a functional good (e.g., pump station)



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Assistance Recipients: Key Occasions to Apply ST Analysis

- To decide in unclear (marginal) cases, recipients can ask: *would we be confident to use information from the analysis to document our BA compliance to State or EPA, that this good is U.S.-produced?*
- If have reasonable doubt, and U.S.-made good meeting recipient's needs is not available, then should apply for waiver
- For recipients considering use of goods claimed to be U.S.-made
 - If a competing manufacturer, bidder or supplier protests such claim, can ask competitors to frame any concerns in the form of specific responses to these questions
 - Responses could provide a resource that recipient can consider



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Can “Substantial Transformation” Occur On-site?



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Can “Substantial Transformation” Occur On-site?

- OMB “manufactured good” definition: a “good brought to the construction site” suggests that only construction occurs onsite, and test is as to origin of goods as they arrive onsite
- However, established interpretations of “substantial transformation” test provide that manufacturing occurs in the U.S. wherever the test is met in the U.S.
- Can reconcile these by maintaining the distinctions made in each test



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“Substantial Transformation” May Occur On-site IF...

- Manufacturer brings all components of the good to the site and does so in normal course of business
 - Ensures that this is not an attempt to game Buy American rules
- Manufacturer does all the work onsite
 - May use sub for this only if manufacturer does so already in the normal course of business
- Answered yes to Questions 1, 2, or 3 above (i.e., found substantial transformation occurs)
 - Case is strongest if the transformative work must be done onsite (e.g., work includes adjustments, calibration, etc required to meet performance spec)



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Question & Answer Section

Have a question?
Submit it using the Q&A console.

(you can submit questions at any
time during the presentation)



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COMPLIANCE



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SRF Assistance Recipients Should Seek First to Comply with §1605(a)

- Must in good faith (where applicable, design the project and) solicit bids for construction with American made iron, steel, and manufactured goods (I/S/MG)
- Should include ARRA's Buy American terms in any RFPs or bid solicitations



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ARRA's Limited Waiver Authority Under §1605(b)

- Agency head may provide a waiver if finds that:
 - Applying Buy American is inconsistent with public interest (§1605(b)(1))
 - U.S. iron, steel, and manufactured goods are not produced in sufficient and reasonably available quantities or of satisfactory quality (§1605(b)(2))
 - Inclusion of U.S. iron, steel, and manufactured goods will increase cost of overall project by > 25% (§1605(b)(3))



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Section 1605(d) Provides That Buy American Requirement Must Be Implemented “Consistent With U.S. Obligations Under International Agreements”

- This provision has very limited applicability relative to the SRF Programs
- April 23, 2009 OMB Guidance
 - Appendix to Subpart B of Part 176
 - The following cities are party to the U.S.-EC Exchange of Letters:
 - Boston
 - Chicago
 - Dallas
 - Detroit
 - Indianapolis
 - Nashville
 - San Antonio
- Counsel for signatory cities should be consulted to interpret how this may apply



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WAIVERS



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Categorical/Nationwide Waivers



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Refinancing Waiver

- Basis: Public Interest
- For projects with debt obligations incurred on or after October 1, 2008 and prior to February 17, 2009 that are refinanced by the SRF using ARRA funds
- Justified by specific ARRA provision that makes eligible projects initially financed within an “in anticipation of ARRA” window



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Refinancing Waiver, continued

- Congressionally-defined window:
 - On or after Oct. 1 = “in anticipation of ARRA”
 - Prior to Feb. 17 = in good faith and without fair notice as to the existence and statutory scope of any Buy American requirement
- To qualify, must have “debt obligations ... incurred” within the window
 - Does not include self-financing or incurring costs alone
 - Might include certain other types of funding agreements if the commitments of both parties are tantamount to a “debt obligation incurred”



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Bid Waiver

- Basis: Public Interest
- For projects that solicited bids on or after October 1, 2008 and prior to February 17, 2009
- To have waiver cover a project, potential assistance recipients must also show verifiable basis on which they believed it was reasonable and prudent to solicit bids for these projects
- Verifiable basis must show solicitation undertaken in specific anticipation of timely funding (from ARRA or other source)



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Bid Waiver, continued

- Rationale for applying both ends of ARRA window is the same as with refinancing
 - Begins when bid solicitations can properly be considered “in anticipation of ARRA”
 - Limited to time before ARRA signing gave fair notice as to Buy American requirement
- Thus, this waiver does not apply to projects that solicited bids after ARRA signing on February 17
- Waiver is intended to recognize appropriateness of proactive steps States took to encourage SRF projects’ readiness for expeditious construction



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De Minimis Waiver

- Basis: Public Interest
- For *de minimis* incidental components of projects, where they comprise no more than 5 percent of the total cost of the materials used in and incorporated into a project
 - 5% of total materials cost determined from research conducted by EPA



