U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL

New Jersey Department of Environmental Protection Needs to Meet Cooperative Agreement Objectives and Davis-Bacon Act Requirements to Fully Achieve Leaking Underground Storage Tank Goals

Report No. 14-R-0278 **June 4, 2014**

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Abbreviations

AAL	Ahmad Associates Limited
CFR	Code of Federal Regulations
DBA	Davis-Bacon Act
EPA	U.S. Environmental Protection Agency
FAQ	Frequently Asked Questions
IPA	Independent Public Accounting
LUST	Leaking Underground Storage Tank Trust Fund Program
NJDEP	New Jersey Department of Environmental Protection
OIG	EPA Office of Inspector General
OMB	Office of Management and Budget
OUST	Office of Underground Storage Tanks
USDOL	U.S. Department of Labor

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U.S. Environmental Protection Agency
Office of Inspector General

14-R-0278
June 4, 2014

At a Glance

Why We Did This Review

The U.S. Environmental Protection Agency (EPA) awarded American Recovery and Reinvestment Act cooperative agreement 2L-97234209 to the New Jersey Department of Environmental Protection (NJDEP). The EPA Office of Inspector General (OIG) contracted with Ahmad Associates Limited, an independent public accounting (IPA) firm, to audit the agreement. The objectives of the audit were to determine whether NJDEP's costs incurred and procurements under the cooperative agreement complied with the applicable federal requirements and whether NJDEP met the Recovery Act requirements and cooperative agreement objectives.

This report addresses the following EPA goals or cross-agency strategies:

- *Cleaning up communities and advancing sustainable development.*
- *Launching a new era of state, tribal, local and international partnerships.*

For further information, contact our public affairs office at (202) 566-2391.

The full report is at:
www.epa.gov/oig/reports/2014/20140604-14-R-0278.pdf

New Jersey Department of Environmental Protection Needs to Meet Cooperative Agreement Objectives and Davis-Bacon Act Requirements to Fully Achieve Leaking Underground Storage Tank Goals

What the IPA Auditor Found

NJDEP did not fully meet cooperative agreement objectives or ensure compliance with Davis-Bacon Act requirements.

The IPA auditor found that NJDEP did not fully meet the cooperative agreement objectives and could not demonstrate compliance with the Buy American and Davis-Bacon Act provisions of the Recovery Act. However, the OIG later determined that the agency and NJDEP had reasonable basis for their determination that the Buy American requirements do not apply to the projects under the cooperative agreement. As a result, the OIG has removed the recommendation relating to the Buy American issue.

The IPA auditor found that NJDEP under-reported the number of jobs created and retained for one of the quarters sampled.

The IPA auditor found that NJDEP had adequate financial management systems to ensure that costs claimed were in accordance with the federal requirements. The IPA also found that NJDEP complied with New Jersey's state procurement policies and procedures, as required under the Code of Federal Regulations (CFR) in 40 CFR 31.36(a).

The IPA auditor is responsible for the content of the audit report, with the exception of the EPA's comments to the draft report and the OIG's evaluation of those agency comments. The OIG performed the procedures necessary to obtain reasonable assurance about the IPA auditor's independence, qualifications, technical approach and audit results. Having done so, except for the Buy American issue as described above, the OIG accepts the IPA auditor's conclusions and recommendations.

Recommendations and Planned Corrective Actions

The IPA auditor's report recommends that the Region 2 Regional Administrator require NJDEP to establish internal controls to ensure that modifications to the cooperative agreement work plan are in accordance with 40 CFR 31.30 and 31.40. The report also made recommendations relating to Davis-Bacon Act compliance and reported job creation/retention.

NJDEP and Region 2 concurred with the job reporting issue and have provided a summary and explanations for the job reporting error. The issue is resolved. NJDEP and Region 2 disagreed with the remaining findings and recommendations in their draft responses. However, during subsequent discussions, Region 2 agreed that NJDEP will ensure that the sites that meet the criteria established in its Office of Underground Storage Tanks Recovery Act guidance meet the Davis-Bacon Act requirements.

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

THE INSPECTOR GENERAL

June 4, 2014

MEMORANDUM

SUBJECT: New Jersey Department of Environmental Protection Needs to Meet Cooperative Agreement Objectives and Davis-Bacon Act Requirements to Fully Achieve Leaking Underground Storage Tank Goals
Report No. 14-R-0278

FROM: Arthur A. Elkins Jr.

TO: Judith A. Enck, Regional Administrator
Region 2

This memorandum transmits the final report for the audit of American Recovery and Reinvestment Act cooperative agreement 2L-97234209 awarded to the New Jersey Department of Environmental Protection (NJDEP).

The independent public accounting (IPA) firm Ahmad Associates Limited conducted this audit on behalf of the Office of Inspector General (OIG) of the U.S. Environmental Protection Agency (EPA). Due to the limitations in the contract terms and conditions, the OIG analyzed the EPA's comments to the draft report and provided the results to the IPA firm. The IPA firm conducted all remaining audit procedures.

The audit was required to be conducted in accordance with *Government Auditing Standards*, issued by the Comptroller General of the United States. The IPA firm is responsible for the audit report and the conclusions expressed in that report. The OIG performed the procedures necessary to obtain a reasonable assurance about the IPA firm's independence, qualifications, technical approach and audit results. Having done so, except for the Buy American issue as described below, the OIG accepts the IPA auditor's conclusions and recommendations.

The IPA auditor found that, among other things, NJDEP could not demonstrate compliance with the Buy American provisions of the Recovery Act. However, the OIG later determined that the agency and NJDEP had reasonable basis for their determination that the Buy American requirements do not apply to the projects under the cooperative agreement. As a result, the OIG has removed the recommendation relating to the Buy American issue.

The IPA firm's full report is attached. Appendix A contains NJDEP's comments on the draft report as well as the IPA firm's responses. Appendix B contains the EPA's comments on the draft report as well as the OIG evaluation of those agency comments. The OIG also includes, as appendix C, a status of recommendations and potential monetary benefits table that summarizes the findings the IPA firm

identified and the corrective actions it recommends. The recommendations represent the opinion of the IPA firm and the OIG, and do not necessarily represent the final position of the EPA. EPA managers, in accordance with established audit resolution procedures, will make a final determination on matters in this report.

Action Required

In accordance with EPA Manual 2750, you are required to provide us your proposed management decision on the findings and recommendations in this report before you formally complete resolution with the recipient. Your proposed management decision is due in 120 days, or on October 2, 2014. To expedite the resolution process, please also email an electronic version of your management decision to adachi.robert@epa.gov.

Your response will be posted on the OIG's public website, along with our memorandum commenting on your response. Your response should be provided as an Adobe PDF file that complies with the accessibility requirements of Section 508 of the Rehabilitation Act of 1973, as amended. The final response should not contain data that you do not want to be released to the public; if your response contains such data, you should identify the data for redaction or removal. This report will be available at http://www.epa.gov/oig.

If you or your staff have any questions regarding this report, please contact Kevin Christensen, acting Assistant Inspector General for Audit, at (202) 566-1007 or christensen.kevin@epa.gov; or Robert Adachi, Product Line Director, at (415) 947-4537 or adachi.robert@epa.gov.

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Audit of American Recovery and Reinvestment Act-Funded Cooperative Agreement 2L-97234209 Awarded to the New Jersey Department of Environmental Protection

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November 26, 2013

Janet Lister, COTR
EPA Office of Inspector General
75 Hawthorne St., Mailcode IGA-1
San Francisco, CA 94105

Dear Ms. Lister:

This is our final report on the audit of Cooperative Agreement 2L-9723409 awarded by EPA to the New Jersey Department of Environmental Protection (NJDEP).

The audit disclosed that NJDEP was not in compliance with the Buy American and Davis Bacon Acts.

To comply with our contractual agreement, please provide documentation on your acceptance of this report.

If you have any questions, please contact Victor R. Ruiz at or 703-447-5602.

Sincerely,

Victor R. Ruiz

Table of Contents

Introduction

Purpose

The primary purpose of this audit was to determine whether the New Jersey Department of Environmental Protection (NJDEP) complied with the requirements of cooperative agreement 2L-97234209 and whether NJDEP met the cooperative agreement objectives.

Objective

The objective of the audit is to determine whether:

- The costs incurred under the cooperative agreement were allowable under the Code of Federal Regulations (CFR) in 40 CFR Part 31, 2 CFR Part 225 and the cooperative agreement terms and conditions.
- NJDEP's procurements under the cooperative agreement were conducted in accordance with 40 CFR, Part 31.
- The objectives of the cooperative agreement were met.
- NJDEP complied with the following American Recovery Reinvestment Act (Recovery Act) requirements: Section 1605 (Buy American), Section 1606 (Wage Rate Requirement/Davis Bacon Act) and Section 1512 (Reporting).

Background

The President signed the Recovery Act on February 17, 2009. The purpose of the Recovery Act is to preserve and create jobs, promote economic recovery, and invest in environmental protection and other infrastructure that will provide long-term economic benefits. The Recovery Act provided the U.S Environmental Protection Agency (EPA) with $7.2 billion for existing EPA programs.

The EPA awarded Cooperative Agreement 2L-97234209 to NJDEP on July 9, 2009. Cooperative agreement 2L-97234209 was funded as part of the $200 million Leaking Underground Storage Tank Trust Fund Program (LUST). The purpose of the cooperative agreement was to provide federal assistance in the amount of $4,819,000 to assess and cleanup petroleum releases from leaking underground storage tank sites in New Jersey. The EPA's contribution to the project was 100 percent of approved costs not to exceed $4,819,000. The federal assistance project's period of performance was from July 9, 2009 to September 30, 2012.

This assistance award was subject to 2 CFR Part 176, "Requirements for Implementing Sections 1512, 1605, and 1606 of the American Recovery and Reinvestment Act of 2009 for Financial Assistance Awards." Section 1512 identifies reporting requirements and Section 1606 requires

payment of wages determined by the Secretary of Labor. Section 1605 requires the use of iron, steel, and manufactured goods that are produced in the United States.

Scope and Methodology

Our Recovery Act performance audit covered the period from July 9, 2009 through September 30, 2012. We conducted our fieldwork at NJDEP in Trenton, New Jersey from October 25, 2012 to April 16, 2013.

Our scope included the review of NJDEP's costs incurred under the cooperative agreement, procurement processes, objectives of the cooperative agreement and compliance with Recovery Act requirements related to Section 1605 – Buy American, Section 1606 – Davis Bacon Act and Section 1512 – Reporting.

A performance audit includes gaining an understanding of internal controls considered significant to the audit objectives, testing controls, and testing compliance with significant laws, regulations and other requirements. For this engagement, we obtained an understanding of NJDEP's procurement processes and internal controls.

Our audit methodology included conducting interviews and discussions with officials at NJDEP to gain an understanding about the internal controls, processes, systems and procedures used to capture, measure and report costs, process procurement actions, and ensure cooperative agreement objectives are met.

To derive a sample population from the provided non-salary and salary data, a combination of random and judgmental sampling techniques was utilized. We used random sampling to select 35 transactions from NJDEP's entire population of transactions under the cooperative agreement. We then judgmentally selected another 5 high dollar transactions because the potential impact of misstatement in these transactions is more significant on the total costs claimed. We tested these transactions to verify that cost was allowable in accordance with the requirements of the cooperative agreement. Total of $863,573.51 was tested, which comprised of 17.5 percent of the total project costs of $4,950,071.96 (includes the cooperative agreement total of $4,819,000 and $131,071.96 paid by NJDEP which was not claimed). We did not project the results to the universe because NJDEP did not segregate the contract costs into cost categories, such as labor, materials and equipment.

We requested, received and reviewed documentation from NJDEP to assess procurement processes and internal controls over procurements. The documentation included the State's procurement policies and procedures and a written description of the internal controls that were in place during the cooperative agreement period designed to detect and/or prevent potential errors related to the procurement process. We also requested, received and reviewed documentation required to verify that the program objectives were met.

We reviewed the documentation provided and interviewed NJDEP personnel to obtain an understanding of the accounting system, operating procedures, and internal controls over funds

receipt, funds disbursement, and financial reporting. We reviewed NJDEP's administrative and financial reports submitted to EPA to determine if they were accurate and timely.

We conducted this performance audit in accordance with generally accepted government auditing standards issued by the Comptroller General of the United States. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provided a reasonable basis for our findings and conclusions based on our audit objectives.

Results of the Audit

NJDEP had adequate financial management systems and related procedures to ensure that costs claimed were in accordance with the federal requirements under 40 CFR Part 31, 2 CFR Part 225, and the terms and conditions of the cooperative agreement. We also found that NJDEP complied with New Jersey's State procurement policies and procedures, as required under 40 CFR 31.36(a).

NJDEP did not fully meet the cooperative agreement objectives and could not provide sufficient documentation to support that all manufactured goods used on the project met the Buy American requirements of Section 1605 of the Recovery Act. In addition, we found that NJDEP did not comply with the Davis Bacon Act (DBA) requirements under Recovery Act Section 1606. NJDEP also under-reported the number of jobs created and retained for one of the quarters sampled.

FINANCIAL MANAGEMENT

NJDEP's financial management system met the federal requirements applicable to the cooperative agreement. Cash draws complied with 40 CFR 31.21 and 31.22, 2 CFR Part 225, Appendix A and the cooperative agreement terms and conditions. In addition, NJDEP's accounting system information and documentation showed that the drawdowns were supported by expenditures incurred under the cooperative agreement.

