



U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL

American Recovery and Reinvestment Act Site Visit of Wastewater Treatment Plant, Village of Itasca, Illinois

Report No. 12-R-0377

March 30, 2012



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At a Glance

Why We Did This Review

The U.S. Environmental Protection Agency, Office of Inspector General, conducts site visits of American Recovery and Reinvestment Act of 2009 (Recovery Act) clean water and drinking water projects. The purpose of our visit was to address a hotline complaint involving compliance with the Recovery Act's Buy American requirement.

Background

The Village of Itasca received a \$20 million loan from the state of Illinois through the Water Pollution Control Loan Program. The loan included \$10 million in Recovery Act funds. The village used these funds to construct a new wastewater treatment plant.

For further information, contact our Office of Congressional and Public Affairs at (202) 566-2391.

The full report is at:
www.epa.gov/oig/reports/2012/20120330-12-R-0377.pdf

American Recovery and Reinvestment Act Site Visit of Wastewater Treatment Plant, Village of Itasca, Illinois

What We Found

We conducted an unannounced site visit of the Recovery Act project to build a new wastewater treatment plant in the Village of Itasca, Illinois, in April and May 2011. As part of our site visit, we toured the project, interviewed village officials and engineering and contractor personnel, and reviewed documentation maintained by the village related to the Buy American requirements of the Recovery Act and contract procurement.

The Village of Itasca did not comply with the Buy American requirements of the Recovery Act. Steel pipes and fittings used in the project were manufactured in foreign countries. We also identified other manufactured goods that did not comply with the Buy American requirements of the Recovery Act. As a result, the project is not eligible for the \$10 million of Recovery Act funds authorized by the state, unless the U.S. Environmental Protection Agency exercises a regulatory option.

What We Recommend

We recommend that the Regional Administrator, Region 5:

1. Require the state to withdraw Recovery Act funds, unless the state can verify that Itasca has complied with Buy American requirements.
2. Employ the procedures set out in the Code of Federal Regulations to resolve any iron, steel, and manufactured good that do not comply with Buy American requirements.
3. Verify that the substitutes for the German-made micropilots meet Buy American requirements.



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

THE INSPECTOR GENERAL

March 30, 2012

MEMORANDUM

SUBJECT: American Recovery and Reinvestment Act Site Visit of
Wastewater Treatment Plant, Village of Itasca, Illinois
Report No. 12-R-0377

FROM: Arthur A. Elkins, Jr.
Inspector General

A handwritten signature in black ink, appearing to read "Arthur A. Elkins, Jr.", is written over the printed name and title.

TO: Susan Hedman
Regional Administrator, Region 5
U.S. Environmental Protection Agency

This is our report on the subject site visit conducted by the Office of Inspector General (OIG) of the U.S. Environmental Protection Agency (EPA). The report summarizes the results of our site visit to the Wastewater Treatment Plant, Village of Itasca, Illinois. The report contains findings that describe the problems the OIG has identified and corrective actions the OIG recommends. This report represents the opinion of the OIG and does not necessarily represent the final EPA position. EPA managers in accordance with established audit resolution procedures will make final determination on matters in this report.

We performed this site visit as part of our responsibility under the American Recovery and Reinvestment Act of 2009 (Recovery Act). The purpose of our site visit was to determine the village's compliance with Buy American requirements under Section 1605 of the Recovery Act and review the procurement process used to award the construction contract. The Illinois Environmental Protection Agency approved the village's project. The village received a \$20 million loan, including \$10 million in Recovery Act funds.

Action Required

In accordance with EPA Manual 2750, Chapter 3, Section 6(f), you are required to provide us your proposed management decision for resolution of the findings contained in this report before you formally complete resolution with the recipient. As part of the audit resolution process, your proposed decision is due in 120 days, or on July 27, 2012. To expedite the resolution process,

please e-mail an electronic version of your proposed 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. We have no objection to the further release of this report to the public. This report will be available at <http://www.epa.gov/oig>.

If you or your staff have any questions regarding this report, please contact Melissa Heist, Assistant Inspector General for Audit, at (202) 566-0899 or heist.melissa@epa.gov; or Robert Adachi, Product Line Director, at (415) 947-4537 or adachi.robert@epa.gov.

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Purpose

The primary purpose of this site visit was to determine whether the Village of Itasca, Illinois, complied with the Buy American requirements, Section 1605, of the American Recovery and Reinvestment Act of 2009 (Recovery Act, or ARRA), P.L. 111-5, pertaining to the wastewater treatment plant project jointly funded by the Recovery Act and the Illinois Water Pollution Control Loan Program. We also reviewed the procurement process used to award the construction contract.

Background

In May 2009, the U.S. Environmental Protection Agency (EPA) awarded over \$177 million of Recovery Act funds to the state of Illinois to capitalize its revolving loan fund, which provides financing for construction of wastewater treatment facilities and other authorized uses. This assistance award was subject to the Code of Federal Regulations (CFR) at 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.

In October 2009, the village accepted a \$20 million loan from the Illinois Environmental Protection Agency to construct a new wastewater treatment plant to replace an existing facility. The terms of the loan were based on an annual fixed loan rate of 0 percent on a 20-year note. The loan included \$10 million in Recovery Act funds, half of which is to be repaid to the state and half of which will be forgiven. The loan balance was funded by the state's Water Pollution Control Loan Program. The village used these funds to construct a new village wastewater treatment plant.

Scope and Methodology

Due to the time-critical nature of Recovery Act requirements, we did not perform this assignment in accordance with generally accepted government auditing standards. Specifically, we did not perform certain steps that would allow us to obtain information to assess the village's internal controls and any previously reported audit concerns. As a result, we do not express an opinion on the adequacy of the city's internal controls or compliance with all federal, state, or local requirements.

We made an unannounced site visit to the wastewater treatment plant replacement project located in the Village of Itasca, Illinois, on April 27–28, 2011. We made subsequent visits on May 3 and May 10–11, 2011. During our visits, we:

1. Toured the project
2. Interviewed village, engineering, contractor, and state personnel
3. Reviewed documentation maintained by the village, its engineer, and project contractor on the following matters:
 - a. Buy American requirements under Section 1605 of the Recovery Act
 - b. Contract procurement

Results of Site Visit

The Village of Itasca did not comply with the Buy American requirements of the Recovery Act. As a result, the village's project to construct a wastewater treatment plant was not eligible for Recovery Act funds. We did not identify any other issues. We have summarized our results below.

Buy American Requirements

Itasca did not comply with Buy American requirements because no one associated with the project determined compliance in a systemic manner. Consequently, there was no assurance that all the iron, steel, or manufactured goods incorporated into the project were manufactured in the United States, as required by the Recovery Act. Steel pipes and fittings used in the project were manufactured in foreign countries. We also identified several other items that did not comply with the Buy American requirements of the Recovery Act. Since Itasca did not comply with the Buy American requirements, the project is not eligible for the \$10 million of Recovery Act funds authorized by the state, unless EPA exercises a regulatory option.

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: (1) iron, steel, or relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; (2) inclusion of iron, steel, or manufactured goods produced in the United States would increase the overall project costs by more than 25 percent; or (3) applying the domestic preference would be inconsistent with public interest.

