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COMPLIANCE WITH ARRA BUY AMERICAN PROVISION FOR SRF PROJECTS CONFERENCE CALL

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Audio Transcript September 15, 2010

Operator: Thank you for standing by and welcome to the Buy America Compliance Workshop conference call. At this time all participants are in a listen-only mode. I must advise you that this conference is being recorded today, September 15th, 2010. I would now like to hand the conference over to your speakers today, the Environmental Protection Agency. Please go ahead.

Slide 2 (Cadmus): Good afternoon, everybody. Welcome to the ARRA workshop on the Buy American provision. Before we dive into the content of this presentation we're going to cover a few logistical issues. This slide shows the dial-in information to access the audio part of the call. You can see the number and webinar ID presented here, also the Qwest technical assistance number. Please do not hesitate to call this if you experience audio difficulties during the presentation.

Slide 3 (Cadmus): If you need help during the webinar, you can raise your hand in the webinar console you should see on your screen and someone will contact you via chat to help. If you would like to ask a question during the presentation, there is also a question box in the webinar console. Please do not hesitate to submit your questions.

Slide 4 (Cadmus): As I said, you can submit questions and comments through the webinar console. EPA will address as many questions as possible at the end of the presentation and will try to compile answers to all questions after the webcast and post them on the EPA recovery Web site.

Slide 5 (Cadmus): Once again, welcome to the webcast.

Slide 6 (Cadmus/KK): I would now like to introduce our speakers for today. First, we are going to hear from Kiri Kroner from the Drinking Water SRF program. Then we will be hearing from Tim Connor with the Clean Water SRF program and Joanne Hogan with the Drinking Water SRF program. I would now like to turn it over to Kiri Kroner.

Thank you. First, before we get started, we wanted to do two poll questions real quick. The first one is just to see how many people are in the room participating in the webcast today. You should see a box open up, hopefully, on your screen soon, if you just want to take a minute to click how many people are at your site. We're just waiting now for the results to come in. It's looking like a majority of people only have one to two people on site. So we'll quickly ask our next question, which is to see – oh I'm sorry, we're showing the results now so that everyone can see how many people. Then we'll go to our next question, which is to see what sector you're from. If you could quickly take a moment to check what organization type you work for. The results are coming in. It looks like we have a good split between government and consultants, with a couple of the other areas. And with that, we'll begin our webcast. I'll turn it over to Tim.

Slide 7: Hi, thank you all for coming on today. As you all know, the Buy American provisions apply to the Recovery Act which was essentially all the funds which were under contract some time ago. We're doing this conference call because there are still a lot of compliance issues and you all are actively trying to work through your compliance activities. We're hoping to not cover some of the basic

provisions of the Buy American provision. We're not going to tell you what a simple waiver is and that process, but we would point out - on this slide that you're seeing now - that there is a lot of good information already available to you via the web on our EPA Web site and you can refer back to this for your information at any time in the future.

We're going to go into today a lot of the issues that are hot and are of topical interest to folks who are actively complying.

Slide 8: We'll skip through on our general topics, here.

Slide 9: It's important for us to all at least iron out here, so we understand what our roles and responsibilities are. The systems, or recipients as we sometimes refer to them, are ultimately responsible for the compliance, for the project. Surprisingly, as simple as that sounds, it's an important point to make. They may request from EPA some project-specific waivers or anticipatory oversight, something I also like to call "help." They must maintain adequate documentation of compliance. That's the system's, the recipient's, primary responsibility and ultimately that's going to fall on them. Engineers and contractors - I'm glad we have a lot on board today to listen - they're there to help ensure compliance. Their roles should be defined by their contracts and they're there to collect adequate documentation and exercise due diligence and assist the recipients, in any way that they can, in compliance. Now states and EPA: we're providing training and guidance, we've provided a lot of training and guidance to this point, hopefully it's been helpful but we're here to answer questions and provide information. We also grant the waivers. We've done a number of national waivers and we'll discuss those today in short order, especially the *de minimis* one, and we've done a lot of project-specific waivers and we're still processing some of those and we'll discuss that today. We also oversee, in some of our areas, and verify project compliance. Those of us on the phone today are in the national program and we deal with the processing of the waivers, primarily.