Table 1: Summary of costs

Cost category	Amount claimed
Personnel	$579,579
Fringe benefits	202,900
Supplies	420
Contractual	3,988,173
Other	66,419
Total direct costs	4,937,491
Indirect costs	112,581
Total costs	$4,950,072
Less amount paid by NJDEP	131,072
Total costs claimed	**$4,819,000**

Sources: Amounts claimed were from the recipient's accounting system.

We examined selected NJDEP's costs and transactions to determine whether charges to the cooperative agreement were adequately supported. Our examination consisted of 35 randomly

selected transactions with a total cost of $493,070.18 and 5 judgmentally selected transactions with a total cost of $370,503.33. Overall, we tested 40 transactions with a total cost of $863,573.51 which comprised 17.5 percent of the total project costs of $4,950,071.96 (which includes the amount paid by NJDEP).

PROCUREMENT

NJDEP complied with New Jersey's State procurement policies and procedures, as required by Title 40 CFR 31.36(a). NJDEP's evaluation committee fully supported the contractors selected to perform the work under the CA. NJDEP required its contractors to retain its records for three years after submitting its final Federal Financial Status report for EPA funded work, as required by 40 CFR 31.42.

COOPERATIVE AGREEMENT OBJECTIVES

The purpose of the cooperative agreement was to provide federal assistance in the amount of $4,819,000 to assess and cleanup petroleum releases from leading underground storage tanks sites in New Jersey. We verified work performance to determine whether the cooperative agreement objectives, as revised in the final work plan dated December 20, 2011, were met. We found that NJDEP did not fully meet the cooperative agreement objectives. NJDEP also did not have a formal process for work plan modifications to ensure compliance with 40 CFR 31.30 requirements. Our discussions with NJDEP personnel and review of documentation indicates that the revisions were based on e-mails and undocumented conversations with EPA Region 2.

Title 40 CFR 31.30(d)(1) requires the recipient to obtain prior approval if the scope or objectives of the project is revised (regardless of whether there is an associated budget revision).

The absence of a formal process for revision of cooperative agreement objectives is a deficient internal control component related to the control or operating environment of the organization. The operations objective pertains to the achievement of the mission of a department and the effectiveness and efficiency of its operations, including performance standards. Without a formal written process, the numerous changes to the deliverables are not captured and revised requirements would be difficult to track. In addition, 2 CFR Part 225, Appendix A, paragraph 2(a)(1) states that governmental units are responsible for the efficient and effective administration of federal awards through the application of sound management practices.

Deliverables Not Completed

The original cooperative agreement had the following deliverables:

(a) Issue 40 Spill Act Directives
(b) Issue 40 Site Access Agreements
(c) File 5 Site Access Complaints with the Courts
(d) 20 Sites cued for public funds
(e) 20 Sites brought into compliance

(f) 16 Cost Recovery Actions
(g) Conduct remediation activities at 16 federal regulated UST release sites
(h) Provide semi-annual site status reports and appropriate financial documents.

The following deliverables were revised on June 22, 2010:
(a) Issue 16 Spill Act Directives (60% reduction)
(b) Issue 16 Site Access Agreements (60% reduction)

NJDEP did not complete the objectives:

- Objective of 20 sites brought into compliance – Actual accomplishment was 7 (a shortage of 13 or 65% not met)
- Objective of 16 Cost Recovery Actions – Actual accomplishment was zero (100% not met)
- Semi-annual site status reports were not provided consistently during the grant period.

The December 20, 2011, work plan added the following deliverables which were also not accomplished:

(a) Construction activities and operational shakedown to be completed.
(b) Complete RI activities.
(c) Conduct IRM for LNAPL.

Work Plan Modification Process

We noted that the original work plan has been changed several times. Our discussions with NJDEP personnel and review of documentation indicates that some of the revisions were based on e-mails and undocumented conversations/meetings with EPA Region 2.

Title 40 CFR 31.30 established the requirements for changes under federal awards. Title 40 CFR 31.30(d)(1) requires the recipient to obtain prior approval if the scope or objectives of the project is revised, regardless of whether there is an associated budget revision. Title 40 CFR 31.40(a) also requires the recipient to monitor the grant support activities to assure that performance goals are being achieved. Without a formal process for addressing changes in the cooperative agreement work plans, there is no assurance that the requirements under 40 CFR 31.30(d)(1) and the performance goals are met.

BUY AMERICAN REQUIREMENTS

Section 1605 of the Recovery Act prohibits the use of Recovery Act funds for a project unless all of the iron, steel, and manufactured goods used in the project are produced in the United States. Section 1605 also requires that this prohibition be consistent with U.S. obligations under international agreements, and provides for a waiver under three circumstances:

(i) Applying the domestic preference would be inconsistent with public interest.

(ii) Iron, steel, or relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality.

(iii) Inclusion of iron, steel, or manufactured goods produced in the United States would increase the overall project costs by more than 25 percent.

Title 2 CFR §176.140(a)(1) defines a manufactured good as a good brought to the construction site for incorporation that has been processed into a specific form and shape, or combined with raw materials 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 in manufactured goods, as long as the manufacture of the goods occurs in the United States (Title 2 CFR §176.70(a)(2)(ii)).

NJDEP could not provide any documentation to demonstrate that the iron, steel, and manufactured goods used under the cooperative agreement were produced or manufactured in the United States in accordance with the Buy American requirements set out in Section 1605 of the Recovery Act. NJDEP staff said they did not monitor for compliance with the Buy American requirements because they determined that the projects under the cooperative agreement were not subject to the requirements based on EPA's formal guidance for the LUST Recovery Act projects and discussions with EPA Region 2.

From the 40 transactions we tested under the financial management section, eight transactions, totaling $ 47,792.13, fell within the purview of the Buy American provisions.

Sample	Type of Material	Cost of Material
2	PVC pipes, fittings, misc.	$ 5,048.96
17	Pneumatic fittings and controls & EV Ball valve	$ 3,779.65
18	Galvanized pipes, fitting, compactor Pipes and gravel	$ 2,082.65
20	Electrical Materials	$ 428.79
21	Well Materials	$ 4,770.00
22	Plumbing Supplies	$ 6,430.76
36	Various plumbing & electrical Supplies	$ 15,208.80
37	Electrical Supplies	$ 10,042.52
		$ 47,792.13

The items listed above were identified in the sample transactions tested and not a complete list of items subject to Buy American provisions. Under the Recovery Act, Section 1605, it is NJDEP's

responsibility to identify all iron, steel, and manufactured goods used in the projects under the cooperative agreement and demonstrate that these goods were produced in the United States.

Discussions with NJDEP personnel disclosed that they were of the opinion, based on EPA's guidance and discussions with EPA Region 2, that the Buy American provisions did not apply. NJDEP stated that based on the EPA guidance, only limited activities under the LUST program may be subject to requirements of the Buy American provision and that using state funds for those limited activities would eliminate the need to comply with the requirements.

We disagree with NJDEP that using state funding would eliminate the need to comply with the Buy American requirements. Recovery Act Section 1605 states that none of the funds appropriated or otherwise made available by the Act may be used for a project unless all of the iron, steel and manufactured goods used in the project are produced in the United States. Using state funds for the qualified activities would not exempt NJDEP from complying with the Buy American requirements.

Because NJDEP cannot show that it complied with the Buy American requirements and has not obtained a waiver from the EPA, NJDEP's use of the Recovery Act funds under the cooperative agreement is prohibited by Section 1605 of the Recovery Act, unless a regulatory option is exercised.

DAVIS-BACON ACT COMPLIANCE

NJDEP did not have adequate controls to ensure that all laborers and mechanics who work at the site subject to the DBA wage requirements were paid properly. We obtained a listing of the vendors/contractors NJDEP used under the cooperative agreement and performed a review of the invoice descriptions for services provided by each vendor to identify vendors that may be subject to the DBA requirements. We found that two of the vendors had a truck driver, electrician and general laborers working on site. The vendor did not submit certified payroll reports, and NJDEP did not verify that the employees were paid at least the DBA wage rates for the hours worked on site. Section 1606 of the Recovery Act requires that all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by the Recovery Act be paid wages at rates not less than DBA rates.

Programmatic condition 5 of the cooperative agreement incorporated the Department of Labor's regulations at 29 CFR Part 1 and 29 CFR 5.5. The cooperative agreement clarified that DBA applies when the LUST project includes:

- Installing piping to connect households or businesses to public water systems or replacing public water system supply well(s) and associated piping due to groundwater contamination.

- Soil excavation/replacement when undertaken in conjunction with the installation of public water lines/wells described above.

- Soil excavation/replacement, tank removal, and restoring the area by paving or pouring concrete when the soil excavation/replacement occurs in conjunction with both tank removal and paving or concrete replacement.

Programmatic condition 5 also included the following statement "The Recipient shall periodically conduct spot checks of a representative sample of weekly payroll data to verify that contractors or subcontractors are paying the appropriate wage rates. The Recipient shall establish and follow a spot check schedule based on its assessment of the risks of noncompliance with [DBA] posed by contractors or subcontractors and the duration of the contract or subcontract. At a minimum, the Recipient must spot check payroll data within two weeks of each contractor or subcontractor's submission of its initial payroll data and two weeks prior to the completion date the contract or subcontract."

NJDEP did not conduct the payroll verification required under the cooperative agreement. Therefore, there is no assurance that employees who worked on projects subject to the DBA requirements were paid in accordance with the DBA requirements.

NJDEP determined based on EPA guidance that only limited activities under the cooperative agreement may be subject to the DBA requirements. NJDEP believed that those limited activities would not be subject to the requirements, so long as NJDEP used state funds for those activities. We agree that based on the guidance EPA received from the Department of Labor, only those sites that meet the criteria established under the cooperative agreement, as listed above under paragraph two of this section, would be subject to the Buy American requirements. However, we disagree that using state funding for those activities would eliminate the need to comply with the DBA requirements. According to Recovery Act Section 1606, a project is subject to the DBA requirements if it is funded "in whole or in part" with Recovery Act funds. NJDEP's lack of payroll verification and documentation would be a noncompliance with the DBA requirements and Cooperative Agreement terms and conditions.

RECOVERY ACT REPORTING REQUIREMENTS

We reviewed the Recovery Act Section 1512 reports submitted by NJDEP for seven of the 12 quarters covering the grant period. The testing of the seven quarters for reporting job creation noted that six were appropriately reported and one report understated the jobs created by 0.88. The understatement was attributed to the omission of hours worked by NJDEP personnel in the quarterly calculation.

RECOMMENDATIONS

We recommend that the Regional Administrator, Region 2:

1) Require NJDEP to establish internal controls to ensure that modifications to the cooperative agreement work plan are in accordance with the requirements of 40 CFR 31.30 and 31.40.

2) Employ the procedures set out in 2 CFR 176.130 to ensure compliance with Buy American requirements. If any foreign manufactured goods are used under the cooperative agreement and the region decides to retain those foreign manufactured goods in the project under 2 CFR 176.130(c)(3), the region should either reduce the amount of the award by the cost of the foreign steel, iron, or manufactured goods that are used in the project or take enforcement in accordance with the agency's grants management regulations.

3) Require NJDEP to provide documentation to demonstrate that it has verified that all laborers and mechanics who worked on the projects subject to the DBA requirements per programmatic condition 5 of the cooperative agreement were paid in accordance with Davis Bacon requirements.

4) Require NJDEP to submit corrections for the one inaccurately reported quarter.

RECIPIENT COMMENTS

NJDEP agreed with the credit back of rental deposit and miscalculation of one Recovery Act Section 1512 report.
NJDEP disagreed with the following issues in the draft report:

- Question costs of $52,077.50 related to adequate supporting documented for labor and material charges.
- Requirement for a certification of independent price certification by contractors.
- Requirement to establish written policies and procedures for monitoring of contractors.
- Question cost of $4,766,922.50 attributed to specific tasks and deliverables not completed.
- Requirement to update its policies and procedure to address grant modifications.
- Lack of compliance with Buy American Act.
- Lack of compliance with Davis Bacon Act.

NJDEP stated that there was no requirement for contractor' invoice, as the only requirement was the submission of a properly executed form DEP-024. In addition, NJDEP stated that the regulation cited for the certification of independent price certification was not applicable to LUST projects and that it has included in their contractor bid proposal the non-collusion language required under the LUST projects. NJDEP believed that they complied with New Jersey policies and procedure related to monitoring.

NJDEP stated the work plan was intended to be a "fluid document" that could be modified with the agreement of both parties. All revisions, modifications or departures from the original work plan were discussed and approved by EPA Region 2. In addition, NJDEP stated that the cooperative agreement had only one performance based requirement which was to obligate funds for contracts, subgrants, or similar transactions for at least 35 percent of funds, and expend at least 15 percent of funds within 9 months of this award. NJDEP believed that this programmatic objective was met.

NJDEP stated that while the NJDEP and EPA Region 2 were in agreement that the overwhelming majority of activities were not subject to the Buy American Act and DBA, it was agreed that some limited activities may potentially be subject to the requirement. The NJDEP and EPA Region 2 agreed that NJDEP would fund those potentially applicable activities with state funds to ensure that the Buy American Act and DBA requirements would not apply. Subsequent to the exit conference, Region 2 provided Department of Labor concurrence that DBA would not apply unless it was in conjunction with paving or concrete replacement. NJDEP stated that state prevailing wage is required for public work construction projects in New Jersey. These wages are comparable to DBA wage; consequently, the workers were appropriately compensated. The NJDEP said it can provide documentation that the workers who worked on-site under the cooperative agreement were compensated appropriately.

