

---

# **Buy American and the American Recovery and Reinvestment Act of 2009 (ARRA)**

---

# Buy American Requirement

---

- ❑ Section 1605(a) of ARRA requires assistance recipients to use domestic iron, steel, and manufactured goods that are produced in the US. 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 US obligations under international agreements”
-

# 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
-

# Recipients comply with Buy American a number of ways

---

- ❑ 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)**
  - ❑ Any non-domestically manufactured items are covered by a categorical (national) waiver
  - ❑ Project specific waiver for any non domestically manufactured items not covered by a categorical (national) waiver
-

# Waiver Determination

---

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

---

# **National Waivers**

---

# 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
-

# Refinancing Waiver

---

- 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”
-

# 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)

# Bid Waiver

---

- 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
  - This waiver does not apply to projects that solicited bids after ARRA signing on Feb. 17
  - Waiver is intended to recognize appropriateness of proactive steps States took to encourage SRF projects’ readiness for expeditious construction
-

# 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
-

# De Minimis Waiver

---

- 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/category
    - calculations of the total cost of materials used to determine the dollar value of goods to which they have applied the waiver
-

# If ARRA-Funded Project Is Covered By Categorical Waiver

---

- No 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
-

# Project Waivers

---

# Many waiver applications may be based on “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.”
-

# Basis on which an recipient could apply for an “Availability” waiver

---

- A 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
-

# What is a 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\(a\)\(2\)\(ii\)](#)]

---

# “Substantial Transformation” Defined

---

- “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
    - EPA believes it provides important guidance on this issue, rooted in well-established legal interpretations
-

# The “Substantial Transformation” Analysis

---

- ❑ Determination of whether “substantial transformation” has occurred is always case-by-case under questions/criteria
  - ❑ 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.”
-

# 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
-

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

---

- Manufacturer brings all components of the good to the site and always does so in normal course of business
    - Ensures that this is not an attempt to game BA rules
  - Manufacturer does all the work onsite
    - May use sub for this only if manufacturer does so already in the normal course of business
    - Case is strongest if the transformative work must be done onsite (e.g., work includes adjustments, calibration, etc required to meet performance spec)
-

# 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 US-made per §1605(a)
-

# Applying “Substantial Transformation” Analysis: EPA Role

---

- EPA does not make “substantial transformation” (ST) or US/foreign origin determinations
  - EPA §1605 role is to review waiver requests when recipient believes it cannot comply by buying US-made good, and do compliance oversight
-

# State Buy American Role

---

- Ensure recipients have adequate documentation in project files to demonstrate all applicable means of BA compliance
    - For US-made goods: verification of US 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
-

# Questions for Determining Whether Substantial Transformation Has Occurred in the US

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 US? (If the answer is yes, then this is clearly manufactured in the US, 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 US (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> ]		

---

If 1,2 or 3 is "yes" then ST has occurred

# 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 a, b or c is "yes", then ST has occurred

# To Answer Question 3, Ask the Following:

---

Question	Yes	No
3. Was(/were) the process(es) performed in the US (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 at least 2 answers are "yes",  
then ST occurred

# **NOT** Substantial Transformation

---

- ❑ 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)
-

# Availability Waivers

---

- *What if a good is produced by both US and non-US manufacturers, but the assistance recipient has reason for concern that the US-produced good may not be available in a sufficient quantity and in a timely manner as to meet the “expeditious construction” and other timing requirements of ARRA?*
  - Availability waivers can be justified if assistance recipient provides adequate documentation of:
    - Good-faith efforts to seek and inability to obtain firm and satisfactory commitment by any US producer to deliver a sufficient quantity of the good in a timely manner as specified in construction documents for project
    - Firm and satisfactory commitment by a non-US producer for timely delivery of a sufficient quantity
-

# Limited US Sourcing Issues & Availability Waivers

---

- A large number of manufactured goods are needed for any ARRA funded SRF project
  - These goods differ greatly in the:
    - Extent to which they are US-manufactured, and
    - Presence or absence of competition as among US producers
  - ARRA requirements
    - “Contract or construction” provision makes timing crucial
    - To complete construction expeditiously to create economic stimulus (Sec. 1602)
    - These requirements properly enable assistance recipients to demand timely delivery, as essential feature of “availability”
-

# Limited US Sourcing Issues & Availability Waivers

---

- Buy American provisions may properly increase demand for goods manufactured by domestic monopoly producers with a relatively small share of the current US market, as no waiver is required for their use
  - EPA expects that access to availability waivers will minimize potential for monopolistic or unfair trade practices by balancing this against ARRA's clear imperative for expeditious construction
  - This balanced approach offers US producers a fair opportunity for a realistic, timely increase in production, while enabling assistance recipients and contractors to obtain necessary goods for construction within ARRA's expeditious time frames
-

# Buy American Waiver Process

---

- ❑ SRF assistance recipient (or State on recipient's behalf) requests waiver
  - ❑ State SRF Program may participate in preparation or review of requests
  - ❑ 5-Step process for reviewing individual case waivers (where approved)
    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
-

# How to submit a request

---

- ❑ Waiver applicants should submit requests accompanied by all necessary documentation to their Regional EPA Office
  - ❑ Via email: [region4waiver@epa.gov](mailto:region4waiver@epa.gov)
  - ❑ Formal review period starts once EPA finds request package is complete
-

# Questions?

---

- ❑ Sheryl Parsons, SRF Coordinator
  - ❑ [parsons.sheryl@epa.gov](mailto:parsons.sheryl@epa.gov)
  - ❑ 404-562-9337
-