There are a lot of activities that the system would need to do here in terms of documentation. Ideally, we're looking for certifications from the manufacturer for products, we're looking for things that can be specific to a part number, that's something that you'll have. We're looking for acceptable forms of documentation, in any form in terms of transit shipping, import activities on products, and that's what they'll be looking for and that's the responsibility of the system to maintain those. It's possible that the Inspector General could be engaged and they may be looking at due diligence in activities so it's important for everyone to keep good record keeping.

Slide 10: A lot of the questions that we deal with deal with iron and steel and the location that it's manufactured. Iron and steel must be completely U.S.-made and specifically it must be manufactured in the United States. I'd just like to emphasize that iron and steel needs to be a process manufactured in the United States. There's one exception, which is metallurgical processes in steel-additive refinement. It's a rare situation for us to deal with that. We also get a question frequently about recycled sources. The source of the recycled material is not relevant, it's where the furnace is, essentially, is what we care about in this case. The manufacturing process must occur in the United States.

Substantial transformation, a topic which we'll get into in some detail later – just note to yourself that we'll revisit this – does not apply to iron and steel products. Some of these products that it wouldn't apply to are: re-bar, I-beams, unlined pipes, fittings. To the extent that we can clarify any of this, this is the basic bottom line: iron and steel must be completely U.S.-made and the process must be in the United States.

Slide 11: A topic that is obviously central to the compliance of Buy American provisions is, what is a manufactured good? A lot of our questions deal with determining whether something is a manufactured good or not. A manufactured good is something that's brought to the construction site for incorporation into the works. In some cases it's processed into a specific shape or form and combined with other raw materials to create a material that has different properties than the original material. That is essentially what we call a substantial transformation to some degree, but again I want to emphasize that we'll revisit this topic, which has been a key one, later on in the presentation. The question of whether something actually changes is: you've got to think about whether the character of the use or the material is complex and meaningful in change and that's a topic we'll re-introduce again. Examples of things that are manufactured goods are pumps, disinfection equipment, hydroelectric generators, and PVC, copper, and cement-lined pipe.

Slide 12: The requirement is that the manufacturing occur in the United States for it to be a U.S. good. There is no requirement at all as to the origin of the components or sub-components, just that the manufacturing process occur in the United States. It does not have to be a U.S.-owned company either. These are simple issues but we want to address it to be thorough. There are some materials that are excluded and we'll get into those on the next slide.

Slide 13: Your basic construction materials that are not permanently incorporated into the project, such as a framing mold, or a sign placed temporarily at the site would not be included as a manufactured good in the definition. Some equipment used during construction, those that are not permanently incorporated into the works, would not be included, like your power tools and backhoes, and especially raw materials we do not consider manufactured goods. We give you a list of examples here of raw materials that we do not consider to be a manufactured good. This is not an all-inclusive list but it is an example set: we have concrete, asphalt, dirt, fill, and lumber. I want to emphasize that plywood is considered a manufactured good. But, as we said before, if it's in a framing mold, plywood that's temporarily used for construction, is not considered part of the project. So those are products covered by the definition of a manufactured good and anything else we would consider to be needing a waiver to be in compliance.

Slide 14: An issue that we've encountered a number of times recently is the issue of trade agreements and we want to make a number of quick explanations and hopefully simple statements to this effect. A simple question: is your project affected by trade agreements? It's unlikely that it would be. Essentially, Buy American requirements are to be applied consistent with our U.S. obligations under international agreement, but there's only a limited applicability of these international agreements that we're aware of to SRF programs and, as an extension, your Buy American compliance. We just want to note that we're not advising you on how to comply with these but if you're operating within the boundaries of seven of these cities which are Boston, Chicago, Dallas, Detroit, Indianapolis, Nashville, and San Antonio, listed on the slide, it's possible that you may have certain projects that are part of an international agreement but you should consult with your local authorities to iron out the details of that compliance. I just want to emphasize, especially in light of the next slide, that it's unlikely that a project is subject to a trade agreement that would essentially absolve you of compliance with Buy American.