NJDEP stated the underreported hours were the result of a miscalculation. At the exit conference, NJDEP stated that it followed up on the job reporting errors and found that there is no way to correct the reported amount. It was agreed that NJDEP would prepare a letter to the EPA documenting the error and follow up actions taken.

The full text of NJDEP's written response is attached in Appendix A.

AUDITOR RESPONSE

We have evaluated NJDEP's comments and have removed the following findings and questioned costs from the final report:

- Inadequate supporting documentation for labor and material charges.
- Certification of independent price certification by contractors.
- Establishing written policies and procedures for monitoring of contractors.
- Question cost of $4,766,922.50 attributed to specific tasks and deliverables not completed.
- Requirement to update its policies and procedure to address grant modifications.

While we have removed the questioned costs relating to the deliverables issue, our overall finding remains unchanged. We disagree that the only requirement was to spend the funds. The cooperative agreement specifically stated the objectives to be met and based on the data provided by NJDEP the objectives were clearly not met.

We have reaffirmed the issues relating to noncompliance with Buy American and DBA requirements.. We disagree with NJDEP that using state funding would eliminate the need to comply with the Buy American and DBA requirements. Recovery Act Section 1605 states that none of the funds appropriated or otherwise made available by the Act may be used for a project unless all of the iron, steel and manufactured goods used in the project are produced in the United States. Section 1606 also stated that DBA applies to projects funded "in whole or in part" with Recovery Act funds. Using state funds for the qualified activities would not exempt NJDEP from complying with the Buy American and DBA requirements.

We agree with NJDEP that the underreported hours were the result of a miscalculation. Based on discussions with the OIG, NJDEP submitted a letter to EPA and the OIG on November 21, 2013

to explain the follow-up actions taken to address the job reporting issue, as agreed to during the final exit conference. The OIG considers the issue resolved upon issuance of this report.

The full text of our responses is embedded as text boxes in Appendix A of this report.

NJDEP's Comments on the Draft Report

State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

Publicly Funded Response Element
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BOB MARTIN
Commissioner

September 27, 2013

Victor R. Ruiz
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Vienna, VA 22182

Dear Messrs. Ruiz and Buchler:

Enclosed please find the New Jersey Department of Environmental Protection's (NJDEP) response to the draft report on the audit of Cooperative Agreement (2L-9723409) for remediation activities at leaking underground storage tank (LUST) sites funded by the American Reinvestment and Recovery Act (ARRA).

The NJDEP strongly disagrees with the general audit findings and with the auditor's recommendations regarding the awarded grant funds. NJDEP maintains that it complied with all applicable Federal and State requirements and fully satisfied the objectives of the grant. All revisions and modifications to, or departures from, the original cooperative agreement workplan were discussed with, and approved by USEPA Region 2.

Much of the information requested by the auditors was provided during the course of the audit and other information provided by the NJDEP was simply misunderstood. Furthermore, the NJDEP disagrees with the auditors' finding that many of the deliverables are "unquantifiable".

Please do not hesitate to contact me at (609) 984-3074 if you have additional comments or questions.

Sincerely,

Edward Putnam
Assistant Director
Publicly Funded Response Element

cc: James Sullivan, USEPA Region II
Dennis McChesney, USEPA Region II

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Audit of American Recovery and Reinvestment Act-Funded

Cooperative Agreement 2L-97234209 Awarded to the

New Jersey Department of Environmental Protection

Audit Response Document Prepared By

New Jersey Department of Environmental Protection

This response is provided in the same section-by-section format as in the document entitled, "Audit of American Recovery and Reinvestment Act-Funded Cooperative Agreement 2L-97234209 Awarded to the New Jersey Department of Environmental Protection" (ARRA LUST Grant).

Purpose – No comment.

Objective – No comment.

Background – No comment.

Scope and Methodology – No comment.

Results of Audit

Buy American Act and Davis Bacon Act Requirements – The New Jersey Department of Environmental Protection (NJDEP) relied on USEPA's "Guidance To Regions For Implementing The LUST Provision Of The Reinvestment Act Of 2009" (Guidance) for Davis Bacon Act and Buy American Act compliance. In reviewing the Guidance it was clear that the Davis Bacon and Buy American Acts would have limited application to the work being conducted pursuant to the ARRA LUST Grant, due to the nature of the activities performed.

The Davis Bacon Act requires that contractor employees are paid a specific wage commensurate with their title, the location of the project and in accordance with a wage chart developed by the US Department of Labor. The New Jersey Prevailing Wage Act has similar requirements and accomplishes the same objectives as the Davis Bacon Act; therefore, the State prevailing wage is required for public work construction projects in New Jersey. These wages are comparable to DBA wages; consequently, the workers were appropriately compensated. The NJDEP can provide documentation that the workers at the ARRA LUST Grant sites were compensated appropriately.

AAL Response 1. NJDEP did not provide documentation to support that workers were compensated appropriately. For those sites which meet the DBA applicability requirements listed in programmatic condition 5 of the cooperative agreement (e.g. sites included tank removal in conjunction with concrete replacement or paving) NJDEP will need to provide documentation to support that the wages paid met the DBA requirements.

The Buy American Act ensures that, to the extent possible, American iron, steel and manufactured goods are used in any defined "public building" or" public work" project. This Act is intended to ensure that there is a domestic preference in the use of these materials. The only work conducted by the NJDEP identified as Davis Bacon Act subject pursuant to the Guidance was asphalt paving. Although the NJDEP did perform concrete and paving work, it was not "concrete replacement" as defined in the Guidance. While the NJDEP and USEPA Region 2 were in agreement that the overwhelming majority of activities were not subject to the Buy American Act, it was agreed that some limited activities may be potentially subject. Because these tasks represented a small portion of the overall activities to be performed, the NJDEP and USEPA Region 2 agreed that NJDEP would fund those potentially subject activities with State funds to ensure that the Davis Bacon and Buy American Act provisions would not apply.

AAL Response 2. NJDEP could not provide documentation to demonstrate that manufactured goods used on the project were produced or manufactured in the United States in accordance with the Buy American requirements. Recovery Act Section 1605 states that none of the funds appropriated or otherwise made available by the Act may be used for a project unless all of the iron, steel and manufactured goods used in the project are produced in the United States. Using state funds for the qualified activities would not exempt NJDEP from complying with the Buy American requirements.

The Guidance explicitly states that USEPA is responsible for overseeing compliance with the Davis Bacon Act. NJDEP routinely sought USEPA's feedback and concurrence on questions related to the interpretation and implementation of the Guidance and proceeded consistent with USEPA's direction. NJDEP maintains that Davis Bacon and Buy American Act requirements are not applicable to activities that are not funded by the ARRA LUST Grant and the Auditors' findings to the contrary are erroneous.

AAL Response 3. Use of state funds for paving does not relieve the requirement for compliance with Davis Bacon. As Section 1606 of the Recovery Act states DBA applies to projects funded "in whole or in part" with Recovery Act funds, so long as the work is closely related in purpose, time and place. It is NJDEP's responsibility to demonstrate compliance. NJDEP has not provided any evidence that steps were taken to ensure compliance. Programmatic condition 5 of the cooperative agreement incorporated the Department of Labor's regulations at 29 CFR Part 1 and 29 CFR 5.5. The cooperative agreement also included the following statement "The Recipient shall periodically conduct spot checks of a representative sample of weekly payroll data to verify that contractors or subcontractors are paying the appropriate wage rates. The Recipient shall establish and follow a spot check schedule based on its assessment of the risks of noncompliance with [DBA] posed by contractors or subcontractors and the duration of the contract or subcontract. At a minimum, the Recipient must spot check payroll data within two weeks of each contractor or subcontractor's submission of its initial payroll data and two weeks prior to the completion date the contract or subcontract." Our position remains unchanged.

The Results of Audit section included the statement, "NJDEP also under-reported the number of jobs created and retained for one of the quarters sampled". One of the purposes of ARRA was to create and retain American jobs. A full time equivalent (FTE) calculation was performed and reported quarterly in the ARRA 1512 Report. As explained to the Auditors, the underreported hours were the result of a miscalculation. In adding the hours worked from the various spread sheets, one page was overlooked resulting in the underreporting of 0.88 FTE. This error was discussed with the Auditors. NJDEP management provided a written explanation of how and why the error occurred to the Auditors, however, a copy of this response was not retained in the NJDEP's file.

AAL Response 4. No response is needed as NJDEP concurs with the finding.

Financial Management – The following items were discussed with the Auditors. One recurring issue which the Auditors could not understand bears specific notice. The Auditors have repeatedly stated that the NJDEP contractors have not appropriately invoiced costs to the NJDEP. In all of the instances cited by the Auditors, invoices are not required per the terms and conditions of both the NJDEP Subsurface Remedial Action Services (Subsurface) and Non-Emergency Remedial Action Services (NERAS) contracts.

Language from the Subsurface Contract is attached (this exact boilerplate language is also in the NERAS contract) documenting the fact that Labor Vouchers and Scheduled Equipment, Materials and Services do not require "invoices"; forms DEP-024A and DEP-024B serve the same purpose. This was explained to the Auditors repeatedly. It seems that, explanation to the contrary, the Auditors continue to believe that all items and/or services which are purchased by the NJDEP are the same as items purchased as "Other Direct Cost" items, which do require invoices. The Auditors confuse these items throughout this section. (See attachment A.)

Auditor Comment 1 – "NJDEP did not credit back to the agreement $60.50 of credits that the contractors received. The NJDEP concurred with our finding on this transaction."

NJDEP Response 1 - The credit was for a deposit on a rented piece of equipment. When the equipment was returned a credit was given to the NJDEP contractor which was not then credited back to the State. Due to an oversight on the part of the NJDEP Site Manager, this error went unnoticed. No mechanism exists in the NJDEP's financial system for the reimbursement of ARRA LUST Grant funds. To rectify this situation, these funds will be deposited in the General State Fund.

Auditor Comment 2 – "Lacked adequate support for $2,120 of material and equipment rental charges. Analysis of data did not contain support for $320 for filters and $1,800 for well development equipment rental charges. Total questioned cost of $2,120. NJDEP personnel stated that the Term Contract specifies a signed DEP-024 form as the only backup required for payment of these line items. NJDEP's response is insufficient as the analysis of the contract term requires submission of invoices."

NJDEP Response 2 - While the NJDEP contractor's Time & Materials – Monitoring report for February 7, 2012 did not include the specific statement "changed TSS filters," the report did note that 8 TSS filters had been used (See attached Time & Materials - Monitoring sheet Attachment #1). Also, while the NJDEP contractor did not include a separate report from the well driller for the February 15, 2012 activities, per the contract such paperwork is not required for payment. It should be noted that the Time & Materials – Installation report for February 15, 2012 (see Attachment #2) for other contract workers on site included the statement referencing the treatment activities including "Pumping down well development water tank". The driller's log is not necessary to pay for this activity. The report did indicate that well development was ongoing and the properly executed DEP-024 form was submitted. Per the contract only the DEP-024 form is required.

Auditor Comment 3 – "Lacked adequate support for $4,602 for drilling and casing. There was no site drilling sheet documentation to support $4,602 for 10 foot bore hole drilling and casing. The response by NJDEP was that the invoice is missing due to problems with the scanning process and that it is not mandatory. NJDEP's response is not adequate to clear this issue."

NJDEP Response 3 - The Time & Materials sheet and the invoice detail that was missing from the invoice package is attached (Attachments #3 & #4). The Time & Materials sheet is not necessary for payment since the information is included on the DEP-024 form. As a point of clarification, the Auditor's comment should reference a "10-inch diameter drill" rather than a "10 foot bore hole" as stated in the Audit Report.

Auditor Comment 4 – "Lacked adequate support for $1,440 for labor charges. Labor charges for 12 line items totaling $1,440 on Daily Labor Reports were not supported by field reports. NJDEP personnel stated the invoices were missing due to problems with the scanning process. In addition, NJDEP personnel stated daily labor reports were not mandatory as payments were correct and complete. The response by NJDEP personnel is insufficient to address the lack of support for the labor charges and is contradictory to requirements."

NJDEP Response 4 – The field person in question was a Health & Safety worker. On April 18, 2012 this individual visited the site and produced a report which was not included in the voucher (Attachment #5). Section 6.10.2.A. ATTACHMENT TO PAYMENT VOUCHERS FOR LABOR of the NJDEP's NERAS contract (page 56) states that submission of a DEP-024 form is all that is required under the contract for payment of labor charges. All contract personnel office time was appropriately noted and billed. This issue was discussed during the audit.

Auditor Comment 5 – "Lacked adequate support for $43,855 of materials. There were no invoices to support unit charges totaling $43,855 consisting of charges for a Catalytic Oxidizer $28,725 and Power drop, utility pole, meter pan, transformer and 200 AMP totaling $15,130. NJDEP personnel stated these are line items in the contract and support invoices are not required to be submitted for payment for contract line items. NJDEP's response is insufficient as the analysis of the contract term requires submission of invoices."

NJDEP Response 5 - The Auditors were repeatedly advised they were referencing the wrong contract term for payment of these items. The terms are detailed on page 56 in Section 6.10.2.B. ATTACHMENT TO PAYMENT VOUCHERS FOR SCHEDULED EQUIPMENT, MATERIALS AND SERVICES in the NJDEP's NERAS contract (attachment A). The CATOX unit is Item 125 on page 9 (Attachment #7) and the 200 AMP Power Drop is Item 148 on page 11 (Attachment #8) on the contractor's Pricing Sheet.

Issue at End of Comments – "As stated above, the response from NJDEP personnel regarding the costs questioned is that invoices for materials are not required. NJDEP's position is not supported as the audit noted that the "Request for Bids" specifically states in section 6.10.1 C - FORM OF COMPENSATION - OTHER DIRECT COSTS: Actual Other Direct Costs will be compensated by submission of invoices to NJDEP listing the items and cost summaries."