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.¹

To assist recipients of Recovery Act funds, EPA developed several guidance documents and Internet-based training modules explaining the concept of substantial transformation and the types of documentation needed to support a substantial transformation determination. Key documents include:

- *Determining Whether “Substantial Transformation” of Components Into a “Manufactured Good” Has Occurred in the U.S.: Analysis, Roles, and Responsibilities*, dated October 22, 2009 (Determining Substantial Transformation)
- *Buy American Provisions of ARRA Section 1605 Questions and Answers—Part 1*, revised May 27, 2010 (Buy American Q&A Part 1)
- *Buy American Provisions of ARRA Section 1605 Questions and Answers—Part 2*, dated November 16, 2009 (Buy American Q&A Part 2)

These guidance documents provide:

- An explanation of substantial transformation
- A matrix of questions for determining whether substantial transformation has occurred in the United States
- The requirements for the type of documentation needed to support substantial transformation
- The need to retain the documentation to support compliance with Section 1605 of the Recovery Act

Unallowable Foreign Steel

Itasca used stainless steel pipes and fittings that were marked as made in various foreign countries, including Canada, China, Philippines, Sweden, Taiwan, and Thailand. We do not know the quantities of the foreign pipe and fittings used or the related costs because the contract was a lump sum and did not include quantities and unit prices. Also, the project was estimated to be 85 percent complete at the time of our review, and some of the pipe was buried.



Steel pipe label at Itasca site. (EPA OIG photo)

The contractor provided a letter and an e-mail to support its use of foreign-made pipe. The letter, prepared by a subcontractor, stated that the raw pipes were altered in the United States through measuring, cutting, grinding,

¹ 2 CFR § 176.70(a)(2)(ii)

welding, polishing, and installing into a working blower system. The e-mail from the Canadian pipe manufacturer discussed the United States' sources of the raw materials used to manufacture the pipe, claiming "98% of our material is from US origin."

The letter addressed the steps applied to the pipe to construct the treatment plant but does not address the processes to produce the pipe and fittings. The letter does not address the requirements of the law and regulations. Section 1605 of the Recovery Act clearly states that all iron, steel, or manufactured goods must be produced in the United States unless a waiver is granted. Title 2 CFR § 176.70 states that production of iron or steel in the United States requires that all manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives.

The subcontractor's alterations to the foreign pipe and fittings did not change the pipe to a new manufactured good distinct from the materials from which it was transformed, as required by 2 CFR § 176.140. According to EPA's guidance, "Determining Substantial Transformation," what occurs at the project site "is presumed to be construction." Also, EPA's "ARRA Buy American Compliance—What You Need to Know for SRF Projects," states that painting and other surface treatment (e.g., grinding, electroplating), kit assembly, cutting to length, and welding are not manufacturing.

Regarding the source of materials used in manufacturing the pipe, 2 CFR § 176.70(a)(2)(ii) states "there is no requirement with regard to the origin of components or subcomponents ... as long as the manufacturing takes place in the United States." Therefore, the source of materials is not a part of the manufacturing determination.

Neither the letter nor the e-mail as provided by the contractor supports Buy American compliance.

Other Foreign Manufactured Goods

The village used several manufactured items that were marked as foreign-made. Except for the micropilots, the village believed that the items were acceptable either because they were substantially transformed in the United States, or eligible for the *de minimis* waiver, or a component of a system in the project.



Manufacturing plate on an Aerzen blower. (EPA OIG photo)

Positive Displacement Blowers—The village installed four Aerzen blowers that were identified on the manufacturing plate as "Made in Germany." The president of Aerzen USA Corporation stated in an undated letter that the company provided design engineering, drafting,

shop labor, assembly and precision alignment,

quality assurance, testing, and field service. Components or subcomponents were mostly made in the United States, Canada, and Germany. A second document from Aerzen's regional sales manager claimed that the blowers were substantially transformed based on a change in character or use through meaningful and complex processes performed in the United States. However, there was no information to support these statements.

In its response to the draft report, Itasca provided additional documentation from the Aerzen USA Corporation. Except for an undated certification of compliance, none of these documents were signed. The only document that specifically referenced the blowers at the Itasca project was an unsigned letter, dated November 8, 2011. That letter stated that the GM 15L blower stage was purchased from Aerzen in Germany. The letter identified five other components and stated that the assembly labor was 56 hours. It was not clear from the letter whether the 56 assembly hours were the total hours per blower or the number of assembly hours used for all four blowers.

The certification of compliance included Aerzen's answers to EPA's test questions for determining whether substantial transformation occurred in the United States. In response to the first question, Aerzen stated that all of the parts were not manufactured in the United States. For the second question, regarding change in character, Aerzen stated that the bare blower or compressor cannot operate without additional components, such as a motor, drive components, and controls. The work in the United States narrowed the range of operation to air compression and other job-specific requirements.

For the third question, which addresses complex and meaningful processes, the certification stated that the estimated hours for a typical municipal wastewater treatment project with three average-sized machines was 20 hours for assembly and precision drive alignment and 18 hours for electrical wiring, programming, and setting controls. The three activities with the highest number of hours listed on the EPA test questions (see list below) are not manufacturing activities:

1. Project management—74 hours
2. Engineering, sizing calculations, selections and drawings—60 hours
3. Startup assistance and training—60 hours

Other answers to the third question stated that the value added by processes and support functions amounted to about 40 percent of the total costs and that about 70 percent of the total sales price was for domestic parts and payrolls. EPA's guidance, "Determining Substantial Transformation," states that design, planning, procurement, component production, or any other step prior to the process of physically working on and bringing together the components into the item used in and incorporated into the project cannot constitute or be a part of substantial transformation. In addition, the statements about value and

cost were not supported by any verifiable data to ensure only manufacturing factors were considered.

As previously noted, a manufactured good is something that has been processed into a specific form and shape, or combined with other raw materials that has different properties than the properties of the raw materials.² There is no requirement regarding the origin of components, as long as the manufacturing occurs in the United States.³ EPA guidance “Determining Substantial Transformation” defines substantial transformation as the United States’ process that transforms materials from foreign countries into a new and different manufactured good distinct from the materials from which it was transformed. According to product literature, the blower is mostly iron and steel, and basically consists of housing parts, shaft, rotors, timing gears, and seals. The GM-type three-lobe positive displacement blowers convey oil free air and neutral gases with operating pressure up to 1,000 mbar gauge and suction operation up to -500 mbar gauge. The company’s documentation does not explain how the properties of the imported “GM 15L blower stage” changed in the United States when combined with other materials.

Based on the documentation provided, we have concluded that the blowers were manufactured in Germany and final assembly occurred in the United States. The documentation does not support that the blower stages were changed into a different manufactured good with properties that were different from the properties of the individual raw materials, as required by the regulations. The addition of a motor and gauges to the blower stage did not change the fundamental purpose or characteristics of the blower stage. Therefore, the four Aerzen blowers do not comply with the Buy American requirement of the Recovery Act.

Miscellaneous Equipment—We identified several other items that indicated either by stamp or a manufacturing plate that the country of origin was other than the United States. These items included three Endress-Hauser micropilots (Germany), a Rosemount magnetic flowtube (Mexico), and an Eaton Filtration duplex strainer (China).

The Endress-Hauser micropilots were identified on the manufactured plate as made in Germany. The supporting documentation provided did not support that the micropilots were manufactured in the United States. Consequently, these micropilots did not meet Buy American requirements. In its response to the draft report, Itasca stated that the



Three Endress-Hauser micropilots. (EPA OIG photo)

² 2 CFR § 176.140 (a) (1)

³ 2 CFR § 176.70 (a) (2) (ii)

German-made micropilots were shipped in error and would be replaced by American-made products.



Rosemount magnetic flowtube. (EPA OIG photo)

The initial documentation regarding the magnetic Flowtubes and the filtration strainer was not sufficient to support compliance with Buy American requirements.

In its response, Itasca identified six flowtubes in the project, two of which were identified as “Assembled in Mexico” and were part of the aerobic digestion system. These two flowtubes were shipped loose to the construction site to be installed within a piping system. The remaining four flowtubes were also made in Mexico and shipped loose to the site as component parts of the rotary sludge press system.