Slide 15: This is especially important because, recently, there's been a lot of information being supplied to folks, especially with regard to pipe, about Canadian manufactured goods. We just want to emphasize that, if you receive some information saying that this Canadian good is compliant with Buy American because of this letter here and the new agreement, this is not likely to be the case for your compliance. There is an actual Canadian agreement that is new but it only applies to future allocations of SRF monies and stimulus projects and at this point there is no new stimulus and Buy American is

not part of the 2010 base programs. The latest agreement has no impact on the existing ARRA compliance that we're aware of. For more information, we have this listed out on the Web site for you to see here.

With that, I'm going to turn it over to Kiri Kroner to talk about documentation of domestic products.

Slide 16: Thank you, Tim. We've gotten a lot of questions about documentation and have seen firsthand a lot of letters and such that may not be considered adequate so we wanted to spend a couple of minutes to talk about what we expect people to have in their files regarding documentation of Buy American.

Slide 17: Most manufacturers are supplying letters or certifications that their products are made in the U.S. or you may have an item that is substantially transformed so that might be your documentation that you have. We're also seeing that a lot of people might have secondary documentation that would be useful to include just to show compliance, such as the bills of lading, the shipping, actual photographs of the equipment when it arrives on-site showing the country-of-origin markings on the box, that sort of thing. Or you may need to have any combination of these different things in order to show compliance. So if you're not getting these types of things or if you're having trouble getting them from the manufacturer, that may raise a red flag and it may get you to dig a little deeper to see if you can find more information.

Slide 18: Basically what we're saying is that pretty much everyone is responsible for doing their due diligence but, as Tim mentioned earlier, it is the assistance recipient's responsibility to have the proper documentation. What we mean by due diligence is just seeing that the person took responsibility for trying to get the documentation that is needed because, basically, you're just trying to protect the interests of yourself and of the government's investments.

Slide 19: Things to look for in your letters from manufacturers: it would be nice to see specific product names for your projects, the location of where it was made, contact information from the manufacturer, that type of thing. If you're getting letters that are vague or, as Tim just talked about, they might say they're covered by trade agreements, which is probably unlikely, or claims that a product is covered under a waiver – we issue a few national project-specific waivers so even if a product has a waiver for another project it doesn't necessarily apply to your project. There is a little bit of confusion with the Buy American Act, which says that a certain percentage of materials are made in the U.S. That is not the Buy American provision for ARRA, so be wary if you see that in the letter. Also any mention of assembly – that should definitely raise a red flag. As we'll talk about a little later, assembly does not qualify as substantial transformation. Also look for things like “most components are manufactured in the U.S.” or “key components” - words like that that just might raise a red flag. We have a couple of example letters posted on our Web site that you can refer to that show what is considered adequate and what is inadequate.

Slide 20: This is an example of some of the broad statements that we've seen in example letters. Things where it says, “we comply” or “we will comply,” that this product meets the Buy American – that type of thing. There's no agency that certifies Buy American so if you see something to that effect in the letter, that should raise a red flag. Something that we've mentioned a couple times is location – it's very important to include that because then that does show a specific factory or something that you can refer to or maybe even include pictures to show that's where the good is being made.

Slide 21: This is an example of a certification form from Montana. This is just an example. We wanted to point out that you may, in addition to this, still need additional supporting documentation if you feel

that you're not getting the right information or if you are not comfortable with what you're given, you may still want to dig a little bit further and actually investigate the manufacturer.

Slide 22: If there's a lack of detail or if the letter is vague (some of the examples that I provided earlier) or if you know that a product is very complicated in its manufacturing process or if it's a specialty product or something that you might know is made overseas, then you probably will want to dig a little deeper and it may trigger looking into the substantial transformation investigation, which Tim is going to talk about next.

Slide 25: Thank you very much. As I alluded to, substantial transformation is an important part and the definition of it is important to go over, so we'll linger on this slide for a minute. A product is made in the U.S. if it has been substantially transformed in the United States into a new and different manufactured good that is distinct from the materials from which it was transformed. It's a lot to chew on there but the key point we want to point out is that the new and different manufactured good is distinct from the materials. We'll explain a little more but an example of something that is not substantial transformation is painting, lacquering, or cleaning.