NJDEP Response - The Auditors were repeatedly advised they were referencing the wrong contract term for payment of labor and equipment. Invoices are required for "Other Direct

Costs" as that term is defined in the contracts. The items being discussed in the Financial Management section of the Audit Report are not defined "Other Direct Costs". The terms are detailed on page 56 in Section 6.10.2.A. ATTACHMENT TO PAYMENT VOUCHERS FOR LABOR and 6.10.2.B. ATTACHMENT TO PAYMENT VOUCHERS FOR SCHEDULED EQUIPMENT, MATERIALS AND SERVICES of the NJDEP's NERAS contract (Attachment A). The Auditors chose to ignore this information after repeatedly being informed of their error.

AAL Response 5. We have evaluated NJDEP' response and revised the draft report to remove all issues related to financial management.

Procurement – This section of the report states that the NJDEP did not require its contractors to include a Certification of Independent Price Determination as required by Title 40 CFR 35.6550 (b)(3). This section of CFR states that all bid proposals are required to have a Certification of Independent Price Determination. Specifically, "the recipient must require that each contractor include in its bid or proposal a certification of independent price determination. This document certifies that no collusion, as defined by Federal and State antitrust laws, occurred during bid preparation."

NJDEP Issue Response –The Auditor cites a provision applicable to CERCLA response actions and not LUST response actions. Notwithstanding, the following language is included in all NJDEP Site Remediation Program remedial contracts:

> 4.4.1.1.3 NON-COLLUSION
>
> By submitting a proposal, the bidder certifies as follows:
> a. The price(s) and amount of its proposal have been arrived at independently and without consultation, communication or agreement with any other contractor, bidder or potential bidder.
>
> b. Neither the price(s) nor the amount of its proposal, and neither the approximate price(s) nor approximate amount of this proposal, have been disclosed to any other firm or person who is a bidder or potential bidder, and they will not be disclosed before proposal opening.
>
> c. No attempt has been made or will be made to induce any firm or person to refrain from bidding on this contract, or to submit a proposal higher than this proposal, or to submit any intentionally high or noncompetitive proposal or other form of complementary proposal.
>
> d. The proposal of the firm is made in good faith and not pursuant to any agreement or discussion with, or inducement from, any firm or person to submit a complementary or other noncompetitive proposal.
>
> e. The bidder, its affiliates, subsidiaries, officers, directors, and employees are not currently under investigation by any governmental agency and have not in the last four

(4) years been convicted or found liable for any act prohibited by state or federal law in any jurisdiction, involving conspiracy or collusion with respect to bidding on any public contract.

This non-collusion language is the state equivalent of the Auditor's reference. In addition, all contract engagements also include a "Conflict of Interest" section (Attachment #9). The NJDEP's contends that this language adequately addresses the Auditors concerns regarding collusion.

AAL Response 6: After evaluation of NJDEP's response, AAL has revised the draft report and removed the issue on independent price certification.

This section continues on to state that the NJDEP does not maintain written policies and procedures for monitoring. Attached is the index for our Hazardous Substance Mitigation Operations Manual (currently under revision) which contains the NJDEP's policies and procedures for publicly funded remediation activities (Attachment #10). Furthermore, it is policy that when either the Subsurface or NERAS contracts are engaged, a NJDEP construction manager is on site while remedial activities are underway.
The third paragraph continues that NJDEP does not have a written policy to address contractor "monitoring". Specifically, Title 40 CFR Part 31.36(b)(2) states, "grantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions and specifications or their contracts or purchase orders." This section does not state that any policies and procedures must be in writing. Furthermore, having an NJDEP construction manager on site during all construction activities satisfies the intent of Title 40 CFR Part 31.36(b)(2).

AAL Response 7: After evaluation of NJDEP's response, AAL has revised the draft report and remove the issue related to monitoring.

Cooperative Agreement Objectives – This section of the Audit Report states that the "NJDEP did not complete the original or revised CA (cooperative agreement) objectives and that there was no formal approval process." It is not clear what formal approval process this Auditor statement refers to. However, the process for the amendment of the CA workplan was that either the NJDEP or USEPA would determine the need for a revision, discuss the revision during one of the bi-weekly conference calls, amend the workplan and send it to the NJDEP or USEPA for their approval. The workplan was always intended to be a fluid document that could be modified with the agreement of both parties.

The audit report states that, "Title 40 CFR Title 31.30(d)(1) requires the grantee to obtain prior approval if the scope or objectives of the project is revised (regardless of whether there is a budget revision)." This was done and also explained to the Auditors. USEPA conducted active monitoring of the NJDEP CA workplan activities using individuals hired specifically for this purpose. This is confirmed by USEPA's Advanced Monitoring Report for the period July 1, 2009 to September 30, 2011 (Attachment #11).

In reference to the comments related to the original CA workplan, these deliverables were amended at USEPA's request and with USEPAs approval by following the above process. Many of the specific issues noted in the Auditor's draft report have already been addressed in a formal response document provided to the Auditors. A response to the first question was emailed to the Auditors on February 26, 2013 (Attachment 12).

The Auditors misstated the revised CA deliverables as: "Issue 16 Spill Act Directives (60% reduction)" and "Issue 16 Site Access Agreements (60% reduction)."
The actual language of this revision reads, "Issue as Many Spill Act Directives as Necessary to Conduct a Total of 16 Site Assessments Initiated and Site Cleanups Initiated" and "Issue as Many Site Access Agreements as Necessary to Conduct 16 Site Assessments Initiated and Site Cleanups Initiated". In total, 26 of each were issued.

The Audit Report states, "NJDEP did not complete the objectives on two of the seven objectives as shown below:

> Objective of 20 sites brought into compliance – Actual accomplishment was 7 (a shortage of 13 or 65% not met)"

NJDEP Response - The NJDEP did not meet the work plan objective of bringing 20 sites into compliance, but instead, the NJDEP conducted publicly funded remediations at 16 other sites.
The Audit Report states: "Objective of 16 Cost Recovery Actions – Actual accomplishment was zero (100% not met)."

NJDEP Response – Conducting 16 cost recovery actions within the ARRA LUST Grant period is not possible. USEPA is aware of this issue, and concurs with the NJDEP. All ARRA LUST Grant sites, with the exception of two that were referred to the NJ Department of Law and Public Safety (DLPS) for cost recovery, will be undergoing remediation for several years. When remediation activities are complete the cases will be referred to the NJDLPS for cost recovery, as the NJDEP does for all other sites. It was understood and agreed to between the NJDEP and USEPA that cost recovery would be initiated on these sites when remediation activities were complete and in accordance with the NJDEP's standard process. Two completed cases, Eric's Main Street Mobil and Carney's Point Service Station were referred to the NJDLPS to initiate cost recovery.

In response to the Audit comment, "The CA also had the following unquantifiable deliverables.

(a) Provide Semi-annual site status reports and appropriate financial documents."
This was accomplished via the semi-annual LUST4 reports for both the NJDEP Site Remediation and Enforcement Programs. Additionally Quarterly Reports were provided in the LUST4 database. Stimulus sites at appropriate milestones were included in the programs semi-annual report and the financial documents were included in the Reports.gov 1512 report. It is not clear what is meant by the Auditor's use of the term "unquantifiable". The NJDEP considers the completion of all required reports as quantifiable.

"(b) Construction activities and operational shakedown to be completed."

While construction activities were completed during the term of the grant, shakedown was not. The remedial systems constructed are complex and require a period of time in which to adjust the system so that it operates properly and as designed. This period can last up to two years and is considered complete when the case enters the operation and maintenance (O&M) phase. This did not occur at four construction sites during the term of the ARRA LUST Grant. However, all are currently in the O&M phase using State funds. The NJDEP considers this deliverable quantifiable.

"(c) Complete RI activities."

No Remedial Investigations (RI) were completed during the term of the ARRA LUST Grant. The NJDEP reallocated the funding from the RI sites to construction sites when the timeframe within which to expend the ARRA LUST Grant funding was reduced by USEPA. Since construction activities are more expensive and typically require less time for completion than an RI, the NJDEP opted to ensure the expenditure of the grant within the shortened timeframe. USEPA was aware of, and concurred with, this change in strategy. The number of RIs completed is quantifiable.

"(d) Conduct IRM for LNAPL."

This deliverable was revised because the NJDEP expected to conduct at least one Interim Remedial Measure (IRM). Since this would be a significant activity, the NJDEP determined it should have its own workplan category. No IRM activities were ultimately required. The number of IRMs conducted is quantifiable.

SRP disagrees that these deliverables are unquantifiable. Contrary to the Auditor's report, semi-annual site status reports were provided by the NJDEP in a timely manner. Quarterly Reports were also provided for LUST4 and the CA workplan. All information contained in the quarterly LUST4 report was included in the Semi-annual Report.

Generally, the Auditor has misconstrued the role of the workplan in the CA process, and has failed to recognize the larger purpose of the ARRA stimulus program. The workplan was developed to meet those objectives. The NJDEP generated an average cost per site for budget purposes. The NJDEP and USEPA understood that this was an estimate and as the work progressed, actual conditions would dictate necessary changes to the workplan. The Auditors appear to have approached this workplan as a contract with guaranteed deliverables, which it is not. The workplan was intended to be a dynamic document developed by the two agencies to monitor the work being performed. All revisions and modifications to, and departures from, the workplan were discussed with, and approved by, USEPA Region 2.

The ARRA LUST Grant had only one performance based grant requirement, namely "…the recipient shall obligate funds for contracts, subgrants, or similar transactions for at least 35 percent of funds, and expend at least 15 percent of funds within nine months of this award." The NJDEP met this programmatic condition and is, therefore, in compliance.

AAL Response 8: AAL disagrees that the only performance requirement was to spend funds. The cooperative agreement and the amended work plan specifically showed the objectives to be met and based on the data provided by NJDEP the objectives were clearly not met. No change has been made to this finding. However, AAL has dropped the costs questioned in connection with this issue based on NJDEP's comments.

Buy American Requirement –See response to **Results of Audit.**

Davis Bacon Requirement – See response to **Results of Audit**.

Recovery Act Reporting Requirement – See response to **Results of Audit.**

NJDEP Response to Draft Report – The ARRA LUST Grant was an extremely burdensome and time consuming grant to administer. There were multiple and overlapping reporting requirements, unrealistic timeframes for grant expenditure and unnecessary documentation requirements which resulted in additional and excessive expenditures of administrative time. However, additional sites have been remediated, New Jersey's environment and economy have benefitted, and jobs have been retained due to the ARRA LUST Grant funds.
When all ARRA LUST Grant funds were expended, the NJDEP continued with remedial activities using State funds and the four sites at which remedial systems were installed are operating today. From the viewpoint of the NJDEP, the objectives of the ARRA LUST Grant were fulfilled.

AAL Response 9: AAL agrees with NJDEP that the cooperative agreement was extremely burdensome and the original work plan may be under-funded. However, this concern was identified in June 2010 in the Advanced Monitoring Report, if not earlier. NJDEP had ample time to modify the work plan to reflect more achievable commitments.

Agency Comments on the Draft Report and OIG Evaluation

September 27, 2013

VIA E-MAIL

Mr. Victor R. Ruiz
Ahmad Associates, LTD
8230 Old Courthouse Rd, Suite 210
Vienna, VA 22182

Re: EPA Response to Ahmad Associates, LTD Draft Audit Report of American Recovery and Reinvestment Act-Funded Cooperative Agreement 2L-97234209 Awarded to the New Jersey Department of Environmental Protection, dated July 29, 2013.

Dear Mr. Ruiz:

Thank you for the opportunity to respond to the issues and recommendations in the subject Draft Audit Report. Following is a summary of EPA's overall position, and attached is a response to each of the Draft Report's recommendations. For the recommendation with which the Agency agrees, we have provided intended corrective action and an estimated completion date. For the recommendations with which the Agency does not agree, we have explained our position, provided the legal basis, and if possible, proposed alternatives to recommendations.

AGENCY'S OVERALL POSITION

This response reflects the strong concerns of EPA Region 2, the Office of Solid Waste and Emergency Response's Office of Underground Storage Tanks, the Office of Grants and Debarment, and the Office of General Counsel regarding the accuracy of the preliminary audit findings, and the adverse policy implications of the proposed recommendations.
The Draft Report's principal recommendation is that EPA recover all of the $4,819,000 in Recovery Act (ARRA) Leaking Underground Storage Tank (LUST) funds awarded to NJDEP under the cooperative agreement (CA). EPA believes that this proposed remedy is not supported by the facts, is inconsistent with the intent of the CA, and is disproportionate to the significance of the issues identified in the report.

Our most significant concern relates to Recommendation No. 4, that EPA recover $4,766,922 from NJDEP unless the State "can adequately segregate and repay EPA the amount attributable to the specific tasks and deliverables not completed." This recommendation fails to take into account the concurrent finding that "NJDEP had adequate financial management and related procedures to ensure that costs claimed were in accordance with the federal requirements under 40 CFR Part 31, 2 CFR Part 225, and the terms and conditions of the CA" (page 5). Although NJDEP technically did not meet all of the workplan objectives during the performance period, the State completed the majority of the objectives and made substantial progress towards completing the remaining ones within the confines of the budget. We believe that Ahmad Associates, LTD (AAL) may have missed that both the Agency and NJDEP intended for the CA to supplement the continuing environmental program funding that EPA provides the State annually to support the LUST program. Our understanding is that NJDEP continues to accomplish a number of the CA's workplan objectives after the term of the agreement ended, using the State's own resources.