As previously noted, a manufactured good is brought to the construction site for incorporation into the project.⁴ Activities that occur on site are generally considered construction, not manufacturing.⁵ Therefore, the use of a manufactured good as part of a system in the project is not a factor when determining compliance with Buy American. Section 1605 of the Recovery Act states manufactured goods used in the project must be produced in the United States unless certain exceptions exist.

Since all six flowtubes were from Mexico and shipped to the construction site for incorporation into the project, none of the flowtubes comply with Buy American requirements.

Itasca agreed that the strainer was made in China and would require a waiver.

Neither the village, the consulting engineer, nor the prime contractor were actively reviewing Buy American compliance. The Public Works Director told us that the village relied on the contractor and resident engineer to assure compliance. The Buy American requirements were included in the construction contract. The consulting engineers told us that Buy American compliance responsibility rested solely with the construction contractor. However, Itasca stated in its response to the draft report that the engineering agreement was modified on August 25, 2009,



Eaton Filtration duplex strainer (EPA OIG photo)

⁴ 2 CFR §176.140(a)(1)

⁵ *Determining Whether “Substantial Transformation” of Components Into a “Manufactured Good” Has Occurred in the U.S.: Analysis, Roles, and Responsibilities*, dated October 22, 2009, page 8.

to include standard language provided by the state that the engineers shall maintain books, records, documents, and other records directly pertinent to the performance of the Water Pollution Control Loan Program. Since the loan program had been amended by the state to include the requirements of the Recovery Act, Itasca concluded that the consulting engineer had Recovery Act responsibilities.

The manager from the Illinois Environmental Protection Agency Infrastructure Financial Assistance office said that the state had done little onsite monitoring of municipal Recovery Act projects, including Itasca, because of the limited resources within the field offices. The state sent the village a modified Recovery Act checklist that the state had been using as a “self reporting” tool in lieu of a state inspector site visit. At the time of our review, the village had not completed this checklist and returned it to the state. The manager also said that Itasca had not contacted the state requesting guidance related to Recovery Act requirements.

Contract Procurement

We did not identify any issues of concern related to contract procurement. The construction contract was competitively awarded to Williams Brothers Construction, Inc., based on public advertisement. Buy American and Davis-Bacon wage requirements were included in the project manual used by the bidders to prepare their bids and incorporated into the contract. Itasca received six bids on the project and, based on the engineer’s recommendation, awarded the contract to the lowest responsible and responsive bidder. We reviewed the bid tabulation and contacted several of the unsuccessful bidders to obtain their feedback on the bidding process. We did not identify any inappropriate or unfair bidding practices.

Recommendations

We recommend that the Regional Administrator, Region 5:

1. Require the state to withdraw Recovery Act funds from the project unless the state can certify that Itasca has complied with Buy American requirements in the Recovery Act, as required by the EPA grant terms and Itasca’s loan agreement with the state.
2. For the iron, steel, and manufactured goods for which the state cannot certify compliance, employ the procedures set out in 2 CFR § 176.130 to resolve the noncompliance on the Itasca project. In the event that the region decides to retain foreign iron, steel, and manufactured goods in the Itasca project under 2 CFR §176.130 (c)(3), because of the serious nature of the noncompliance, the region should either reduce the amount of the award by the cost of the steel, iron, or manufactured

goods that are used in the project or take enforcement or termination action in accordance with EPA's grants management regulations.

3. Verify that the substitutes for the German-made micropilots meet Buy American requirements.

Village of Itasca Response to Draft Report

Itasca stated that planning for the construction of a new treatment plant began years before the enactment of the Recovery Act. As such, the design, plans, and construction was focused on compliance with the Illinois Water Pollution Control Loan Program. Despite the timing of the Recovery Act as it related to the bid and construction timeline, the village made a concerted effort to comply with all requirements and also required its contractors to comply.

Itasca provided additional documentation with its response to support Buy American compliance for the items questioned in the draft report. In the event that the documentation was not sufficient, Itasca stated that the *de minimis* waiver should apply to the steel pipe, blowers, flowtubes, and strainer. If the *de minimis* waiver does not apply, Itasca believes EPA should grant a site specific waiver.

OIG Comment

We modified our report based on the comments and additional documentation provided by Itasca. We removed certain manufactured goods questioned in the draft report. However, we do not agree that all the iron, steel, and manufactured goods used in the project comply with Buy American requirements.

We also do not agree that the manufactured goods still questioned are incidental to the construction and thereby eligible for the *de minimis* waiver.⁶ The waiver is not to be used for a relatively small number of high-cost components incorporated into the project that are iron, steel, and manufactured goods, such as pipe, tanks, pumps, motors, instrumentation, and control equipment. The waiver is for low-cost components that are essential for, but incidental to, the construction such as nuts, bolts, other fasteners, tubing, gaskets, etc. The components included in the Itasca's calculation are all major components of the new facility and not incidental to the project.

We added a recommendation regarding the micropilots. Otherwise, our recommendations are unchanged. The entire Itasca response to the draft report and the OIG's specific comments are included in appendix A.

⁶ Notice of Revised Nationwide Waiver of Section 1605 (Buy American Requirement) of American Recovery and Reinvestment Act of 2009 (ARRA) Based on Public Interest for *de minimis* Incidental Components of Projects Financed Through the Clean or Drinking Water State Revolving Funds Using Assistance Provided Under ARRA [74 Fed. Reg. 39959 (August 10, 2009)]

Status of Recommendations and Potential Monetary Benefits

RECOMMENDATIONS						POTENTIAL MONETARY BENEFITS (in \$000s)	
Rec. No.	Page No.	Subject	Status ¹	Action Official	Planned Completion Date	Claimed Amount	Agreed-To Amount
1	8	Require the state to withdraw Recovery Act funds from the project unless the state can certify that Itasca has complied with Buy American requirements in the Recovery Act, as required by the EPA grant terms and Itasca's loan agreement with the state.	U	Regional Administrator, Region 5		\$10,000	
2	8	For the iron, steel, and manufactured goods for which the state cannot certify compliance, employ the procedures set out in 2 CFR § 176.130 to resolve the noncompliance on the Itasca project. In the event that the region decides to retain foreign iron, steel, and manufactured goods in the Itasca project under 2 CFR §176.130 (c)(3), because of the serious nature of the noncompliance, the region should either reduce the amount of the award by the cost of the steel, iron, or manufactured goods that are used in the project or take enforcement or termination action in accordance with EPA's grants management regulations.	U	Regional Administrator, Region 5			
3	9	Verify that the substitutes for the German-made micropilots meet Buy American requirements.	U	Regional Administrator, Region 5			

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

Village of Itasca Response to Draft Report and OIG Comment



Village of Itasca

550 W. Irving Park Rd. Itasca, IL 60143
630.773-0835. Fax 630.773.2505 • www.itasca.com

January 12, 2012

Robert Adachi
United States Environmental Protection Agency
Office of Inspector General
Washington, D.C. 20460

Michael Rickey (via email rickey.michael@epa.gov) only
John Trefry (via email trefry.john@epa.gov) only

***Re: Response to U.S. EPA Office of Inspector General Draft Report
Project No. OA-FY11-0234***

Dear Gentlemen:

The Village of Itasca (the “Village”) appreciates the opportunity to submit this response to the findings and recommendations of the U.S. Environmental Protection Agency Office of Inspector General’s (“OIG”) October 19, 2011, draft report (“Draft Report”) in the above referenced matter. This response has been prepared by the Village with assistance from its engineering consultant, Baxter & Woodman, Inc. (“Baxter & Woodman”); its Village Attorney, Charles E. Hervas from the law firm Hervas, Condon & Bersani, P.C.; and Special Counsel, Jennifer J. Sackett Pohlenz from the law firm Clark Hill PLC.