Slide 26: Essentially, we determine substantial transformation, or the recipient will, on a case-by-case basis. I want to point out that the system or the assistance recipient is responsible for making the determination and they must obtain information about the processes used in the manufacturing if they're going to make a determination. Now, this is the recipient. EPA does not make determinations. I want to re-emphasize that: EPA does not make determinations, but we will provide anticipatory oversight informally at the request of the utility, the recipient. We can provide a lot of help and technical oversight but, at the end of the day, I want to emphasize – the system is responsible for making that determination. Substantial transformation only applies to manufactured goods, a reiteration of a point before, not to iron and steel and Congress has differentiated between these two products. I want to say that typically substantial transformation occurs at the site of manufacturing and not, traditionally, or not typically, on-site. It is possible for on-site substantial transformation to occur but the bar is higher in terms of judgment for how that occurs, in general, based on the guidance.

Slide 27: How is it evaluated? When substantial transformation is evaluated, there is a checklist we've put together and we'll show you an example. Checking the boxes alone is not adequate. A basic letter just declaring substantial transformation is not sufficient. Systems and their manufacturers that are supplying this information must reasonably document the process. In our checkbox, if there's an answer of yes, there's something happening here that makes it transformed, some degree of documentation is required and is going to be expected during inspection.

Slide 28: On the next page you'll see an example of the checklist. We'll go through a case, a real-life case, which we've changed some details on, and we'll explain how to fill out and document here.

Slide 29: Here's an example of substantial transformation. This is a real situation we've taken and just presented here in some basic information for you. A manufacturer of a generator claims that their product is substantially transformed within the United States and, of course this product includes foreign-made parts (in this case an engine) and a U.S.-made generator and other U.S.-made components. So the imported engine and American components are all incorporated together and packaged together in a co-generation unit within the United States and so this system, or this recipient, asked EPA for help.

Slide 30: Here we are on page 30, I believe, and we'll see the checklist filled out for this particular

case. The first question, obviously, are the components domestic: no. You don't need to document that further, you're saying that they aren't. Are there physical or chemical transformations in the properties? No. Is there change from one use to another? No, it's still a generator. Is there a narrowing of the range of possible uses – this is a more complex question, specific probably to the item, but in this case they said no so we don't have to explain in great detail here. But as we get to question three, the questions then turn into “yes” answers. Did it take a substantial amount of time to transform this, or to work on this? They said yes. Some documentation about the amount of time and what went into that time would be good. Was it costly? They said yes, so some explanation of the cost would be good. Was there high-level skill, etc. multiple operations, etc. and did it add value? No, but that's again not a question of proving a point.

Slide 31: On to question one, the engine was manufactured in Europe and all other components were manufactured in the United States so no is the answer and we can move on.

Slide 32: Question two, no again is the answer. The manufacturing activities did not occur in the United States and it did not change the physical or chemical properties – the engine is still an engine.

Slide 33: Was it complex and meaningful on question three, here is an example of how they might have documented this and they would have provided maybe some letters or something from the company to substantiate the four hundred plus hours it took, the substantial expenditures, the level of skill of the workers, and all of the complex steps that it involved.

Slide 34: Summarily, we can say that this would be a situation where they would fulfill the requirements for substantial transformation because of the answers to question three and the documentation and reasoning behind it.

Slide 35: Another way that we would accept is any photographic evidence to show that substantial transformation was occurring and, apparently, but I will say this, just because you put on gloves doesn't mean that it is substantial transformation – it would be helpful if there were some explanation of what is going on in the picture.

Slide 36: Can manufacturers move to the United States? They certainly can – we encourage it! We have examples of this having occurred, where a foreign manufacturer has produced American goods by moving a manufacturing operation to the United States in order to comply with Buy American. They can open new manufacturing facilities, they can have those activities take place in the United States, and this would help in their determination of substantial transformation. It still would need some documentation, such as pictures of the facilities and operations in the United States would be helpful.