In order for EPA to disallow and recover costs from NJDEP as recommended in the Draft Audit Report, the State's violations of the terms of the CA, including those that are based in statute or regulation, must be material and the remedy for the noncompliance must be appropriate under the circumstances. 40 CFR 31.43(a). The alleged instances of noncompliance were based on inaccurate information, and referred to project sites without identifying them. In addition, AAL did not use the correct regulatory standards in conducting the audit. EPA believes that NJDEP successfully performed eligible activities consistent with the purpose and scope of the CA, for which NJDEP has properly been reimbursed, as the costs incurred were allowable and otherwise met Federal cost principles.

It was also difficult for EPA to respond to a number of findings in the Draft Audit Report because AAL did not provide sufficient information for the Agency to evaluate. For example, the Draft Audit Report alleges that NJDEP did not have adequate controls to ensure that the State's contractors complied with the Davis Bacon Act prevailing wage requirements of Section 1606 of ARRA for laborers and mechanics "who work at the site" Draft Audit Report at p. 11. AAL, however, did not specify the site where NJDEP's controls were allegedly inadequate. Agency reviewers could not discern whether the term "the project" as used throughout the Draft Audit Report referred to a particular remedial action or the work plan for the entire CA. The former made sense in some contexts, the latter in others.
EPA strongly encourages AAL to reconsider both the draft findings and recommendations. EPA would appreciate the opportunity to comment on AAL's Final Report, and we look forward to continuing discussions, prior to finalization of the report by EPA's Office of Inspector General.

AGENCY'S RESPONSE TO REPORT RECOMMENDATIONS

Agreement

No.	Recommendation	High-Level Intended Corrective Action(s)	Estimated Completion by Quarter and FY
9	See attached specific recommendation and responses.		

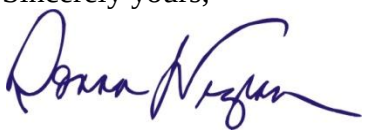
Disagreements

No.	Recommendation	Agency Explanation/Response	Proposed Alternative
1-8	See attached specific recommendations and responses.		

CONTACT INFORMATION

If you have any questions regarding this response, please contact John Svec, Audit Coordinator, Grants and Audit Management Branch, at (212) 637-3699 or at svec.john@epa.gov.

Sincerely yours,



Donna J. Vizian
Assistant Regional Administrator for Policy and Management
Attachment

cc: Robert Adachi, EPA-OIG

OIG Response 1. These are the agency's summary comments. The OIG's responses to the agency's comments for each of the issues summarized above are discussed in detail under the OIG responses that follow. Although the agency's comments did not change the overall issues relating to the uncompleted deliverables and the noncompliance with the Davis-Bacon Act requirements, the IPA, in consultation with the OIG, modified the recommendations to address some of the agency's concerns.

Although the agency's comments did not change the Buy American issue in the IPA report, the OIG has removed all recommendations relating to the issue based on discussions with the agency and OMB subsequent to the written responses to our draft report.

Specific Comments

Recommendation # 1

"We recommend the Regional Administrator for EPA Region 2 recover the questioned costs of $52,077.50, unless NJDEP adequately support the charges for labor and materials or remit to EPA the unsupported charges."

Agency Response

EPA disagrees with AAL's recommendation to recover $52,017 of the $52,077.50 in questioned costs because the Draft Audit Report does not persuade us that NJDEP materially failed to comply with the financial management requirements applicable to the cooperative agreement (CA). We understand that NJDEP concurred with the finding in the Draft Audit Report regarding crediting the CA with a $60.50 credit one of the State's contractors received. The Agency will, therefore, defer to NJDEP on that issue.

At the outset, it is important to note that the Draft Audit Report cites 40 CFR 30.22 as the financial management regulation applicable to the cash draws NJDEP made under the CA. That provision governs financial assistance payments to nonprofit organizations, universities and hospitals. Payments to state recipients are subject to 40 CFR 31.21.
We agree with AAL that under 2 CFR Part 225, Appendix A, Section C. 1. j. NJDEP must adequately document the costs it incurred under the CA. However, the financial management standards for state recipients, as befits the comity between states and the federal government, focus on whether states comply with their own accounting requirements, rather than more detailed federal requirements applicable to other recipients. The regulations provide:

> (a) A State must expend and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to—
>
> (1) Permit preparation of reports required by this part and the statutes authorizing the grant, and
>
> (2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes (40 CFR 31.20(a)).

In contrast, the financial management regulations for governmental units other than states (40 CFR 31.20(b)) and nongovernmental recipients (40 CFR 30.21) establish more detailed standards for source documentation. Similarly, the regulations provide that unlike other recipients ". . . a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations" (40 CFR 31.36(a)).

We believe that AAL did not properly apply 40 CFR 31.20(a) and 40 CFR 31.36(a) when it found that NJDEP did not have adequate support for $52,017 in contract payments due to "missing" invoices.

We understand that NJDEP advised AAL that under State accounting and procurement procedures, the payments questioned in the Draft Audit Report are not required to be supported by invoices. Rather, the terms of the contract at issue required that NJDEP contractors submit forms DEP-024A or DEP 024B to document expenditures for the items questioned. AAL, however, refused to accept the State's explanation and appears to have misinterpreted the terms of the NJDEP contract at issue. We understand from NJDEP that although the contract required NJDEP's contractor to submit invoices for items classified as "Other Direct Costs" it was acceptable for the contractor to provide forms DEP-024A or DEP 024B for "Labor Vouchers" or "Scheduled Equipment, Materials and Services" that were already priced in contract line items. All of the $52,017 in contractor payments questioned fell under these two categories, according to NJDEP. We understand that the State has documents demonstrating that the costs questioned were adequately supported in accordance with contract terms.

EPA lacks authority under the applicable regulations to disallow otherwise allowable costs that NJDEP incurred in material compliance with state law and procedures. Moreover, the Draft Audit Report does not provide evidence that any of the $52,017 in questioned costs were unallocable, unnecessary, unreasonable or were tainted by fraud or other improper conduct by NJDEP or its contractor. Even if NJDEP's source documentation was inconsistent with contract terms (which does not appear to be an accurate audit finding based on information NJDEP provided), any noncompliance would not rise to the level of materiality required to disallow and recover costs under 40 CFR 31.43(a) if the contractors provided state forms rather than invoices to support payments for services rendered. The Agency, therefore, disagrees with the recommendation that EPA recover $52,017 in contract costs questioned.

OIG Response 2. Based on NJDEP and the agency's draft report comments, the finding and recommendation related to inadequate supporting documentation have been deleted from the final report. Regulatory reference for cash draw has been changed to 40 CFR 31.21 and 31.22 based on the agency's comments.

Recommendation # 2

"We recommend the Regional Administrator for EPA Region 2 require that for future contracts NJDEP include in its bid proposal a requirement that contractors include Certification of Independent Price Determination language in their bid proposals as required by Title 40 CFR 35.6550(b)(3)."

Agency Response

EPA disagrees with this recommendation because the Agency lacks authority to implement it. The cited regulation applies to CERCLA Section 104(d) Superfund CAs subject to 40 CFR Subpart O rather than LUST CAs. AAL apparently based this finding on provisions of NJDEP

contracts that included certain Subpart O requirements relating to accident and catastrophic loss insurance (40 CFR 35.6590(b)) and retaining records for 10 years (40 CFR 35.6705). AAL seems to have reasoned that if NJDEP applied some provisions of Subpart O to its contracts that other provisions must apply as well.

As previously noted, under 40 CFR 31.36(a) states follow their own procurement laws and procedures. Subpart O supplements 40 CFR Part 31 but only applies to cooperative agreements awarded pursuant to Section 104(d)(1) of CERCLA with Superfund appropriations (40 CFR 35.6005(a) and (b)). The regulation does not apply to the CA which was awarded under Section 9003(h)(7) of the Solid Waste Disposal Act with LUST appropriations made available by ARRA. Under 40 CFR 31.6(a), the Agency would have to issue a regulation applying 40 CFR Subpart O to recipients of LUST funding in order for the Agency to require NJDEP to comply with the independent price determination provisions of 40 CFR 35.6550 (b)(3).

The fact that NJDEP may have chosen to require that its contractors comply with other provisions of Subpart O does not provide EPA with a legal basis to mandate compliance with all provisions of that regulation. Moreover, EPA believes NJDEP's contracting procedures adequately ensure that prices have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement (i.e. collusion) with any other bidder(s). EPA, however, has no objection to NJDEP adopting the use of Certification of Independent Price Determination language in its future bid proposals if the State chooses to do so.

OIG Response 3. Based on analysis of NJDEP and the agency's draft report comments, the finding and recommendation related to certification of independent price determination has been deleted from the final report. Regulatory reference for record retention has been changed to 40 CFR 31.42 based on the agency's comments.

Recommendation # 3

"We recommend the Regional Administrator for EPA Region 2 require that NJDEP establish written policies and procedures related to the monitoring and reporting of contractors in performing in accordance with the terms, conditions and specifications of their contract or purchase order."

Agency Response

EPA disagrees with this recommendation because the Agency lacks the authority to implement it. AAL found that "NJDEP's on-site managers have adequate monitoring processes and reporting in place to determine and report that all work under the contract or purchase order was done and properly billed." However, the Draft Report asserts that the State has not complied with 40 CFR 31.36(b) due to the absence of written policies and procedures. Draft Audit Report at p. 7. The requirement in 40 CFR 31.36 (b)(2) for recipients to maintain written policies and procedures for contract administration does not apply to states. Rather, the regulation governing procurement standards for a State grantee is 40 CFR 31.36(a), which, in pertinent part, requires the State to follow the same policies and procedures it uses for procurements from its non-

Federal funds. The Draft Report does not cite a provision of New Jersey law, regulation or policy that requires NJDEP to maintain written contract administration procedures. Notwithstanding the above, as a general matter we do agree with the AAL that "[T]he lack of written policies and procedures could result in inadequate internal controls related to the monitoring processes and procedures that are inconsistently applied." Draft Audit Report at p. 7. The Agency also notes the finding in the Draft Report that NJDEP officials recognize the need for written contract administration procedures, but that other priorities have prevented the State from adopting them. Draft Audit Report at p. 7. Should NJDEP elect to update its policies and procedures to adopt a written contract administration system, Region 2 would support NJDEP's decision, as maintaining written policies and procedures for an organization's key procurement functions is an accepted best practice.

OIG Response 4. Although NJDEP recognized the need for written contract administration procedures and the EPA agreed that maintaining such procedures would be a best practice, the finding and recommendation were removed from the final report because the IPA and the OIG were unable to identify specific federal or state regulations applicable to NJDEP requiring such procedures.

Recommendation # 4

"We recommend the Regional Administrator for EPA Region 2 to recover the questioned costs of $4,766,922.50, unless NJDEP can adequately segregate and repay EPA the amount attributable to specific tasks and deliverables not completed."

Agency Response

EPA strongly disagrees with this recommendation. The Draft Audit Report asserts that that NJDEP ". . . did not complete the original or revised [cooperative agreement] objectives and there was no formal approval process." Draft Audit Report at p. 8. While AAL acknowledged that NJDEP completed five of the seven quantifiable deliverables in the CA, the Draft Audit Report found that NJDEP:

- Brought only 7 of the 20 sites specified in the cooperative agreement deliverables into compliance with state and federal UST requirements; and,
- Did not undertake any of the 16 Cost Recovery Actions specified in the cooperative agreement deliverables.

AAL also found that NJDEP did not provide reports on such unquantifiable deliverables as:
- Completion of construction activities and operational shakedowns;
- Completion of Remedial Investigations; and,
- Conducting [Interim Remedial Measures] for [Light Non-Aqueous Phase Liquid].

Draft Audit Report at pp. 8 and 9.

Finally, AAL asserted that NJDEP did not consistently provide semi-annual site status reports as required by the terms of the CA.

It is clear that AAL misunderstands the nature of the cooperative agreement. EPA does not consider NJDEP's inability to achieve all of the objectives of the CA to rise to the level of material noncompliance, which would warrant the extraordinary, unprecedented and disproportionate remedy that AAL has recommended.

First, EPA and NJDEP did not enter into a fixed priced agreement with separately priced deliverables that the Agency may seek damages for if NJDEP does not complete all of the tasks specified in the terms of the agreement. To the contrary, the CA was a financial assistance agreement, in which the Agency agreed to reimburse NJDEP for all eligible and allowable costs the State incurred in pursuing the objectives of the CA. AAL found that NJDEP had adequate financial management systems in place to ensure that "costs claimed were in accordance with the federal requirements under 40 CFR Part 31, 2 CFR Part 225, and the terms and conditions of the CA." Draft Audit Report at p. 5. With respect to a grantee's material noncompliance under a CA, EPA's grant enforcement authority provides that the Agency may take one or more enforcement actions that are appropriate under the circumstances of the case, and which includes the authority to disallow all or part of the cost of the activity or action not in compliance. 40 CFR 31.43(a). In this case, however, EPA does not believe that NJDEP's inability to accomplish all of the CA objectives rises to the level of material noncompliance under 40 CFR 31.43(a). EPA does not have a reasonable basis to disallow the costs NJDEP incurred for objectives the State was unable to achieve, due to factors that were unforeseen at the time of award, much less to recover over $4.8 million in otherwise allowable costs. It is our understanding that NJDEP successfully performed eligible activities under the CA that are consistent with the purpose and scope of the CA for which NJDEP has properly been reimbursed, as the costs incurred are allowable and otherwise meet Federal cost principles.