The American Recovery and Reinvestment Act 2009 (“ARRA”), enacted towards the end of the Village’s planning for its new wastewater treatment plant (“WWTP”), provided the Village with important funds to assist the Village in completing its WWTP and provided a “shovel ready” project to help spur economic recovery that met the purposes of ARRA. The

Village has required compliance from its general contractor and engineering consultant on this project, and when the Village learned of potential non-compliance it immediately sought corrective action by its contractor and consultant.

The Village provides information and documentation responding to the issues raised in the Draft Report and is organized in four sections: (I) Background; (II) Response to Issues Raised in the Draft Report; (III) Waivers; and (IV), Conclusion. This response provides OIG with the basis for a final recommendation of no further action in its final report. Alternatively, if OIG identifies deficiencies, notwithstanding this response, the Village respectfully requests the application of waivers and the consideration of alternatives to refunding loan amounts, as described herein.

I. BACKGROUND

It is important to view the Village's WWTP project and the legal requirements for it in the context in which the ARRA funds were provided, and the evolving and shifting legal landscape in which the construction took place. As such, the Village provides a brief history of the WWTP project.

Years before ARRA, the Village began planning the WWTP, as its existing wastewater treatment facility was overtaxed due to the growth stimulated by the O'Hare Airport Western Access project and other area developments.

The Village originally considered expanding its current wastewater treatment facility, however, in 2002, it began re-evaluating that plan and in 2003, it decided to build a new WWTP on a new site. To help fund the WWTP, the Village intended to apply to Illinois EPA for a loan from Illinois Water Pollution Control Loan Program ("WPCLP"). As such, the Village's plans, designs, and construction was focused on WPCLP compliance.

One of the first steps on the road to the WWTP was the Village's acquisition of the property for the new facility. This took several years to do, multiple parcels needed to be purchased, and one of those parcels resulted in a condemnation action being filed. All parcels of the property was finally acquired in 2006. The Village incurred significant expenses and loaned itself money, associated with the WWTP project, including but not limited to over a million dollars towards the purchase of the property where the WWTP would be located and over \$500,000.00 in engineering and design fees associated with the WWTP. All of this was occurring years before ARRA was proposed.

On February 17, 2009, ARRA was enacted and the initial guidance document published in the Federal Register. In March 2009, plans, specifications, and construction permit application for the WWTP project were submitted to the Illinois EPA. In March 2009, Volume I of the Questions and Answers for ARRA was published in the Federal Register. The February and March 2009 guidance, attempted to explain how certain provisions in ARRA would be interpreted, but even those were subject to revision (*e.g.*, the March 2009 Question and Answers were revised in December 2009). Also on April 15, 2009, the Illinois EPA issued ARRA Guidance. In May 2009, the U.S. Environmental Protection Agency (EPA) awarded Recovery

Act funds to the State of Illinois. On June 2, 2009, Illinois EPA proposed and implemented emergency rules applicable to WPCLP projects with ARRA funding.

On August 25, 2009, the Village's engineering and design consultant, Baxter & Woodman, amended its agreement with the Village to include language required by the Illinois EPA for ARRA projects. This amendment states that the purpose of the August 25, 2009, amendment is "to include the Standard Language necessary to be eligible for a loan through the American Recovery and Reinvestment Act of 2009 administered by the Illinois [EPA]." The exact language supplied by Illinois EPA was used by the Village for this amendment and requires that ". . . ENGINEERS shall maintain books, records, documents and other evidence directly pertinent to performance of WPCLP." At the time of the contract, the WPCLP had been amended through Illinois EPA's emergency rulemaking to incorporate the requirements of ARRA.

On October 29, 2009, the Village was awarded Loan No. L17 1456 by IEPA for the construction of a much needed wastewater treatment plant. On November 13, 2009, the Village awarded the bid for construction of the WWTP to Williams Brothers Construction, Inc. ("WBCI").

The Village's contract with WBCI required compliance with ARRA, including but not limited to the following:

THE PROCUREMENT WILL BE SUBJECT TO REGULATIONS CONTAINED IN THE PROCEDURES FOR PROVIDING FINANCIAL ASSISTANCE FROM THE WATER POLLUTION CONTROL LOAN PROGRAM UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 (ARRA), THE DAVIS-BACON ACT (40 USC 276A THROUGH 276A-5) AS DEFINED BY THE UNITED STATES DEPARTMENT OF LABOR AND THE EMPLOYMENT OF ILLINOIS WORKERS ON PUBLIC WORKS ACT (30 ILCS 570). (Page 1 of the Advertisement for Bids).

25.02 Comply with Section 1605 of the American Recovery and Reinvestment Act of 2009 (ARRA), which specifies that all iron, steel and manufactured goods used in the project are produced in the United States. (Page 00 21 00.61-9 of the Bidder Instructions).

11. d. All iron, steel and manufactured goods to be used in the project are produced in the United States in compliance with Section 1605 of the ARRA of 2009. (Page 00 41 00.61-4 of the Bid Form)

The agreement with WBCI provided that all bid documents, among other items, were incorporated into the agreement.

7.01 The Contract Documents which comprise the entire agreement between OWNER and CONTRACTOR concerning the Work consist of this Agreement, the General Conditions, Supplementary Conditions,

Specifications and Drawings, all Addenda issued prior to receipt of Bids, CONTRACTOR's Bid, Performance and Payment Bonds, Insurance Certificates, and all written Amendments issued after the Effective Date of the Agreement pursuant to paragraphs 3.04 of the General Conditions. (Agreement Section 7.01)

Construction on the Village's Project started in November 2009. Likewise in November 2009, Volume II of ARRA Questions and Answers was published (this guidance had a particular focus on substantial transformation). In May of 2011, additional ARRA guidance was published concerning compliance and late waiver requests, supplementing the earlier produced guidance in April 2009, on waiver requests. The WWTP became operational on December 12, 2011. It will be declared substantially complete when all of its systems are thoroughly proven to function properly. At the time of this response, the liquid treatment system has been proven and the biosolids treatment system is being commissioned.

During the week of February 7, 2011, Baxter & Woodman identified portions of the WWTP that were potentially non-compliant with ARRA, notified WBCI at the next weekly construction meeting, and initiated an investigation.

In April and May of 2011, the OIG inspected the WWTP in response to a hotline complaint. Several areas of non-compliance were identified as a result of the inspections.

In response to OIG's inspection and prior to issuance of OIG's draft report, the Village took immediate action to address the issues brought to its attention by the OIG inspections. For example, on May 17, 2011, the Village, through Baxter & Woodman, directed WBCI to stop installation of the then supplied stainless steel pipe and replace it with U.S. made stainless steel pipe that did not rely on substantial transformation, trade agreements, or other exception to ARRA for compliance.

Additionally, on July 29, 2011, Baxter & Woodman wrote to both the Illinois EPA and U.S. EPA seeking clarification on several remaining compliance questions. Neither Illinois EPA nor EPA have provided responses to the Baxter & Woodman's letters.

On August 25, 2011, the Village, through Baxter & Woodman, submitted an additional request to EPA Region 5, asking EPA to allow an then-estimated \$120,000 of installed stainless steel pipe (non-drop pipe) to remain in place. The Village has also not received a response from EPA Region 5 to this second request.

On September 21, 2011, the Village, through Baxter & Woodman, submitted another request, this time to EPA Headquarters. The Village requested EPA to provide "anticipatory oversight" and review and comment on the sufficiency of the substantial transformation documentation for the Sequencing Batch Reactor ("SBR") equipment manufactured by Aqua Aerobic Systems Inc. of Rockford, Illinois. A component of this system is the upper drop pipe assemblies which are a subject of the Draft Report. A response to this request has not been received.