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De Minimis Waiver, continued

- Assistance recipients would determine and retain relevant documentation
- Assistance recipients would include in reports to the State:
 - Types/categories of items to which this waiver is applied
 - Total cost for each type
 - Calculations of the total cost of materials used to determine the dollar value of goods to which they have applied the waiver



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De Minimis Waiver, continued

- The waiver text identifies the following as characteristics needed for items to be covered:
 - “Country of manufacture and the availability of alternatives are not readily or reasonably identifiable prior to procurement”
 - “Use of literally thousands of miscellaneous...components” (different items of miscellaneous character)
 - “Generally low cost”
- “Not readily identifiable” is essential: “EPA has found that it would be inconsistent with the public interest...to require that the national origins of these components be identified”



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If ARRA-Funded Project Is Covered By Categorical Waiver...

- Do not need to apply for an individual waiver
- Documentation that a project is covered by a categorical waiver *must include all elements required by the waiver*
- Maintain documents in project files



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Project Specific Waivers



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ARRA Provides Three Bases on Which a Project Specific Waiver May be Granted by EPA

- Applying Buy American is inconsistent with public interest (§1605(b)(1))
- U.S. iron, steel, and manufactured goods are not produced in sufficient and reasonably available quantities or of satisfactory quality (§1605(b)(2))
- Inclusion of U.S. iron, steel, and manufactured goods will increase cost of overall project by > 25% (§1605(b)(3))



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EPA Anticipates That Many Waiver Applications May Be Based Upon “Availability” Considerations

- U.S. iron, steel, and manufactured goods are not produced in sufficient and reasonably available quantities or of satisfactory quality (§1605(b)(2))
 - The Agency’s April 28, 2009 memorandum defines “reasonably available quantity” as:
 - “Quantity will be available at the time needed and place needed, and in the proper form or specification as specified in the project plans and design.”



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Possible Basis on Which an Assistance Agreement Recipient Could Apply for an “Availability” Waiver

- An Assistance Agreement Recipient May Apply to EPA for a Waiver from the “Buy American” Requirements on the basis of “Availability” if, based upon the responses to a bid solicitation, the Assistance Agreement Recipient has determined that:
 - Only Non-U.S. Manufactured
 - Iron
 - Steel or
 - Manufactured Good(s)
 - Meet the Project Specifications (e.g.):
 - Performance
 - Physical Characteristics
 - Timeliness of Delivery



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WAIVER REQUESTS



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Assistance Recipient **Requests Waiver**



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SRF Assistance Recipients Should:

- Ensure that project design specifications do not unnecessarily preclude U.S.-produced iron/steel/manufactured goods (I/S/MG)
- Include bid solicitation provisions and enforceable contract provisions for timely delivery of I/S/MG to ensure expeditious construction under ARRA
- Should make clear bidders' responsibility to document in detail any unavailability of U.S.-produced I/S/MG in response to bid solicitation



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SRF Assistance Recipients May...

- Apply for a waiver IF I/S/MG are not produced in sufficient and reasonably available quantities or of satisfactory quality (§1605(b)(2))
 - Prior to or after preparation of bid solicitation
 - After bids are received and contractors or suppliers document that I/S/MG are not produced in sufficient quantities or adequate quality domestically
- Requests submitted after construction contract is signed must explain why request could not be timely submitted (OMB Guidance at §176.120)



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Appendix 1: Information Checklist for Waiver Request

The purpose of this checklist is to ensure that all appropriate and necessary information is submitted to EPA. Please review this checklist carefully and provide all required information to EPA. This checklist is for informational purposes only and does not need to be included as part of a waiver application.

Items	✓	Notes
General <ul style="list-style-type: none"> • Waiver request includes the following information: <ul style="list-style-type: none"> – Description of the foreign and domestic construction materials – Unit of measure – Quantity – Price – Time of delivery or availability – Location of the construction project – Name and address of the proposed supplier – A detailed justification for the use of foreign construction materials • Waiver request was submitted according to the instructions in the memorandum • Assistance recipient made a good faith effort to solicit bids for domestic construction materials/manufactured goods, as demonstrated by language in requests for proposals, contracts, and communications with the prime contractor 		
Cost <ul style="list-style-type: none"> • Waiver request includes the following information: <ul style="list-style-type: none"> – Price Comparison Worksheet shown in Table 1 – Relevant excerpts from the bid documents used by the contractors to complete the Price Comparison Worksheet – Supporting documentation indicating that the contractor made a reasonable survey of the market, such as a description of the process for identifying suppliers and a list of contacted suppliers 		
Availability <ul style="list-style-type: none"> • Waiver request includes the following supporting documentation necessary to demonstrate the availability, quantity, and/or quality of the materials for which the waiver is requested: <ul style="list-style-type: none"> – Supplier information or pricing information from a reasonable number of domestic suppliers indicating availability/delivery date for construction materials – Documentation of the assistance recipient's efforts to find available domestic sources, such as a description of the process for identifying suppliers and a list of contacted suppliers. – Project schedule – Relevant excerpts from project plans, specifications, and permits indicating the required quantity and quality of construction materials • Waiver request includes a statement from the prime contractor confirming the non-availability of the domestic construction materials for which the waiver is sought • Has the State received other waiver requests for the materials described in this waiver request, for comparable projects? 		