Second, as a continuing environmental program grant, LUST funding under Section 9003(h)(7) of the Solid Waste Disposal Act (SWDA) is awarded to states under statutory allocation standards (Section 9004(f) of the SWDA) each fiscal year. As clearly stated in the "Notice of Award", the purpose of the ARRA LUST funds EPA awarded for the CA was to supplement the continuing environmental program funding that EPA provides the State annually to support the NJDEP LUST program. The objectives of continuing environmental program grants, unlike competitively awarded project grants, must be viewed in the context of a state's overall environmental program.[1] Our understanding is that NJDEP accomplished a number of the CA's Workplan objectives after the term of the agreement ended, with the State's own resources.

Third, EPA's June 22, 2010 Advanced Monitoring Review Report recognizes that the scope of work in the original CA Workplan was underfunded.[2] The recommendation to require NJDEP to repay over $4.8 million in federal funds unless the State agrees not to accept reimbursement for otherwise allowable costs NJDEP incurred in pursuing tasks that were not accomplished because CA funding was inadequate, raises serious policy consequences for effective federal/state

[1] Our position on the Draft Audit Report should not be read to imply that states are not accountable for accomplishing project objectives when EPA funds are misused.

[2] From the June 22, 2010 Advanced Monitoring Review Report: "There is evidence that there not a sufficient amount of funds remaining in the cooperative agreement to complete the work (i.e., the 16-site cleanups.) First, NJDEP is estimating that the average site assessment will cost approximately $600,000. The original estimate was $250,000. 16-site x $600,000 per site assessment equals $9.6MM for site assessments, which is about twice the amount of money available in this grant."

co-regulator relationships. States may be unwilling to accept continuing environmental program grants, which may be part and parcel of state agreements to accept delegations or authorizations to carry out federal environmental programs, if EPA were to accept AAL's recommendation. The Agency has other enforcement tools at its disposal under 40 CFR 31.43 (such as withholding funds for particular parts of a state program that are performing poorly) that are more appropriate than recovering funds that have already been spent.

Fourth, AAL's findings and recommendation for disallowance of costs fail to recognize the nature, complexity, and risks associated with soil and groundwater contaminant investigations and cleanups at sites where conditions at the outset are essentially unknown or poorly defined. EPA believes that NJDEP's performance, given the unknowns at the outset of the work, complied with the terms of the CA and that the State effectively achieved the CA objectives given funding limitations. NJDEP's Workplan was an ambitious estimate of the amount of work that might be accomplished under the best circumstances with $4,819,000 of ARRA LUST funds. The State's Workplan provided flexibility should problems arise, as they did. For example, NJDEP had difficulty gaining site owners' approval for access in order to perform work, requiring court action by the State Attorney General (with costs properly charged to the CA) to obtain unrestricted access for the NJDEP to address the public health and environmental risks posed by suspected LUST releases of regulated substances at the sites. In the course of its investigations, NJDEP also found contamination at some sites which, due to the quantity and extent of contamination, posed heightened risks to public health or the environment, therefore demanding more extensive resources than could have been known in advance.

Fifth, for the LUST sites addressed by NJDEP using ARRA LUST funds, actual costs substantially exceeded the $250,000 per site projection in the proposed budget. Since the ARRA LUST cooperative agreement project period was short consistent with ARRA's intent to rapidly create or retain jobs, NJDEP and EPA agreed to amend the Workplan by substituting an expenditure plan which focused on the actual work and expenditures at LUST sites with ongoing remediation activity[3]. Further highlighting the high costs of addressing the LUST sites identified in the Workplan, on June 28, 2010, NJDEP submitted an application to Region 2 for an additional $4 million of ARRA LUST funds to supplement the initial award so that as many as possible of the 16 LUST sites identified in the Workplan could be addressed. While there was no additional ARRA LUST funding available to provide NJDEP, its application is a clear indication that the original funding was not sufficient to achieve all the environmental objectives.

Sixth, the most important performance measures for state ARRA LUST recipients was to assess and cleanup LUST contamination (Office of Underground Storage Tanks, Guidance To Regions For Implementing The LUST Provision Of The American Recovery And Reinvestment Act Of 2009 ("OUST ARRA Guidance") at pp.7 and 8). Although the ARRA funds states expended are recoverable, cost recovery was not as much of a priority during CA performance. This is because the Agency had terms and conditions in ARRA LUST CAs that would allow for EPA to ensure that any program income generated by cost recoveries of ARRA funds would be used to

[3] ARRA "placed an emphasis on spending the funds quickly to help stimulate economic revitalization." - April 29, 2009 Statement of Melissa Heist, Assistant Inspector General for EPA's Audit Office of Inspector General before the Committee on Transportation and Infrastructure.

further supplement future non-ARRA LUST agreements. Consequently, EPA does not consider the absence of cost recoveries by NJDEP during the term of the CA to be material to the State's performance of the agreement.

Seventh, AAL's assertion that NJDEP did not consistently submit semi-annual ARRA site status reports as required by the terms of the CA does not provide a basis for EPA to disallow costs. NJDEP eventually provided all of the required reports, including semiannual site status reports, so there was no material violation warranting action under 40 CFR 31.43(a).

OIG Response 5. Although the work in the original work plan may be under-funded and it may initially be difficult to get an accurate assessment of the site conditions, the concern on under-funding was identified in June 2010 in the Advanced Monitoring Report. The cooperative agreement ended in September 2012. The work plan was modified several times during the course of the cooperative agreement (July 2010, February 2011 and December 2011). NJDEP and the EPA had ample time and opportunities to modify the work plan to reflect more achievable commitments. The work under the cooperative agreement, as documented in the final approved work plan dated December 20, 2011, was not fully accomplished.

Although the cooperative agreement is a financial assistance agreement, not a fixed priced agreement, NJDEP and the EPA are bound by the commitments in the cooperative agreement. These commitments are documented in the work plan. Under 40 CFR 31.30, if there is a change in the scope of the work, the cooperative agreement needs to be modified. Title 40 CFR 31.40(a) also requires the grantee to monitor the grant support activities to assure that performance goals are being achieved. Without a formal process for addressing changes in the cooperative agreement work plans, there is no assurance that the requirements under 40 CFR 31.30(d)(1) and the performance goals are met.

The agency stated that the most important performance measures for the state Recovery Act LUST recipients were to assess and clean up LUST contamination. However, under the cooperative agreement, NJDEP only brought seven sites into compliance while the cooperative agreement objective was 20 sites, thus a 65 percent shortage.

Based on the discussions above, the issue remains unchanged. However, the IPA, in consultation with the OIG, has removed the recommendation to recover all costs claimed. Instead, this recommendation was combined with recommendation 5 in the draft report. The revised recommendation requires NJDEP to establish internal controls to ensure that modifications to the cooperative agreement work plan are in accordance with the requirements of 40 CFR 31.30 and 31.40.

Recommendation # 5

"We recommend the Regional Administrator for EPA Region 2 require NJDEP to update its written policies and procedures to ensure they address grant modifications to include revisions of requirements when prior approval is required."

Agency Response

EPA disagrees with this recommendation because it assumes that all adjustments to NJDEP's work plan required prior written approval by EPA by a formal amendment to the CA. The audit finding that NJDEP lacks a formal approval process for revising the CA objectives does not provide an adequate basis for EPA to require NJDEP to adopt one. Draft Audit Report at p. 8.

First, not all grant project changes require EPA prior approval. The governing standards for grant project changes and EPA prior approval are contained in 40 C.F.R. 31.30. As provided in 40 CFR 31.30(a), [G]rantees . . . are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project". Under the regulation, if program changes amount to a revision to the scope or objectives of the project, prior EPA approval is required (40 CFR 31.30(d)(1)). Prior approval must be exercised through formal written approval (i.e., a grant amendment) unless waived by EPA.

Whether a grant modification that involves a programmatic revision triggers prior approval depends on whether the change to the requirement at issue substantially affects the achievement of the Agency's goals in awarding financial assistance. This determination involves a case- by-case analysis of, at a minimum, the requirement at issue coupled with the programmatic circumstances that prompted the recipient to make the revision. An EPA Project Officer has the discretion to determine whether formal written approval is necessary or to waive the need for a formal grant amendment, based on these and other relevant factors based on discussions with the recipient. We believe that a governmental unit would not materially violate the "sound management practices" provision of 2 CFR Part 225, Appendix A, Section A. 2(a)(1) if its policies and procedures did not include a requirement for formal written approval of all changes to the objectives of an EPA continuing environmental program grant.

Second, the record in this case shows that prior approval was obtained consistent with the regulatory framework noted above. There is nothing in the Draft Audit Report to suggest that Region 2 Project Officers inappropriately exercised their discretion under 40 C.F.R, 31.30(a) to waive the requirement for a formal amendment. NJDEP did obtain the prior approval from the EPA Project Officer for revision of the objectives of the project. NJDEP's June 28, 2010 and July 19, 2010 Workplan revisions were accepted in writing by Region 2 on July 27, 2010.[4]

Third, under 40 CFR 31.40, Monitoring and reporting program performance, NJDEP was required to provide information including:

[4]These documented changes were transmitted to OIG via email on March 5, 2013. AAL apparently overlooked this documentation.

(i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output may be required if that information will be useful.

(ii) The reasons for slippage if established objectives were not met.

and

(d) Significant developments. Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

We believe NJDEP fully met these requirements. Consequently, the Agency was aware that NJDEP did not have adequate funding from the CA to achieve all of the objectives set forth in the workplan.

Fourth, the dynamic nature of state continuing environmental program grants, and the administrative burdens on both states and EPA of formally amending assistance agreements strongly support the practice of Region 2 project officers to agree to modifications to the objectives informally. In addition to the burdens on EPA of processing a formal grant amendment whenever there are unanticipated adjustments to workplan deliverables, state procedures often require high level approval of grant amendments. The delays associated with processing formal amendments when the applicable regulations offer alternative means of modifying project objectives are not warranted from EPA's programmatic and grants administration policy perspectives.

Notwithstanding our position that EPA does not have an adequate basis to require that NJDEP change its internal procedures for modifying federal grants, the Agency does recognize that good practice does support fully documenting changes to assistance agreements. Auditors understandably are more comfortable when contemporaneous written records rather than recollections of discussions are available. EPA is willing to work with NJDEP to improve both the Agency's and the State's procedures for efficiently documenting changes in the scope or objectives of continuing environmental program grants under 40 CFR 31.30(a) and (d)(1).

OIG Response 6. The draft report recommended NJDEP to ensure modifications to the cooperative agreement are done when prior approval is required. The report did not recommend formal modification for all work plan changes. Title 40 CFR 31.30(d)(1) requires prior EPA approval if the scope or objectives of the project is revised, regardless of whether there is an associated budget revision. The work plan changes under the cooperative agreement equate to a scope change because the cost recovery objective in the work plan was eliminated from actual work performance. As a result, the EPA's prior approval is required under 40 CFR 31.30. The EPA project officer does not have the discretion to waive the prior approval. Although NJDEP may have provided the monitoring reports under 40 CFR 31.40, it does not waive the prior approval requirement under 40 CFR 31.30.

As a result of informal modifications, the EPA and NJDEP were not in agreement as to the date of the final work plan. EPA stated during the audit field work and in the draft report comments that the final work plan was dated July 19, 2010, while NJDEP provided two subsequent versions, dated February 8, 2011, and December 20, 2011. Commitments under all three work plans were not fully accomplished.

Based on the discussions above, the issue remains unchanged. However, the recommendation has been modified to read: "[r]equire NJDEP to establish internal controls to ensure that modifications to the cooperative agreement work plan are in accordance with the requirements of 40 CFR 31.30 and 31.40."

Recommendation # 6a

"We recommend the Regional Administrator for EPA Region 2 to recover the questioned costs of $4,819,000 if the amount in not recovered under recommendations 1 and 4 above."

Recommendation # 6b

"We recommend the Regional Administrator for EPA Region 2 to require NJDEP to update its policies and procedures to ensure staff is trained on contract terms and conditions."

Agency Response (#6a and #6b)

EPA disagrees with these recommendations. Apparently, AAL reviewed one project (the Draft Audit Report does not specify which project) and determined that NJDEP could not document that manufactured good used on the project complied with ARRA Section 1605. AAL also concluded that NJDEP failed to properly oversee procurement activities associated with the CA to ensure compliance with Buy American requirements. AAL sampled 40 transactions (possibly associated with this unnamed project) and determined that eight transactions involving purchases of $47,792.13 were subject to Section 1605 and 2 CFR Part 176. Draft Audit Report at p. 10. They concluded:

> "Because NJDEP cannot show that it complied with the Buy American requirements and has not obtained a waiver from EPA, the NJDEP projects presently are not eligible for Recovery Act funding. As a result, NJDEP's use of over $4.8 million of Recovery Act

funds is prohibited by Section 1605 of the Recovery Act, unless a regulatory option is exercised."

Draft Audit Report at p. 10

While AAL auditors acknowledged that NJDEP had coordinated its Buy American decisions with EPA, they did not change their position due to the absence of a legal opinion or other supporting documentation.

AAL has misinterpreted Section 1605 and 2 CFR Part 176 and failed to acknowledge the OUST ARRA Guidance on Buy American requirements, as well as the terms and conditions of the CA. The Draft Audit Report is seriously flawed in that it does not adequately take into account the limited reach of the ARRA Buy American requirement for ARRA LUST cooperative agreements. Further, AAL has advocated a remedy for ARRA Buy American violations that is disproportionate to any damages the Agency may have suffered and, accordingly, may not be legally defensible.