Slide 37: If the answer to the substantial transformation question is “no” or “unknown,” what are the options for the recipient? Well, they can either switch to a domestic alternative, if one is available, we can potentially help identify that, the EPA has some assistance that they can provide, or you can fit the product under the *de minimis* waiver which Joanne will talk about in a little bit if it's possible and, if none of these are available, then they can request a project-specific waiver for that product.

And now Joanne will talk about the *de minimis* waiver.

Slide 38: As many of you know, EPA did issue a *de minimis* national waiver that's available in the *Federal Register* and I'm going to talk a little bit about the main point of that waiver.

Slide 39: First of all, there are two critical criteria in the waiver. It only applies to incidental items and those incidental items can cost no more than 5% of the total material cost. What is the definition of incidental as it applies to the *de minimis* waiver? Typically, it's low-cost items, individually and in total, and typically it's items that are procured in bulk – nails, that sort of thing. It should not be used for a few expensive items because, again, typically a few expensive items aren't going to be incidental. There's a copy of the FR notice, the Web site there, that you can click on to see the parameters for the *de minimis* national waiver.

Slide 40: Possible incidental items: right in the waiver text we talk about nuts, bolts, other fasteners, gaskets, tubing. Other possible examples that we've seen: water/sewer main projects: such as valve risers, meter boxes, curb stop boxes. Treatment plant projects: electrical components, anchor bolts, concrete forms; and pump station projects: conduits, electrical components, vault lids – those types of things. Again, what is incidental will vary by project.

Slide 41: To use the *de minimis* waiver, the total materials cost includes all of the raw materials that are not subject to Buy American so you can count as part of the total cost the concrete, asphalt, and lumber that are included in the denominator of the calculation. It does not include rental equipment and that sort of thing, though. Systems should plan in advance for the incidental percentage early on so that you don't use the 5 percent up too soon. Now, if a system is having trouble and is above their 5 percent, they should look to see what has been produced domestically if they can or request a project-specific waiver.

Slide 42: The assistance recipient should keep materials so that they can ultimately report to the state how they've used the *de minimis* if they are using it. They must summarize their use of *de minimis* in a report to the state including the types and categories of items, the total costs of incidental components, calculation by which the compliance was determined, including total cost of materials used in the project. The assistance recipient should keep relevant documentation of that.

Slide 43: Now here is an example of a *de minimis* inventory and it shows, for example, for the ultra-filtration membrane that they requested a product-specific waiver for that – that's \$200,000 worth of items. But if you move down, there's an estimate for the gaskets, nuts, and bolts of \$2,000 for the total amount and that could be considered under the *de minimis* waiver. The total materials, as you can see here, are \$371,000 and the total incidental material here is 3.09%.

Slide 44: Project-specific waivers: one of the things that you should be aware of, and the reason why a project-specific waiver only applies to the specific project is something that Tim said a moment ago. There have been manufacturers who have been moving their manufacturing facilities to the U.S. in order to comply with Buy American. So it is imperative that you look to see if there is an American manufacturer because even if there has been a project-specific waiver granted in the past, now the same circumstances may not apply.

Slide 45: Can waiver requests still be submitted? Yes, they can still be submitted. Waiver requests are supposed to be submitted at the time of contracting and we definitely encourage everybody to have had their waivers in and this is, as you may be aware, six months after everything has been under contract. But we are following the OMB regulations on this, which are at 2 CFR part 176 and, with respect to those, waiver requests may still be considered timely if the product was not specified in the original project specifications, if there's lack of reasonably foreseeable circumstances, and if quantity waivers are likely as the construction season progresses. For example, there may be a domestic manufacturer that could have produced something six months ago and committed to do that, but if they can no longer do that, the circumstances may have changed so that the product is not available. Whether a waiver

request is considered timely or late depends on project-specific circumstances so it's important to get the waiver request in if you believe that you're going to need a waiver, and to detail why the waiver is coming in at this period in time.

Slide 46: Typically this is what we're going to be doing with respect to new waiver requests: if there are unforeseeable circumstances or other exceptions, the waiver request may still be considered timely and EPA may review and may grant the waiver request still.

