



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
WATER

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MEMORANDUM

SUBJECT: Clarification of Requirements for Projects to be Under Contract or Construction by February 17, 2010 under the "American Recovery and Reinvestment Act of 2009"

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TO: Water Management Division Directors
Regions I - X

P.L. 111-5, the "American Recovery and Reinvestment Act of 2009" (ARRA), provides significant levels of funding for States to finance high priority infrastructure projects needed to ensure clean water and safe drinking water. The overarching principle, however, is to use all ARRA funds as expeditiously as possible for eligible projects that preserve and create jobs and promote economic recovery. In direct implementation of the explicit intent of Congress, EPA has, in and since the SRF Guidance memorandum of March 2, 2009, clearly stated that all funds must be under contract or construction, supported by assistance agreements, by February 17, 2010.

Questions have arisen recently as to the meaning of the February 17, 2010 "contract or construction" requirement. Specifically, questioners have asked 1) whether the words "or construction" would allow a portion of a project to be under contract or construction and still meet the required deadline; and 2) whether a project would comply with the deadline if it has full contracts in place that are not funded by an assistance agreement. The answer to both these questions is no.

The specific language in the ARRA that sets the deadline is as follows:

"Provided further, That the Administrator shall reallocate funds appropriated herein for the Clean and Drinking Water State Revolving Funds (Revolving Funds) that are not under contract or construction within 12 months of the date of enactment of this Act:"

The Joint Explanatory Statement of the Conferees explicitly stated that the purpose of this statutory requirement was "[t]o ensure that the funds appropriated herein for the Revolving Funds are used expeditiously to create jobs" (H. Rpt. 111-16, at 443). Congress' clear objective will not be met unless all ARRA SRF funds are committed in assistance agreements and under contract by the February deadline. Consistent with this congressional direction, EPA's March 2, 2009 ARRA guidance for the SRFs, states that:

"The purpose of this language is to ensure that all funds appropriated under the ARRA are not only committed to projects through binding commitments or executed loan agreements, but are further committed to contracts for construction by the assistance recipient, or construction has commenced within 12 months of enactment. In order to meet the requirements of the ARRA, all funds must be committed to eligible projects and each State must provide a signed certification that contracts have been signed or projects are under construction in an amount equal to the full value of the ARRA assistance agreement by February 17, 2010."

Both the ARRA language and the subsequent EPA guidance consistently direct that all funds appropriated under ARRA must be committed to projects that are covered by assistance agreements and that all of these funds committed under assistance agreements must also be placed under contract or construction by February 17, 2010. The ARRA conferees were emphatic that "the [SRF] funds appropriated herein are used expeditiously to create jobs." This and the statutory language do not allow for any reasonable interpretation other than that all ARRA SRF funds not in assistance agreements and under contract or construction by February 17, 2010 must be reallocated as not being "used expeditiously to create jobs."

Regarding the first question, the necessary mechanism for using ARRA funds for project construction is the contract funded by the assistance agreement. Therefore, a project will fail to meet the required deadline if only a portion of the ARRA funding for the project is under contract, even if construction has begun. Construction may appear to be carried out without a contract where a governmental assistance recipient does so through ARRA-funded force account work (using its own employees and equipment). Force account work can, however, also be viewed as in effect under contract, where such recipients have officially obligated the funds for such work from an ARRA assistance agreement to the project by the deadline.

Regarding the second question, the only way that ARRA funds can be committed to a project is through an assistance agreement. Projects that do not have assistance agreements in place by February 17, 2010 will not meet the ARRA deadline regardless of the status of contracts or construction.

If you have any questions concerning the contents of this memorandum you may contact us, or have your staff contact Jordan Dorfman, Attorney-Advisor, Clean Water State Revolving Fund Program, at (202) 564-0614, or Philip Metzger, Attorney-Advisor, Drinking Water State Revolving Fund Program, at (202) 564-3776.