Specific reasons for disagreement with these recommendations are as follows:

First, Section 1605 states that ARRA Buy American requirements apply to ". . . the construction, alteration or repair of a public building or public work. . . ". (Emphasis added). The statute does not govern any "project" funded with ARRA appropriations as AAL contends. Further, AAL's description of 2 CFR 176.140(a)(1) is incomplete in that AAL does not acknowledge that in order for ARRA Buy American requirements to apply, a manufactured good must be "brought to the construction site for incorporation into the building or work. . . ". (Emphasis added). The terms "public building or public work" are defined at 2 CFR 176.140(a)(2) and include a wide range of projects that may be undertaken by governmental entities with ARRA funds that have one common feature—construction, alteration or repair of structures designed to remain in place for extended periods of time that amounted to "permanent" installation of manufactured goods. The Draft Audit Report is inaccurate in that it does not recognize that Section 1605 applied only to manufactured goods that would remain in structures after construction, alteration, repair or maintenance was complete.

Second, the Draft Audit Report does not acknowledge EPA's and OMB's interpretations of Section 1605 and 2 CFR Part 176, Subpart B.

Based on advice from EPA's Office of General Counsel, EPA's Office of Underground Storage Tanks (OUST) expressly determined that, in the absence of unique circumstances, Section 1605 and 2 CFR Part 176 only applied to:

- Installing piping to connect households or businesses to public water systems or replacing public water system supply well(s) and associated piping due to groundwater contamination, or

- Construction related activities associated with site restoration, including paving or concrete replacement (OUST ARRA Guidance at p. 13).

These types of projects could involve installation of manufactured goods in structures on a "permanent" basis in construction, alteration and repair projects undertaken with ARRA LUST funds. Further, as indicated in the OUST ARRA Guidance, EPA interpreted the Section 1605 Buy American requirement to apply to similar projects subject to the "Davis Bacon" requirement in Section 1606 of ARRA which also applied to "construction, alteration, maintenance and repair" projects. EPA's interpretation of the terms "construction, alteration, maintenance and repair" for Davis Bacon purposes was based on guidance from the U.S. Department of Labor.

The OUST ARRA Guidance was issued in June 2009 based on interim OMB guidance issued in February 2009, and interim regulations promulgated in April of that year. All agencies received direction from OMB to award ARRA funding expeditiously based on the interim regulations and their best judgment on how ARRA and 2 CFR Part 176 applied to grant programs receiving ARRA appropriations. For this reason, the OUST ARRA Guidance states that "OMB plans to issue additional guidance that will assist in the implementation of Recovery Act activities. All recipients will need to adhere to the requirements contained in future OMB Recovery Act guidance." Significantly, OMB's August 2010 Frequently Asked Questions[5] (FAQ) on Section 1605 state that OMB interpreted the Act and 2 CFR 176.240(a)(2) to mean that "If the facility [being constructed, altered, repaired, or maintained with ARRA funds] is/will be privately-owned, then the ARRA Buy America provision will not apply to it, because it will not be a "public building or public work." This subsequent OMB guidance indicates that LUST site remediation activities that involve paving or concrete replacement would only be subject to Section 1605 Buy American requirements if the remediation took place on land owned by a governmental unit.

OMB's FAQ does not alter the OUST ARRA Guidance's direction that installation of manufactured goods on projects for public water systems would be subject to ARRA Buy American requirements. Our understanding is that NJDEP did not use CA funds for any of these types of projects. However, the OMB FAQ establishes that unless a LUST soil excavation project involving concrete replacement or paving took place on a governmental facility, or on a contaminated unit of government property acquired due to tax foreclosure or otherwise, the Section 1605 Buy American requirement would not apply. Consistent with the Agency's interpretation of the ARRA Davis Bacon requirement, the requirement would not apply to site remediation projects when pumping equipment (including pipes) is installed temporarily on a site as part of the remedy for contamination at the site. The Draft Audit Report does not acknowledge these important policy choices made by OMB and EPA in interpreting Section 1605.

Third, OMB interpreted Section 1605 to apply only to funds "appropriated or otherwise made available" by the ARRA (2 CFR 176.70(a)). If a recipient of an ARRA LUST CA used state or private funds to purchase manufactured goods for a project, the ARRA Buy American provisions would not apply even if other components of the project were financed with ARRA appropriations. The Section 1605 Buy American requirements, unlike the Section 1606 Davis Bacon requirements, do not apply to projects "assisted in whole or in part by and through the Federal Government pursuant to[the ARRA]…" (2 CFR 176.190 (a)). We understand that for some projects, ARRA LUST funds were not expended by NJDEP on either paving or concrete replacement. Such activities, where necessary to restore the site an "as found" condition, thereby

[5] See, http://www.whitehouse.gov/omb/recovery_faqs

returning it to the private owner for its intended use, were funded with NJDEP Spill Act funds. The Section 1605 Buy American requirements would not apply because the iron, steel and manufactured goods NJDEP used for concrete replacement and paving would not have been purchased with ARRA funds. We believe that AAL may not have taken NJDEP's financing patterns into account in preparing the Draft Audit Report.
Fourth, AAL did not acknowledge that the terms and conditions of the NJDEP CA incorporated EPA's interpretation of the Section 1605 Buy American requirement and the implementing OMB regulations contained in the OUST ARRA Guidance. NJDEP relied on these terms and conditions in performing the CA. Moreover, the Agency shared the OUST ARRA Guidance with the OIG during the collaborative process for implementing the ARRA, and the OIG did not raise objections to EPA's proposed scope of the Buy American requirements.

We also note that a retroactive application of a different interpretation of the ARRA Buy America provisions would be inconsistent with a determination recently made by Deputy Administrator Perciasepe. He observed on another matter involving EPA's interpretation of Section 1605, "[The] EPA generally should not reverse a carefully considered, reasonable position that has been fully implemented and relied upon by many recipients . . . unless that is clearly shown to be necessary." (Memorandum dated May 10, 2013, " OIG Report 11-R-0700, American Recovery and Reinvestment Act Site Visit of Wastewater Treatment Plant-Phase II Improvement P/Iojt, City of Ottawa, Ill., September 23, 2011." Senior Agency Management has made it clear that recipients should not be harmed when there is a policy disagreement between the OIG and the Agency over the best interpretation of Section 1605.

Fifth, the Draft Audit Report contains no affirmative evidence that the iron, steel, and manufactured goods from the $47,792.13 in questioned costs were produced outside the United States. The Draft Report lists various manufactured goods purchased with ARRA funds without providing documentation that using ARRA LUST funds to purchase these specific goods violated ARRA Buy American provisions. This is a serious shortcoming - more evidence is necessary to support the findings which prompted AAL to recommend that EPA disallow all of the $4,819,000 in ARRA LUST funds the Agency awarded to NJDEP, due to alleged noncompliance with the Section 1605 Buy American requirements.

Finally, AAL's recommendation that the Agency recover $4,819,000 in ARRA LUST funds from NJDEP is wholly disproportionate to damages caused by any (as yet unproven) violations of the Section 1605 Buy American requirements by NJDEP. The appropriate remedy under 40 CFR 31.43(a) for a material violation of Section 1605 would be to disallow the costs a recipient incurred with ARRA funds for purchases of noncompliant iron, steel or manufactured goods.

As discussed above, the Agency determined that the Section 1605 Buy American requirement applied only to purchases of manufactured goods in a narrow range of circumstances. AAL has not provided evidence that steel, iron or manufactured goods NJDEP used on any projects that fell under the Buy American terms and conditions of the CA, as modified by subsequent OMB guidance regarding facility ownership, were produced in countries other than the United States. Moreover, even under a more expansive view of the projects which should be subject to Section 1605, a substantial portion of NJDEP's expenditures under the CA were not for "construction, alteration, repair or maintenance of public buildings or public works". Costs NJDEP incurred for

preparation of Spill Act Directives, negotiating Site Access Agreements, Cost Recovery Actions and site investigations preliminary to remedial actions, would obviously not fall under those terms or involve the use of ARRA funds to purchase iron, steel or manufactured goods. AAL's finding that all of NJDEP's projects were not eligible for ARRA funding due to alleged noncompliance with the Section 1605 Buy American requirements is clearly erroneous.

OIG Response 7. The agency stated that for the Buy American requirement to apply, the items must be for permanent incorporation into the building or work. The Buy American compliance issue was discussed with NJDEP and the EPA during fieldwork. Neither party provided evidence that these items were not used for incorporation into the building or work, or that NJDEP has complied with the requirement. The Recovery Act states that "[n]one of the funds appropriated or otherwise made available by this Act may be used for a project....unless all of the iron, steel...used in the project are produced in the United States." The act requires the recipient to demonstrate compliance. The agency also seemed to believe the same. While the IPA and OIG did not identify any LUST guidance on Buy American compliance documentation, the EPA provided such guidance under the Clean Water and Drinking Water State Revolving Fund programs. The agency reiterated in several webinars that assistance recipients should have adequate documentation in project files to demonstrate all applicable means of Buy American compliance. Examples can be found in webinar slides dated June 22, 2009, and September 15, 2010.

The agency stated that if a recipient used state or private funds to purchase manufactured goods for a project, the Buy American provisions would not apply even if other components of the project were financed with Recovery Act appropriations. This statement is inconsistent with the Recovery Act and 2 CFR 176.70(a), which stated that *none of the funds* appropriated under the Recovery Act may be used for a project *unless all* of the iron, steel and manufactured goods used in the project are produced or manufactured in the United States. Therefore, if any part of the project is financed with Recovery Act funds, the entire project is subject to the Recovery Act requirements, including the Buy American requirements. This interpretation is consistent with the agency's Office of Water guidance for the state revolving fund program. The Office of Water's Buy American implementation plan, dated April 28, 2009, stated "[b]ased on the [Recovery Act] language in section 1605, which requires that American iron, steel, and manufactured goods be used in any project receiving [Recovery Act] funding, EPA has concluded that any project that is funded in whole or in part with [Recovery Act] funds, must comply with the Buy American provisions."

The agency determined prior to the start of the cooperative agreement that the Recovery Act Buy American provision does not apply to the projects under the cooperative agreement. The agency's OUST issued a Recovery Guidance stating that the Buy American provision only applied to:

- Installing piping to connect households or businesses to public water systems or replacing public water system supply well(s) and associated piping due to groundwater contamination, or

- Construction related activities associated with site restoration, including paving or concrete replacement.

According to the agency, the Buy American provision does not apply to the remediation work under the cooperative agreement even for sites that meet the criteria established under its OUST Recovery Act guidance because the remediation took place on privately owned land and, thus, does not qualify as public work. The agency stated that it relied on OMB's FAQ on its interpretation of "public building or public work."

Our initial response to the agency's position regarding OMB's FAQ was two-fold. First, we determined that it appeared that the FAQ was only narrowly applicable to colleges and universities. Second, we determined that the definition of public building and public work in Title 29 was applicable based on the language in cooperative agreement programmatic condition 5. Title 29 CFR 5.2(k) states that the "term public building or public work includes building or work, the construction, prosecution, completion, or repair of which, as defined [in section (i)], is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency." Therefore, in our opinion, the project qualifies as "public" if it is carried out or funded by federal agencies; ownership does not matter.

In an effort to better assess the validity of the OMB FAQ position regarding private or public ownership, the OIG on January 22, 2014, requested in writing that OMB provide a legal statement setting out the legal support for its position in the FAQ regarding ownership. OMB has not yet provided legal support for its position regarding ownership in the FAQ.

However, even though OMB has not provided legal support for its FAQ position, the OIG understands how the agency would have assumed that OMB's position in its FAQ was credible and clear. OMB had been tasked with writing Recovery Act-related regulations, and in one of those regulations it set out a definition of public building and public work (which did not discuss ownership). OMB then appeared to be interpreting its definition in a Recovery Act-related FAQ wherein it took the position that ownership was a critical factor in determining whether the project in question was a public building or public work. Because of OMB's role in regard to Recovery Act-related regulations, the agency reasonably relied on the OMB FAQ when it determined that the remediation activities in question were not public buildings or public works because of private ownership and therefore not subject to the Buy American provision of the Recovery Act. As a result, the OIG removed the recommendations relating to the Buy American issue. The attached IPA report remains unchanged; since the IPA report is the responsibility of the IPA, the OIG is not authorized to make modifications.

Recommendation # 7

"We recommend the Regional Administrator for EPA Region 2 require NJDEP to provide documentation to demonstrate that it has verified that all employees who worked on the project were paid in accordance with Davis Bacon requirements."

Recommendation # 8

"We recommend the Regional Administrator for EPA Region 2 require NJDEP to update its policies and procedures to ensure staff is trained on contract terms and conditions, including requirements to verify that all prime and subcontractors comply with DBA requirements."

Agency Response (#7 and #8)

EPA disagrees with these recommendations. The Draft Audit Report does not provide sufficient information for EPA to determine whether NJDEP violated the DBA requirements applicable to the CA. Further, DBA requirements applied only to ARRA LUST funds NJDEP received under the CA, rather than annual LUST funding NJDEP currently receives from continuing environmental program grants. In order for EPA to require that NJDEP update its policies and procedures as well as train staff on DBA, AAL must show that NJDEP lacks the capacity to comply with DBA on EPA grant programs subject to the Act.

OIG Response 8. NJDEP did not verify or maintain documentation regarding DBA compliance and was unable to provide the necessary payroll documentation for the auditor to verify compliance. Programmatic condition 5 of the cooperative agreement requires contractors to submit the payroll data weekly for each week contract work is performed and the recipient to maintain the records on behalf of EPA. Programmatic condition 5 further requires the recipient to periodically conduct spot checks of a representative sample of weekly payroll data to verify compliance. NJDEP has not obtained the required payroll data from its contractors and has not conducted any verification for compliance.