Slide 47: If there are no unforeseeable circumstances, if it's scenario number two, the waiver request will be considered late. However, if EPA would have granted the waiver if it had been submitted on time, EPA can choose how to address the timeliness consistent with the OMB regulations.

Slide 48: Scenario number three is if there are no unforeseeable circumstances and EPA cannot determine if the waiver would have been approved. The waiver request would be considered late if EPA determines that the request would not have been approved and the material has been used, the project will be determined non-compliant and then OMB also has non-compliance regulations at 2 CFR 176.130 that EPA will have to use to determine how to address that non-compliance. The remedies for non-compliance are in that regulation.

Slide 49: That concludes the main part of our webcast and we are now going to spend the remaining twenty minutes trying to answer the questions that you're submitted. If you do have questions, you can continue to submit them and we will get to as many as we can. That concludes the main part of our webcast, and we are now going to spend the remaining 20 minutes trying to answer some of the questions you have submitted. If you still have questions you can continue to submit them and we will get to as many as we can.

(TC): Hi, this is Tim. We're going to take a quick pause for about thirty seconds to gather ourselves. There are over 400 people on the call submitting questions so we're going to take a little time to make sure we can go through this orderly. Thank you.

Thank you all for your patience. We'll start in with some questions and answers now. We'll read them off and then do our best to answer them summarily.

Question 1: The first question is, and I'll just paraphrase it, is that equipment has already been installed that is not made in the U.S. and there aren't parts in the U.S. The state is withholding payment, etc. – what happens now, since it's already been installed?

Answer (JH): What would happen is that they would have to come to the EPA level because EPA is the award official. It would probably be considered non-compliant. We would look at the OMG regulations at 2 CFR 176.130 to see what we would do with respect to this particular non-compliance. If the materials don't have a waiver and they've already been used in the project, not subject to the *de minimis* waiver, it would be considered non-compliant. Now, the non-compliance provision, though, does allow for many different options that are available to us in order to remedy it. One of the remedies is to withhold payment for that, but there are other remedies as well including saying that it's in the public's interest not to dig up the material, not to not let it be used, and it would be something that would be on a case-by-case basis, there could be a determination that the materials still could continue to be used. There are all sorts of options in that non-compliance provision.

(TC): I'd just like to re-emphasize something that Joanne said. This is something that EPA would

participate in so any determinations about a product that is in use would need to come through an EPA regional office and we can work from there. We recommend that the recipients get in touch with their regions and determine the process for moving forward.

Question 2: Next question: we've been getting this one quite a bit and it's in regard to the new rule published in the Federal Register recently where the FAR changed a little bit about the Buy American and people are asking if we're going to change our interpretation.

Answer (JH): We are aware of the changes to the FAR that apply to direct contracts. To the best of my knowledge, though, OMG has not done any additional amendments to the ARRA regulations that are applicable to our program. We certainly are aware that there have been some changes with respect to the FAR and ARRA on August 30 of this year. I would say that that's still under review about what, if anything, we may be doing with those.

Question 3: The next question is what government agency governs inspection or compliance with regard to Buy American?

Answer (JH): Everybody is responsible to make sure that it's compliant but the way that the SRF program works is that it goes to the state and then it goes to the assistance recipient, which are typically municipalities. Those are the first line folks that need to make sure that everything that is being used is compliant with Buy American. That's also the entity that provides the waiver request up to EPA. The way the OMB regulations are drafted only the EPA can grant waivers or does need to be involved with non-compliance decisions. But again, the municipalities are the ones who are closest to the key projects and they would be the first line that needs to address the Buy American issue. We got a question, just to clarify what the FAR is. Some of you are familiar with it – it's the Federal Acquisition Regulations and it's typically applied to direct contracting.

Question 4: Another question we've gotten, and I don't know that we know the full answer, but we were asked what the difference is between the Buy American Act and the Buy American provisions of ARRA.