On October 19, 2011, OIG issued the Draft Report.

II. RESPONSE TO ISSUES RAISED IN THE DRAFT REPORT

The Draft Report raises several areas where OIG questions compliance of the WWTP project with the Act:

- A. steel pipes and fitting;
- B. 4 Aerzen positive displacement blowers;
- C. 6 WEMCO-Hidrostal submersible pumps;
- D. 4 Watson Marlow 620N Bredal pumps; and
- E. miscellaneous equipment identified as 3 Endress-Hauser micropilots; 1 Quincy 325 compressor; and 1 Eaton Filtration duplex strainer.

The Village addresses each item separately in the sections below. As an initial matter, however, the Village provides this introduction to several items that share a common issue: whether an item is compliant with the Act when a component of a final product is not American-made.

Several of the items discussed below – (A) stainless steel drop pipes, (B) the displacement blowers, (C) the submersible pumps, and (D) the Watson Marlow Bredal pumps -- share a common issue: OIG questioned the manufacture of a component part of a final product.

In some cases, when requested to supply additional detail and documentation to support substantial transformation the manufacturer of the American-made final product provided documentation showing that most component parts were manufactured in the U.S. Since identification of where component parts are manufactured is not required by ARRA, it should be sufficient for the manufacturers of the final product to describe the process of manufacturing the final product without specifically identifying the origin of its parts. The Village submits that it is sufficient to show substantial transformation, even without documentation of component part origin, when there is a description of the U.S. based production process where one can fairly say that substantial transformation occurred. Not a single one of the items referenced above are a “kit” type of example. In all cases, these are new, final products, made in the U.S.

Alternatively, in those cases where the final product manufacturer provided documentation for the WWTP that identified the country where component parts were made, if OIG determines there is not substantial transformation to a final product, then only those component parts made outside the U.S. should be found to be non-compliant and the Village requests an opportunity to submit additional documentation about component origin from those final product manufacturers that did not provide that information to the Village.

Even if the documentation supplied in this response is not considered sufficient by the OIG and compliance remains in question, the Village submits that the items are covered or, alternatively should be covered, under the ARRA waivers discussed in Section III of this response.

A. Stainless Steel Pipes and Fittings

There are two categories of stainless steel pipe and fittings: (1) general and (2) drop pipes that are a component part of a sequencing batch reactor (“SBR”).

(1) *General Stainless Steel Pipe and Fittings*

The stainless steel pipe and fittings used at the WWTP that are not drop pipes were supplied to WBCI from Tobin Brothers, Inc. (“Tobin”). Tobin, in turn, obtained the steel from Connor Company. At the time of the OIG’s investigation, Baxter & Woodman had estimated what stainless steel had already been installed and was on site based on its observations and the schedule of costs in the Village’s contract with WBCI. Since that time, the Village has obtained the Connor Company invoices which more accurately detail what quantity of pipe was *returned* from the worksite to Connor Company for a credit and then replaced with U.S. steel. (**Exhibit A-1**). Even with this information, the quantity-estimate based on price will overestimate the amount of steel initially installed at the WWTP, as some of the returned items did not receive a monetary credit and, thus, are not captured in the calculation. Likewise any cost differential impacts an attempt to estimate using dollars rather than quantities. However, given the variety of supplied parts for which quantities would need to be tracked and compared, the estimation may be less understandable than using dollars, where quantities are underestimated through “credits” and potentially over- and underestimated through the per-item costs. The invoices obtained from Tobin that have been categorized by Tobin as “Canada-Made” and “U.S. Made” are attached as **Exhibits A-2** and **A-3**, respectively.

In April 2011 when OIG made its first site visit, Baxter & Woodman estimated that there was approximately \$201,000 of stainless steel pipe on the construction site. Of the \$201,000 of stainless steel pipe, Baxter & Woodman estimated that approximately \$120,000 had already been installed. The stainless steel was thought to be compliant through its substantial transformation by Tobin. Based on the documentation the Village has received to date, it understands that the \$120,000 estimate provided by Baxter & Woodman was conservative and overstated the quantity and cost of steel installed. Baxter & Woodman subsequently obtained the invoices from WBCI for Connor Company and recalculated the amount of steel installed based on what was returned to Connor Company. **Exhibit B**. Based on this calculation, it is estimated that \$89,579.78 of stainless steel pipe and fittings was installed, based on Tobin’s reliance on substantial transformation and trade agreements for ARRA compliance.

On May 17, following OIG’s April and May inspections, the Village, at the regular construction progress meeting, immediately notified WBCI and halted any further installation of stainless steel pipe and fittings at the WWTP that relied on substantial transformation, trade agreements, or other exceptions to ARRA. The remaining stainless steel pipe was replaced with U.S. made stainless steel pipe before its installation.

A December 16, 2011, letter from Tobin represents that at the time it learned of the potential for non-compliance with ARRA (although it was acting in what it understood to be compliance with ARRA through substantial transformation) only fifteen percent (15%) of Tobin’s stainless steel materials had been installed. (**Exhibit C**). Tobin states

that it replaced all uninstalled stainless steel with pipe that was manufactured in the United States. Using Tobin's percent replacement of stainless steel with the total, original contractual value of the steel, only \$18,000 of stainless steel pipe that was rolled in Canada remains at the WWTP.

Although the Village has requested that WBCI clarify with Tobin how much steel was rolled in Canada versus in the United States and provide bills of lading and invoices for the replacement stainless steel pipe and fittings that were made in the United States, at the time of submittal of this response, that documentation has only in part been provided. For example, although Tobin has provided all of its invoices with Connor, the Village has also requested that Tobin supply the original supplier's documentation to show through that paperwork, in addition to the representation of Connor Company, a U.S. manufacturer. The Village requests that it be allowed to supplement this response with that documentation once it is received.

As respects the stainless steel pipe and fittings that were not "without a doubt" American made, WBCI and its subcontractors supplying the stainless steel pipe and fittings were operating under the understanding that the non-American rolled stainless steel pipe and fittings were compliant through the application of trade agreements and, alternatively, substantial transformation.

Additionally, the circumstances involved in the initial installation of stainless steel pipe and fittings at the WWTP (where contractors and subcontractors relied on substantial transformation and trade agreements for ARRA compliance) and the fact that it would cost approximately \$1,000,000 to remove the less than \$89,579.78 of stainless steel pipe and fittings and replace it with U.S. made pipe, supports the application of a *de minimis* waiver and, alternatively, if needed, EPA's granting of a site-specific waiver. The Baxter & Woodman cost estimate for the removal of the \$89,579.78 of stainless steel pipe and fitting, and replacement with new pipe and fittings is attached as **Exhibit D**. This cost estimate is understated as it does not include the costs (and other potential issues) associated with the two to four month shutdown of the WWTP, which is currently in operation, that would be needed to replace the stainless steel pipe and fittings being questioned by the OIG.

- (a) *The Non-US Rolled Pipe Was Rolled in Canada and Should be Considered Compliant as Canada is a WTO Agreement Country*

Even if substantial transformation did not occur, compliance of the non-drop pipe stainless steel was also interpreted as ARRA compliant, as the steel sheet was rolled into pipe in Canada. Canada participates in the World Trade Organization Government Procurement Agreement ("WTO Agreement"), which is recognized by the State of Illinois. The initial EPA guidance on the application of trade agreements in circumstances like this did not preclude or discourage the application of free trade agreements as the WTO Agreement was applied by contractors for this project.