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Where to Submit

- Waiver applicants should submit requests accompanied by all necessary documentation to their Regional EPA Office
- Via:
 - Email at regionXwaiver@epa.gov
(X represents the region such as 1, 2, 3, etc)
- Region may ask for additional information if necessary; formal review period starts once Regional office finds request package is complete



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5-Step Process For Reviewing Waivers



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5-Step Review Process For Individual Project Waivers

1. Once Region finds request package is complete, initial technical review by contractor/evaluation by Regional office
2. Coordination with Cross-Agency Working Group
3. OARM Concurrence (after RA tentative approval)
4. Signature by Regional Administrator
5. Publication in Federal Register



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Documentation



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Assistance Recipients Buy American Role

- Assistance recipients should have adequate documentation in project files to demonstrate all applicable means of BA compliance
 - For U.S.-made goods: verification of U.S. production (as stated in sample certification point 2 in EPA 4/28/09 BA memo)
 - For items covered by a categorical (e.g., nationwide) waiver: the documentation must include all elements specified in and required by the waiver for an item or project to be covered
 - For any component that has been granted a waiver: FR notice of project specific waiver, and/or
 - For items subject to an international agreement
 - Communication from applicable state or municipal party to the agreement that recipient and item(s) are covered, and
 - Verification of country of origin



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Documentation

- The April 28 guidance memo suggested that assistance recipients require certification from contractors to demonstrate Buy American compliance
- Fraud and abuse will be investigated by the Office of Inspector General (OIG)
- Communicate any concerns in this regard to: www.epa.gov/oig/hotline/how2file.htm



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Role of OIG

- The OIG has a prominent role under the Act, which includes education, training, outreach, audit, evaluation and investigative activities
- Section 1515 of ARRA allows the OIG:
 - (1) To examine any records of the contractor or grantee, any of its subcontractors, or any State or local agency administering such contract, that pertain to, and involve transactions relating to, the contract, subcontract, grant, or subgrant
 - (2) To interview any officer or employee of the contractor, grantee, subgrantee, or agency regarding such transactions



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How Does OIG Accomplish Its Mission?

- The OIG has access to EPA files and records, as well as those of State, local, tribal and non-profit agencies, contractors and sub-contractors, grantees and sub-grantees, that administer or spend EPA funds
- EPA Criminal Investigators have the authority to:
 - Administer and Take Oaths
 - Serve Subpoenas
 - Make Arrests
 - Execute Search and Seizure Warrants



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Why Should I Monitor My Project?

- As a recipient of ARRA funds, you must monitor your project because:
 - You are responsible for completing the project according to the approved plans and specifications
 - It helps protect the Federal, state and local investment
 - The responsibility to monitor the project begins when the loan or grant is made
 - Monitoring reduces the opportunity for fraud, waste and abuse
 - Federal law requires an audit if you spend over \$500,000 of Federal funds annually...**let us walk you through some of the audit requirements**
- Prudent steps here are opportunity for recipients and contractors to protect yourselves



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So, What Is Grant Fraud?

- Simply put, fraud is:
Lying, cheating, and stealing in the performance of a government grant, contract or loan
- There is a fine line between *Fraud* and a *Mistake*...

That line is **Intent!**



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What Are the Elements of Fraud?

- A Representation
- About a Material Point
- Which is False and Intentional
- Which is Acted Upon
- To the Victim's Damage



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What Is a Representation?

- Representations are generally statements of fact; examples in the SRF program would include:
 - Bid Proposal
 - Project Invoice



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So You Suspect Fraud... What Do You Do Next?

- What you should do:
 - Discuss your concerns with the OIG
 - Seek answers to your questions in the normal course of business
 - Cooperate with the OIG and expect to be contacted and involved
- What you should not do:
 - Change your normal course of business unless otherwise directed
 - Tip off subjects of actual or pending investigation
 - Protect someone who may be committing fraud



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Question & Answer Section

Have a question?
Submit it using the Q&A console.



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Thank you for attending
today's Webcast!



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For More Information

- EPA Recovery: www.epa.gov/recovery/
- DWSRF: www.epa.gov/safewater/dwsrf/
- CWSRF: www.epa.gov/owm/cwfinance/cwsrf/index.htm
- OIG: www.epa.gov/oig/hotline/how2file.htm



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