Answer (JH): They're different statutes and we call this the Buy American provisions of the ARRA because it is different in the language that's used in the ARRA as compared to the Buy American Act. There are some other statutes out there that specifically cite the Buy American Act. ARRA doesn't do it, it comes up with its own language with respect to Buy American provisions. If you're familiar with the Buy American Act there are several things that just don't apply to the Buy American provisions of ARRA. Tim pointed out, I believe, that the Buy American Act or at least the FAR, in implementing the Buy American Act, talks about percentage of foreign-made materials. The costs of the materials are different in the Buy American Act. It's something to be aware of but if your only role is to deal with ARRA projects, the Buy American Act would likely have little impact on anything that you are doing.

Question 5: The next question has to do with a manufactured good that is built in the U.S. using non-U.S. components but, because of its size, it's disassembled for shipping. If one of the disassembled pieces is actually non-U.S., then when they reassemble it at the job site would the non-U.S. component be considered substantial transformation?

Answer (JH): So it's something that was manufactured in the U.S. but then broken down again for shipping and put back together again? I would think, and it's hard to tell exactly what it is, but it seems that that's something where you should ask for anticipatory oversight. In many cases, I would think that

is something that would still be consistent with the substantial transformation requirements and would be considered to be substantially transformed.

(TC): If this is a case where it's unclear what is happening, the recipient can request EPA's help. You'd just get in touch with your regional EPA office and say, "we need some anticipatory oversight, help, in determining the substantial transformation status of this activity or this particular set of pieces," and we could help fill out the checklist in that case.

Question 6: We've gotten a couple of *de minimis* questions. One of them is about when to report your *de minimis* percentages – if you have to do it periodically or just at the end?

Answer (JH): I believe we suggested to do it at the end and to provide that to the state, but that doesn't mean that you shouldn't be keeping a running record of it. You should keep the material to ultimately compile a report on an ongoing basis so that you can be certain that you're taking into account total material costs and all of the costs of the incidental materials that you plan on using the *de minimis* waiver for.

Question 7: One of the other questions we've seen a couple of times has to do with iron and steel and *de minimis*, which I believe you might have mentioned but maybe reiterate. Do iron and steel supersede the *de minimis* or can you include it?

Answer (JH): You can include it but, again, it has to meet the two main components of the *de minimis* waiver, which are that it has to be incidental – and that's again going to be a fact-specific sort of thing. If it's a pipe project, it's unlikely that any pipes are going to be incidental. If it's a water treatment plant and it's some pipe to run the water treatment plant, that may be incidental. Iron and steel can be considered part of the *de minimis*, it's not just manufactured goods.

Question 8: We have a question here about substantial transformation. They want to know if there's a standard for determining how much time, how much cost, how much labor would be considered substantial transformation.

Answer (TC): We have not produced, as far as I'm aware, guidance on specific time. It's a fact-specific case to determine in the judgment based on, essentially, the recipient's judgment as to whether or not there's a significant amount of time being used. EPA can assist, again, on these determinations and compare to some other situations. I would say that, if it's a question that comes down to how much time is okay or not, it's probably a case that it would be reasonable to get EPA involved in anticipatory oversight.

Question 9: Another substantial transformation question has to do with ductile iron pipe that is not manufactured in the U.S. Would it be considered substantially transformed if cement mortar lining was applied in the U.S.?

Answer (TC): The answer is yes and we got that question three times so hopefully that covers all of those.

Question 10: Just trying to catch up with some of the new ones that have been coming in. We've gotten a bunch of questions about the U.S.-Canada agreement.

Answer (TC): I think for the U.S.-Canada agreement, I noticed a number of questions coming in and I

would just like to refer folks that have asked that question to actually read through the full memo that's available on EPA's Web site which you can actually refer back to in the slide in which it was addressed. Read through the logic of that memo. I think it'll make a lot of sense about what applies once you do that. If it's the case that you read through and you still have questions about it, EPA is here and available to help out and answer questions in that case, but I should refer you back to the reference.

(JH): If you take a look at it, one of the questions that I saw was regarding its applicability. It does still apply to ARRA for funds that have not yet been obligated, but in our program, in the SRF program, everything has long ago been obligated and we are not doing any sort of re-allocation of the funds so that there is no ARRA money to be re-allocated to which it would apply. The people that are confused about its applicability: it applies, but there's no money that it would apply to and that's what the memo goes through. If that's where your confusion lies or if you're wondering how it works with respect to other programs that you may be involved with, that's why it would not, in effect, apply to the SRF programs.