Indeed, the Illinois EPA guidance issued on April 15, 2009, specifically allows for the application of the WTO Agreement:

The Buy American requirement shall not be applied where the iron, steel or manufactured goods used in the project are from a Party to an international agreement, listed in the paragraph directly below, and the recipient is required under an international agreement, described in the Appendix to this document, to treat the goods and services of that Party the same as domestic goods and services. This obligation shall only apply to projects with an estimated value of \$7,443,000 or more and projects that are not specifically excluded from the application of those agreements. **(Exhibit E).**

The April 15, 2009, Illinois EPA ARRA Guidance, specifies Canada (§176.70). However, although not incorporated in the text of the Illinois EPA ARRA Guidance, the Appendix, identifies “U.S. States and Other Entities Subject to U.S. Obligations under International Agreements” and, potentially limits §176.70 of the Guidance by apparently excluding “construction-grade steel.” This Illinois EPA guidance is the only Illinois published guidance and was never changed subsequent the issuance of later ARRA guidance.

WBCI purchased the steel products from Tobin, who produced what was used in the project on site. Tobin purchased the steel materials from Connor Company, who obtained the stainless steel pipe that was rolled in Canada from Alrite. WBCI and Tobin knew ARRA were an issue, but Tobin intended and expected to comply with ARRA, based on its production of the final product that was used at the WWTP. Given the timing of this project, the timing of the issuance of federal guidance, and the still current April 15, 2009, Illinois EPA ARRA Guidance which can be read to allow the application of trade agreements as done in this case, this is not a circumstance wherein the OIG should recommend any penalty. WBCI and its subcontractors supplied the Canadian rolled stainless steel pipe thinking it was compliant. Moreover, when the Village learned of the potential non-compliance of this pipe it was prompt in requiring the uninstalled pipe to be removed from the WWTP and replaced with compliant pipe, which was done.

OIG Response 1: The April 15, 2009, state guidance referred to by Itasca is consistent with the federal requirements to implement the Buy American requirements at 2 CFR Part 176. Federal regulations [2 CFR §176.160 (b)(ii)] and the state guidance state that the requirements of Section 1605 do not apply when the iron or steel is from a party to an international agreement and the recipient is obligated to treat the iron or steel as domestic goods. The state guidance and the Appendix to Subpart B of Part 176 [74 Fed. Reg. 18475 (April 23, 2009)] identify only the state’s Department of Central Management Services and Chicago as the only Illinois entities subject to United States obligations under international agreements.

This appendix was revised to include all EPA Clean Water State Revolving Fund recipients funded with reallocated Recovery Act funds where the contracts were signed after February 17, 2010 [75 Fed. Reg. 14323 (March 25, 2010)]. Itasca’s project was funded by the \$177 million capitalization grant that EPA awarded to the state on May 27, 2009. This capitalization grant was from EPA’s initial allocation of Recovery Act funds. EPA accepted state certifications that all the state revolving fund projects were under contract by February 17, 2010, and consequently, no Recovery Act funds were reallocated. In addition, Itasca signed the construction contract on November 13, 2009, well before the revised appendix eligibility date of February 17, 2010.

Therefore, consistent with state guidance and federal regulations, Itasca was not an eligible party to an international agreement and was not required to treat foreign iron or steel as a domestic good. Itasca was required by state guidance and federal regulations at 2 CFR §176.70 (a)(2) to use iron or steel produced in the United States.

(b) *The Non-US Rolled Pipe Was Substantially Transformed On-Site*

Tobin submits documentation to support the substantial transformation of the Canadian rolled stainless steel pipe that was installed at the WWTP. (**Exhibit C**). Although the transformation occurred on the project site, this is the customary operation by Tobin for the manufacturing of the pipe and pipe components used in projects such as this one. The on-site manufacturing process used by Tobin is time intensive (in excess of 1000 labor hours) and is substantially more involved than simple “construction.” The on-site manufacturing process employed by Tobin involves grinding, welding and polishing to form pieces to specification. Only then are the pieces installed and, as part of that installation, potentially, cut, re-welded, and re-polished. The non-installation portion of the on-site manufacturing done by Tobin could be done elsewhere, and then the pieces hauled by truck to the project site, however, doing so limits Tobin’s flexibility in making adjustments to manufactured pipes that need to be adjusted or remanufactured prior to installation. Presumably, this also decreases transportation costs and labor hours associated with the manufacture and installation of the steel pipes. In the event that OIG does not find compliance with the installed, Canadian-rolled, stainless steel pipe based on trade agreements (a), the Village requests that OIG find compliance based on Tobin’s substantial transformation documentation, attached as **Exhibit C**.

OIG Response 2: Both the Recovery Act and the regulations clearly state that all iron and steel must be products of the United States which requires that all manufacturing processes take place in the United States. Therefore, the foreign-made iron and steel pipes and fittings used in Itasca’s project do not comply with Section 1605 of the Recovery Act.

(2) *SBR with Component Part Stainless Steel Drop Pipes*

Drop pipes are a single component part to a larger system, the SBR. Federal ARRA guidance is specific that component parts of a finished product that is manufactured in the United States are not required to be likewise American made.

The drop pipes convey air from the main air headers at the top of the SBRs to the diffusers on the floor of the SBRs. The SBRs are manufactured by a subcontractor to WBCI, namely, Aqua Aerobic Systems (“Aqua”) of Rockford, Illinois. The upper portion of the drop-pipe is stainless steel. The lower portion is PVC pipe, with stainless steel supporting units. There are four drop pipes in each SBR and 4 SBRs. A total of two of the sixteen upper drop pipes (*i.e.*, half the number in one SBR unit), contained steel plate or pipe from Taiwan. The remaining fourteen drop pipes contained only steel from the United States. (**Exhibit G**).

Aqua provided a memo dated October 28, 2009, certifying that the SBRs, including the drop pipe components, meet ARRA requirements through substantial transformation. (**Exhibit F**). Although the memo cites to ARRA guidance and it appears the

drafter is knowledgeable about such guidance, it does not provide the detail that is required to show substantial transformation.

On August 23, 2011, Deb LaVelle of Aqua spoke with Andrew Bielinski of EPA, seeking assistance and his review of whether Aqua had sufficient documentation to support substantial transformation as respects the SBRs and, specifically, the drop pipe portion of them. **(Exhibit G)**. Mr. Bielinski relayed to Ms. LaVelle what occurred in Ottawa, Illinois, wherein drop pipes on a conventional aeration tank *not an SBR* were determined not to meet substantial transformation requirements and were replaced with American-made steel pipes. However, the situation with the Village's WWTP is distinguishable, as the drop pipes at issue are part of SBRs. At the time of this conversation, an SBR was already being installed and two drop pipes made with Taiwan steel were already in place at the WWTP. **(Exhibit H-2)**.

The SBRs contain thirteen categories of parts. **(Exhibit I)**. The aeration system portion of the SBR contains the drop pipes. The aeration system itself contains eleven categories of parts. **(Exhibit I & H-2)**. Although *not required by* ARRA, each of these categories of component parts are manufactured in a U.S. location, for example, specifically, as pertains to the Taiwan steel at issue: the two upper drop pipes at the Village's WWTP were made by Metals and Services located in Addison, Illinois; the stainless steel supports in the two lower drop pipes were manufactured by Chicago Plastic Systems of Crystal Lake, Illinois; and the manifold brackets are manufactured from stainless steel sheet by Metals and Services in Addison, Illinois. **(Exhibit H-2)**. In total, the SBR as a system takes over 400 U.S. labor hours to manufacture. **(Exhibit H-1, p. 6)**. Due to the size of the SBR, it is neither economical or practical to ship it whole to the jobsite. As a result, component parts are shipped and further transformed on site.