The recommendation regarding updating policies and training staff has been removed from the final report based on the agency's comments.

Section 1606 of ARRA as implemented by 2 CFR Part 176, Subpart C requires that all laborers and mechanics employed under contracts or subcontracts for projects "assisted in whole or in part" with ARRA funds be paid prevailing wages as determined by the U.S. Department of Labor (USDOL) under the Davis Bacon Act (DBA). AAL found that "NJDEP did not have adequate controls to ensure that all laborers and mechanics who work at the site were paid in accordance with DBA wage requirements." Draft Audit Report at p. 11. Among other things, AAL found that NJDEP did not include DBA requirements in a "Request for Bids" for a (again not specified) project, that two NJDEP vendors for the project who employed workers covered by DBA did not submit certified payrolls, and that NJDEP did not monitor DBA compliance as required by the terms of the CA. Draft Audit Report at p. 11.

At the outset, the Agency again notes that AAL has failed to recognize the significance of the DBA interpretation contained in the OUST ARRA Guidance, which was incorporated into the terms and conditions of the CA (see Amendment No. 1 to Assistance Agreement No. 2L-97234209, Programmatic Condition No. 5, DBA Requirements). EPA developed this DBA coverage in consultation with USDOL. The DBA prevailing wage requirement applied only when the ARRA LUST project includes:

> (a) Installing piping to connect households or businesses to public water systems or replacing public water system supply well(s) and associated piping due to groundwater contamination,
> (b) Soil excavation/replacement when undertaken in conjunction with the installation of public water lines/wells described above, or
> (c) Soil excavation/replacement, tank removal, and restoring the area by paving or pouring concrete when the soil excavation/replacement occurs in conjunction with **both** tank removal and paving or concrete replacement.

We are not aware of any circumstances in which NJDEP used ARRA LUST funds to install public water lines or wells as specified in (a) and (b). With respect to item (c), NJDEP did use ARRA LUST funds for projects that included soil excavation/replacement, tank removal, and restoring the area - AAL's Draft Audit Report, however, does not provide evidence that NJDEP used ARRA LUST funds for a specific project that included both tank removal and paving or concrete replacement. Consequently, AAL's Draft Audit Report does not provide enough information for EPA to determine whether the project(s) AAL has in mind was subject to DBA.

OIG Response 9. We agree that the agency's LUST guidance should have been included in the draft report and we brought this concern to the IPA's attention. A discussion of the guidance has been added to the final report. The IPA and the OIG made attempts during the fieldwork to understand the agency's rationale for the DBA applicability criteria cited in the OUST guidance and the cooperative agreement programmatic condition 5, but the agency was unable to provide any explanations. Subsequent to the draft report comments, EPA provided the USDOL's concurrence with the agency's determination cited in the OUST guidance and the cooperative agreement. Based on this information, the IPA and the OIG agree that the DBA requirements only apply to sites that meet the criteria in the cooperative agreement. NJDEP needs to identify the applicable projects and provide documentation to demonstrate that it has verified that all laborers and mechanics who worked on these projects were paid in accordance with DBA requirements.

Moreover, even if DBA did apply to a project NJDEP carried out with ARRA LUST funds the Agency's focus would be on ensuring that NJDEP could verify that workers received wages equal to or more than the DBA prevailing wage requirements. EPA would not retroactively require that DBA obtain payroll certifications from contractors and subcontractors or conduct spot checks on payrolls for completed work. The mere absence of Davis Bacon documentation, e.g., site interview forms, does not necessarily mean the DBA prevailing wage requirements have been materially violated. This is particularly true in New Jersey, which is a "Little Davis Bacon" state and the State's Fair Labor Standards Act was in force through the life of the grant.

OIG Response 10. The IPA and the OIG agree that the focus should be on ensuring that the workers received equal to or more than the DBA-required wages and benefits. The agency said it would not retroactively require NJDEP to obtain payroll certification from contractors and subcontractors. However, the agency has not proposed an alternative method to conduct DBA verification. Maintaining payroll documentation and spot checking are requirements under the cooperative agreement. Even if New Jersey is a state with higher Fair Labor Standards Act rates than DBA rates, payroll data still needs to be reviewed to verify compliance with the Fair Labor Standards Act rates and the DBA rates.

Each NJDEP contract Request for Proposal for work funded under the CA contained the following prevailing wage conditions:

> *6.1.7 PREVAILING WAGE*
> *A. New Jersey Prevailing Wage Act P.L. 1963, Chapter 150 (NJSA 34:11056.2 et seq.) is made part of every contract entered into by the State where applicable. The Bidder's signature on the Bid is its guarantee that neither it nor any subcontractors it might employ to perform the work covered by this Bid are listed or are on record in the Office of the Commissioner of the Department of Labor as one who failed to pay prevailing wages in accordance with the provisions of this Act. The Contractor also agrees to comply with the Wage Act, Copeland Act and the Contract Work Hours and Wages Act, as stated in 29 CFR Parts 3, 4 and 5.*

Further, we understand that NJDEP has policies and procedures for monitoring compliance with New Jersey labor laws.

If NJDEP's contractors paid laborers and mechanics at rates which complied with the New Jersey Prevailing Wage Act, and those rates equal or exceeded federal DBA rates, then EPA's position would be that NJDEP materially complied with prevailing wage requirements contained in the CA. The Draft Audit Report does not provide enough information for the Agency to determine whether this is the case. In fact, Region 2, found in its June 22, 2010 grant monitoring report that NJDEP was being billed for work under the CA at rates above the Bureau of Labor Statistics mean rate for New Jersey Construction Laborers. It is also worth noting that no instances of unfair wage allegations were raised to EPA during the course of the CA. However, we are willing to work with the State to ensure that laborers and mechanics performing work under the CA that was subject to DBA requirements are paid DBA prevailing wages in situations in which documented underpayments come to light.

OIG Response 11. As stated under OIG response 8 above, the cooperative agreement requires NJDEP to verify compliance with DBA wages. If NJDEP could provide evidence that it has conducted appropriate verification for compliance with state prevailing wages and that the state prevailing wages are equal to or higher than the DBA wages, the issue is considered resolved. However, NJDEP has not provided such evidence. The fact that NJDEP was being billed at rates above the Bureau of Labor Statistics' mean rate and there was no instance of unfair wage allegation does not provide the positive assurance required under DBA and the cooperative agreement. Therefore, the issue remains unchanged.

It is also unclear from the Draft Audit Report whether DBA requirements applied to work at any specific site in which remediation work was funded by the CA. Our understanding is that NJDEP used New Jersey Spill Act funds, rather than ARRA LUST funds, for paving or concrete replacement. This financing approach does not, in and of itself, relieve NJDEP of responsibility for complying with DBA since the ARRA DBA requirement (unlike the ARRA Buy American requirement) applied to projects funded "in whole or in part" with ARRA LUST funds. Rather, in order for EPA to determine whether a project that otherwise would require compliance with DBA was exempt from federal requirements due to state funding of paving or concrete replacement, the Agency would need enough information to follow the USDOL ARRA guidance set forth below.

> . . .the Department's longstanding view [is] that a project consists of all construction necessary to complete the building or work regardless of the number of contracts involved so long as all contracts awarded are closely related in purpose, time and place. The use of the phrase "projects funded directly by or assisted in whole or in part" in the ARRA labor standard provision precludes the intentional splitting of ARRA projects into separate and smaller contracts to avoid Davis-Bacon coverage on some portion of a larger project, particularly where the activities are integrally and proximately related to the whole. However, that does not suggest that Davis-Bacon coverage of an ARRA project lasts in perpetuity. There are many situations in which major construction activities are clearly undertaken in segregable phases that are distinct in purpose, time, or place. While the Federal agency must examine every situation independently, the general guidelines that define "project" for Davis-Bacon coverage purposes as contracts that are related in purpose, time, and place should govern in most instances.

USDOL Memorandum dated May 29, 2009 "Applicability of Davis-Bacon labor standards to Federal and federally- assisted construction work funded in whole or in part under provisions of the American Recovery and Reinvestment Act of 2009" at p. 5.
AAL will need to provide site specific information that demonstrates that NJDEP contracts for paving or concrete replacement were closely related in purpose, time and place with contracts for soil excavation such that it would be reasonable to conclude that DBA requirements applied to the entire remediation project.

While the Agency believes that updating NJDEP's DBA policies/procedures and training staff would be useful, an audit of an ARRA LUST cooperative agreement does not provide an adequate basis for EPA to require that the State undertake these measures. The Davis Bacon Act itself applies only to contracts the federal government enters into directly. In order for Davis Bacon prevailing wage requirements to apply to contracts and subcontracts entered into by EPA financial assistance recipients program legislation or another statute (such as ARRA) must provide the requisite authority (40 CFR 31.36(i)(5)). The first and only time DBA has applied to LUST cooperative agreements under SWDA Section 9003(h) was for those funded with ARRA appropriations. EPA does not have an adequate basis to require that NJDEP expend funds from

its annual LUST continuing environmental program grant for DBA related activities because DBA no longer applies to LUST cooperative agreements.[6]

OIG Response 12. Using state funds for paving and concrete replacement does not relieve the requirement to comply with the DBA. As Section 1606 of the Recovery Act requires, and the agency agreed, DBA applies to projects funded "in whole or in part" with Recovery Act funds as long as the work is closely related in purpose, time and place. All work on a particular site was conducted for the purpose of remediating the site (i.e., closely related in purpose and place). NJDEP would continue to remediate the site until remediation is completed. Unless NJDEP can show otherwise, there is no reasonable expectation for a long break in the remediation to justify that the work is not closely related in time. Although some of the work, such as issuing Spill Act Directives, would not be subject to the DBA, NJDEP needs to identify the projects subject to the DBA requirements. Since NJDEP did not identify the applicable projects and provide documentation to demonstrate compliance, this issue remained unchanged.

Although the overall issue remained unchanged, recommendation 7 has been modified to reflect the USDOL's concurrence with the agency's OUST DBA guidance. The final report recommended the Regional Administrator for Region 2 to require NJDEP to provide documentation to demonstrate that it has verified that all laborers and mechanics who worked on the projects subject to the DBA requirements per programmatic condition 5 of the cooperative agreement were paid in accordance with DBA requirements.

Recommendation 8 has been removed from the final report based on the agency's comments. Since DBA no longer applies after the Recovery Act cooperative agreements, updating NJDEP's DBA policies/procedures and training staff may not benefit future work.

Recommendation #9:

"We recommend the Regional Administrator for EPA Region 2 require NJDEP to submit corrections for the one inaccurately reported quarter and verify that the remaining quarters covering the grant period complied with reporting requirements."

Agency Response

EPA agrees with this recommendation. AAL reviewed the Recovery Act Section 1512 reports submitted by NJDEP for seven of the twelve quarters and found that "six were appropriately reported and one report understated the jobs created by 0.88" due to NJDEP omitting hours worked by State personnel in the calculation.

[6]DBA does apply to other assistance NJDEP receives or may receive from EPA such as CERCLA 104(d) Superfund cooperative agreements, CERCLA 104(k) Brownfields grants or capitalization grants for the State's Clean Water and Safe Drinking Water revolving funds.

Entering the period of administration of ARRA's environmental funding, it was widely acknowledged[7] that there would be challenges with environmental staff being required to track unfamiliar performance measures (e.g., jobs created). The one inaccurately reported quarterly job figure should be updated. Note that this update will increase the number of cost effective jobs created or retained by NJDEP's expenditure of ARRA LUST funds, contributing to the successful outcomes of its efforts in implementing ARRA.

EPA Region 2 will request NJDEP to update by October 31, 2013, its Section 1512 report for the one applicable quarter.

OIG Response 13. The agency concurred with the finding and recommendation. Based on our research on another audit, quarterly reports for prior periods cannot be amended. Since NJDEP has submitted the revised job creation and retention information and explanations for the error, this recommendation is considered resolved.

[7] "The goals of the Recovery Act are to create and retain jobs, promote economic recovery, and assist those most impacted by the recession. However, these goals are outside of EPA's mission to protect human health and the environment and their intended results are not traditionally tracked by EPA." - Statement of Arthur A. Elkins, Jr. Inspector General - Before the Committee on Transportation and Infrastructure - U.S. House of Representatives - May 4, 2011.

Appendix C

Status of Recommendations and Potential Monetary Benefits

RECOMMENDATIONS						POTENTIAL MONETARY BENEFITS ($000s)	
Rec. No.	Page No.	Subject	Status[1]	Action Official	Planned Completion Date	Claimed Amount	Agreed-To Amount
1	11	Require NJDEP to establish internal controls to ensure that modifications to the cooperative agreement work plan are in accordance with the requirements of 40 CFR 31.30 and 31.40	U	Region 2 Regional Administrator			
2		*Recommendation removed by OIG.*					
3	12	Require NJDEP to provide documentation to demonstrate that it has verified that all laborers and mechanics who worked on the projects subject to the DBA requirements per programmatic condition 5 of the cooperative agreement were paid in accordance with Davis Bacon requirements.	O	Region 2 Regional Administrator			
4	12	Require NJDEP to submit corrections for the one inaccurately reported quarter.	C	Region 2 Regional Administrator	11/21/2013		

[1] O = Recommendation is open with agreed-to corrective actions pending.
C = Recommendation is closed with all agreed-to actions completed.
U = Recommendation is unresolved with resolution efforts in progress.

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