(TC): We should emphasize for the SRF programs that that holds true.

Question 11: We have a question about untimely waivers. Are there penalties if EPA considers a waiver request untimely, or late?

Answer (JH): Well, one thing is that if EPA doesn't grant the request, then you do have to use a domestic product or an alternative product. That's one thing that could happen. We would like the late requests that are coming in to be because of circumstances that are not foreseeable and we've seen several of them recently that have unforeseeable circumstances and there's an explanation as to why it's unforeseeable. But if a product is used and then someone comes in and asks for a waiver, then certainly the non-compliance provisions will apply and there are penalties there, not serious unless there's fraud or something like that, in which case there are serious penalties. You would be considered non-compliant and the remedies that are in that provision could apply.

Question 12: We received a question about how long after construction is completed could a project still be audited for Buy American compliance?

Answer (JH): I do not know. I would suppose that states have their own audit procedures. I would suspect that our Inspector General would be auditing as the projects are completed. I think that once you keep the paperwork for whatever is in the grant agreement.

(TC): Backing up one question, I'd like to make a point on timeliness of waivers. EPA is the processor of waivers so even if a waiver is late, EPA should be involved in the process and you should submit a waiver request. That's a fundamental activity. If you know that it's a project-specific waiver request situation, you should submit it to your EPA regional office.

Question 13: We've gotten a lot of questions, too, about this Q&A session and our intent is to try to come out with another, I think we're on part three, Q&A for Buy American where we will address either the questions that we won't get to or the common themes that we've been answering now.

Answer (KK): Also, we plan to post this webcast, the slides and the audio, at a later date so you will be able to come back and listen to the questions again if you want. I just wanted to make that point.

Question 14: We got a question about projects that are only partially funded by ARRA - if the proof of

compliance is only limited to the part that was paid for with the ARRA funds?

Answer (JH): That again is because of the language in ARRA itself that applies to any project that uses even part of ARRA so that the requirements for Buy American and other requirements of ARRA would go on however else the project is funded.

Question 15: We have some more questions on *de minimis* – there seem to be a lot of those. One of them is asking about, if you've used up and gone over your 5% are you endangering the whole project for being non-compliant or just the cost of the items that go over that 5%?

Answer (JH): It could be you're endangering the whole cost of the project. Again, the non-compliance provisions that OMB has give a variety of remedies and options and that is one of the possible remedies, to not pay for the entire project. What I would advise people to do is to start asking for waivers if that's the case, so that perhaps some of those waivers will be granted and some of the materials won't be part of the *de minimis* calculation. Or, the other suggestion is to look at what you've used for *de minimis* and see what the source is, and source it domestically. If that's the case, then that's material that you have other evidence for that complies with the Buy American without using *de minimis*.

Question 16: We've gotten a bunch of questions, too, about reporting *de minimis* – wanting to know about the requirements for reporting which, I believe, was in the actual waiver, in the FR.

Answer (JH): We might have to go back and check that and follow up, to see about the reporting to states.

(KK): We're just about running out of time.

(TC): I should say that we did our best to get through as many questions as we could, and in some detail, and address them properly, but there are a lot of questions. We appreciate all the questions and we will be attempting to follow up on all of those that we can, as Kiri said, subsequently. We're getting your questions and if we didn't get to it, we apologize, it was, in all likelihood, oversight on our part and we appreciate you all participating.

Slide 50: Just again to remind you there are a couple of links for important resources that are on our Web site that we referenced today during the webcast. For example, the substantial transformation information, the checklist that Tim talked about, etc. - there's a link to that here. This is the same Web page where future information will be posted so if you want to check back in the future, this is where the webcast slides, any type of Q&As and other information that we might issue would be posted here.

Slide 51: And with that we want to thank you for participating and if you have any questions, you can follow up with any of the three speakers here today: myself (Kiri), Tim, or Joanne. These are our email addresses. Again, thanks for participating.