An August 24, 2011, dated memo from Aqua adds detail specific to the substantial transformation of the drop pipe component of the SBR system. **(Exhibit H-3)**. On August 25, 2011, Aqua's Deb LaVelle sent an email to EPA's Andrew Bielinski, confirming their conversation on August 23rd, seeking his review of the substantial transformation documentation, and confirming that Aqua was replacing the drop pipes in the SBRs at the WWTP with stainless steel pipes made in the United States, even though it was maintaining the Taiwan pipe was ARRA compliant through substantial transformation. **(Exhibit G)**.

On August 31, 2011, Aqua sent a letter and documentation (including a revised memo certifying compliance with ARRA also dated August 31, 2011), seeking EPA review of its substantial transformation documentation of SBRs. **(Exhibit H-1 & H-2)**.

On September, 21, 2011, Baxter & Woodman sent a letter to EPA further explaining the SBRs and asking for a determination on whether substantial transformation occurred. **(Exhibit I)**.

A single SBR is estimated to have cost the Village \$449,500. A single drop pipe (upper and lower) cost \$1,054.00, with \$695.00 attributable to the stainless steel material used in the manufacture of the upper drop pipe. **(Exhibit J)**

Thus, after the August 23, 2011, phone call between EPA and Aqua where it appeared, anticipatorily, to Aqua that EPA would not accept Aqua's substantial transformation documentation, Aqua replaced all of the drop pipes. However, two drop pipes containing Taiwan steel and manufactured by Metals and Services in Addison, Illinois had already been installed into one of the SBRs at the WWTP. The steel is merely a component part of the manufactured SBR system and, thus, the Village requests that OIG find the two, Taiwan-stamped steel drop pipes remaining at the WWTP to be compliant through substantial transformation by the manufacture of the SBR or, alternatively, if the OIG does not agree that the SBR is a manufactured final product, that the drop pipes were themselves substantially transformed at Metals and Services located in Addison, Illinois and Chicago Plastic Systems of Crystal Lake, Illinois, where they were manufactured.

OIG Response 3: We agree with EPA's determination regarding substantial transformation. As noted above, the Recovery Act requires that all manufacturing processes for iron and steel, except metallurgical processes, must take place in the United States. The drop pipes sent to the Itasca site were manufactured in Taiwan and do not comply with Section 1605 of the Recovery Act.

B. 4 Aerzen U.S. Positive Displacement Blowers with Component Part Aerzen German Motors

The WWTP contains four Aerzen positive displacement blower assemblies that supply air for the autothermal thermophilic aerobic digestion process. The four Aerzen blower assemblies are manufactured by Aerzen USA Corporation ("Aerzen"), in Coatesville, PA. There are six categories of component parts identified by Aerzen to manufacture the final product: the positive displacement blower. Although not required by ARRA, all but one of the component parts are manufactured and supplied by American plants. The one component part supplied that is not American-made is the GM15L Blower Stage, which is purchased from Aerzen Germany. (**Exhibit K**, p. 1).

On November 8, 2011, following a request by Baxter & Woodman for additional and clarified ARRA documentation, Aerzen supplied a package consisting of: a November 8, 2011, letter (unsigned) outlining the component parts of the blowers and the American labor used to manufacture the blower in the Aerzen plant located in Coatesville, Pennsylvania⁷; purchase orders for all the American-made component parts; an ARRA certification signed by P. Noack, the President of Aerzen; and a completed EPA Question and Answer form for determining substantial transformation, with detailed descriptions concerning the U.S. manufacturing process and labor to manufacture the blower assemblies. The total cost of the four blower assemblies to the Village is \$136,947.00. (**Exhibit L**). The cost of the GM15L Blower Stage, the only non-U.S. made component to the 4 Aerzen positive displacement blower assemblies, is approximately \$68,500.

Thus, the Village requests that OIG find this item complies with ARRA through substantial transformation.

⁷ It is likely that this letter was not signed as it was sent electronically to Baxter & Woodman.

OIG Response 4: The new documentation was not sufficient to prove that the blowers manufactured in Germany were sufficiently changed in the United States into a new and different manufactured good distinct from the materials from which it was transformed, as required by federal regulations and EPA guidance. The Aerzen blowers do not comply with the Buy American requirements of the Recovery Act.

D. 6 Weir Submersible Pumps with Hidrostral Motors

As with the SBR and Aerzen blowers, the submersible pumps manufactured by Weir Specialty Pumps (“Weir”) have a component part that is not manufactured in the U.S.: the Hidrostral motors manufactured in Switzerland. As discussed above, ARRA does not require that component parts be manufactured, along with the final product, in the U.S. The Draft Report questions the Hidrostral motor component of the Weir submersible pumps. Although the Weir pumps are marked as manufactured and supplied by Weir, located in Salt Lake City, Utah, the motor component of the pumps are from Hidrostral and manufactured in Switzerland. **(Exhibit M-1)**. Weir’s Utah plant is where the submersible (and other) pumps used at the WWTP were manufactured.

On May 1, 2009, Weir provided a letter from the Central Regional Manager and ARRA certifications for its pumps, including but not limited to the submersible pump questioned in the Draft Report (referenced on the certification as “immersible pumps”). **(Exhibit M-2)**. The submersible pump certification did not contain a description of substantial transformation.

On April 28, 2011, Thomas Smith, the Director of Sales Engineering of Weir (at the Utah plant location) supplemented the May 1, 2009, certifications with a letter certifying compliance with ARRA. **(Exhibit M-3)**. Again, this document does not contain detailed explanation of substantial transformation.

On October 31, 2011, Weir supplemented its prior certifications with a three page letter identifying the process that occurs at the Utah plant, including but not limited to how component parts originating from outside the plant are handled, that other component parts are machined at the Utah plant, and how the final product is produced. **(Exhibit M-4)**. The letter from Weir was intended to answer Question 3 of the ARRA guidance Question and Answer form on substantial transformation. The letter clarifies that the manufacturing of the final pump product takes a minimum of three weeks at the Utah plant.

On November 1, 2011, Thomas Smith, the Director of Sales Engineering (the same person who signed the April 28, 2011, certification) sent an email restating that the final product is the submersible pump, which is manufactured at the Weir Utah plant. **(Exhibit M-1)**.

Weir’s Internet site describes the function of the submersible (and other) pumps, and a diagram identifies its major component parts. From this diagram, the motor is identifiable as only one component part of the manufactured final product. **(Exhibit M-5)**. Given this description, the Village, through Baxter & Woodman and WBCI, asked for a more detailed description as it appeared that a substantial portion of the production at the Utah plant was being left out of the descriptions previously provided by Weir. On January 3, 2012, Weir further supplemented its documentation, detailing the manufacturing that it does in Utah, which

amounted to an estimated 525 labor hours for the 6 Weir submersible pumps at issue. (**Exhibit M-6**).

Thus, the Village requests OIG to approve the sufficiency of the attached documentation to show the substantial transformation of the 6 Weir submersible pumps, of which the Hidrostal motor identified by the OIG is a component part, as the pumps were manufactured at Weir's plant in the Salt Lake City, Utah plant. The 6 pumps are valued, collectively, at \$187,188. (**Exhibit M-7**). The Hidrostal motors, *i.e.*, the component part of the pump that was not U.S. made, costs only a portion of the collective pump price and the Village will supplement this response with that specific cost.

OIG Response 5: Based on our review of the additional documentation provided with this response, we agree that the pumps meet the Buy American requirements of the Recovery Act. We removed the section questioning pump compliance from the final report.

E. Chemical Metering System with Component Part 4 Watson Marlow 620N Bredal Pumps

The chemical metering system is titled a Watson-Marlow 620 Chemical Metering System ("CMS"). The CMS is a final product that is manufactured by Watson-Marlow at its plant in Wilmington, Massachusetts. (**Exhibit N-1**). Although not required to be manufactured in the U.S. under ARRA, seven of the nine component parts are in fact American made. *Id.*, pp. 1-2. The Draft Report identifies the pump component of this Chemical Metering System, which is manufactured in the United Kingdom.

A November 1, 2011, letter from Watson-Marlow describes each of the component parts, of which they are individually manufactured, and the specific process for creating the final product. This process includes fabrication of the skid mounted frame, pump shelf, back panel, fusion-welding, mounting, assembly, fitting, solvent-welding, pressure testing, quality control measures, and more. (**Exhibit N-1 & N-3**, p. 3). The process takes in excess of 20 labor hours. *Id.*

Additionally, on November 1, 2011, Watson-Marlow provided another letter, serving as a cover letter to the ARRA Question and Answer form concerning substantial transformation. (**Exhibit N-2**).

When requested by Baxter & Woodman and WBCI to provide additional specificity, Watson-Marlow redated the two, above described letters to December 15, 2011, and resubmitted them. (**Exhibit N-3**). While it is always better to have more detail than less, the Watson-Marlow documentation is specific as to its U.S. manufacturing process to make the component parts a substantially transformed final product. Thus, the Village requests OIG find compliance of this item based on the supplemental documentation supplied by Watson-Marlow showing substantial transformation of the final product, of which the pump is a component part.

Additionally, the documentation supplied by Watson-Marlow identifies the alternate application of the WTO Agreement to the component parts that are not manufactured in

the United States. (**Exhibit N-3** p. 6 & **N-1**, p. 4). The four Watson-Marlow 620N Bredal pumps cost the Village, collectively, \$25,000.

If OIG does not find the documentation supplied to be sufficient for substantial transformation to the chemical metering system final product, then the Village alternatively requests that OIG consider the component parts made outside the U.S. to be compliant through the recognition of the WTO Agreement as described above in (A)(1)(a)(i), which is incorporated by reference herein.

OIG Response 6: Based on the additional documentation provided, we agree that the Watson-Marlow pumps were component parts of the chemical metering skid shipped to the construction site for incorporation into the project, and thereby comply with Buy American requirements. We removed the chemical metering pump section from the final report.

F. **Miscellaneous Equipment: 3 Endress-Hauser micropilots; 1 Quincy 325 Compressor; and 1 Eaton Filtration duplex strainer.**

(1) *3 Endress Hauser Micropilots – Made in Germany*

WBCI contracted Thermal Process Systems to provide the micropilots. The three micropilots are minor components of a larger, final product: an autothermal thermophilic aerobic digestion system. The micropilots are radar level indicators in the autothermal thermophilic aerobic digestion system. The Draft Report identifies that three Endress-Hauser micropilots at the WWTP were manufactured in Germany. This is correct, however, the incorrect micropilots were sent to the WWTP. Upon notification, Thermal Process Systems identified this as a shipping error, ordered replacement units that are made in America. (**Exhibit O**).

After the replacement micropilot arrives at Thermal Process Systems, it needs to fabricate a mounting configuration to fit the specifications of the WWTP for the new micropilots and will then ship the micropilots with fabricated mounting to the WWTP to be swapped-out with the German manufactured Endress-Hauser micropilots.

The swap-out of the three micropilots has not yet been done. It will be done approximately at the end of January 2012 and this response will be supplemented with the documentation for the new micropilots.

OIG Response 7: Itasca has agreed to remove the German micropilots and install American-made equipment. We will recommend that EPA verify that Itasca completes this planned replacement.

(2) *Quincy 325 Compressor*

There are two Quincy Series QR-25 Model 325 air compressors at the WWTP: one is installed in the Control Building and the other is installed in the Sludge Building. They were supplied by the James Machinery Company of Springfield, IL. The motor nameplates say that the motors were manufactured in the U.S. and the compressor sticker states “Made in the

USA.” **(Exhibit P)**. These compressors are used at the WWTP to provide air for air tools and other miscellaneous air needs.

There is a third Quincy air compressor, a Model QT-54-5-60. It provides air for the air-operated valves and controls of the rotary sludge press system. This air compressor is a component part of the rotary sludge press package supplied by Fournier. The compressor motor has a tag that says the motor was assembled in Mexico and the compressor sticker says “Made in the USA.” **(Exhibit Q)**. Based on the reference in the Draft Report to a motor manufactured in Mexico, it appears that the Draft Report intended to reference the Model-QT-54-5-60 and not the 325 compressor. It is unclear what the Draft Report references when it states the 325 compressor has an electric motor manufactured in Canada with assembly occurring in Mexico, but the reference does not match the three Quincy air compressors described in this response.

Assuming that OIG intended to reference the Quincy Model QT-54-5-60, that air compressor is a component part to the Fournier rotary sludge press package. Documentation from Fournier is provided as **Exhibit R**. The same rotary sludge press has been installed in Ottawa and it is the Village’s understanding from Fournier, that OIG accepted the compliance of Fournier’s substantial transformation documentation related to that press package.

In addition, should OIG consider the compressor separate and not a component part of the rotary sludge press package, the compressor itself was substantially transformed in the U.S. Quincy Compressor, of Quincy, Illinois provides a certification that identifies the work done to the compressor which includes the Mexican made motor, to substantially transform it. **(Exhibit S)**. Based on the documentation provided, the Village requests that EPA finds sufficient documentation showing the substantial transformation of the rotary sludge press package, of which the Quincy air compressor, Model- QT-54-5-60 was a component part or, alternatively, that it finds the air compressor compliant with ARRA, as it was substantially transformed at Quincy Compressor’s Illinois plant.

OIG Response 8: The draft report issue was about the Quincy Model QT-54-5-60. Apparently, the confusion occurred when we obtained documentation for the 325 compressor. Based on new documentation from the manufacturer, we have concluded that the Quincy Model QT-54-5-60 was manufactured in the United States. Reference to the Quincy compressor was removed from the final report.

(3) *Magnetic Flowtubes*

There are two magnetic flowtubes, on each of the two Fournier rotary sludge press flocculators (total of four flowtubes), that are labeled “Assembled in Mexico”. There are also two magnetic flowtubes that Thermal Process Systems provided as part of the an autothermal thermophilic aerobic digestion system. One is in the transfer pump discharge pipeline and one is on the biofilter water panel. Both are labeled “Assembled in Mexico”. Given the reference to Mexico, the Village assumes that these are the flowtubes referenced in the Draft Report.

The two flowtubes on the Fournier rotary sludge press system, are a component part of that system. *See*, Section II.F(2), above.

The two flowtubes on the Thermal Process System autothermal thermophilic aerobic digestion system are likewise component parts of that system. **(Exhibit T)**.

The value of each of the flowtubes is approximately \$5,000 per flowtube, \$20,000 total. The Village request the OIG determine that the flowtubes are in compliance, given that they are component parts of much larger systems that are manufactured as a final product in the U.S. Alternatively, as respects the flowtubes on the autothermal thermophilic aerobic digestion system, if OIG determines they are not a component part of a U.S. manufactured final product, then the Village requests OIG find that they are a substantially transformed part. Thermal Process Systems used these flowtubes on a control panel that it fabricated, thus if not a component part of the larger system, the flowtubes are at least a component part of the fabricated control panel. **(Exhibit T)**.

OIG Response 9: The Rosemont Magnetic Flowtube referred to in the draft report is model number 705TSA040S1W0N0Q4, with serial number 0193781. This Flowtube was clearly identified as made in Mexico. The Recovery Act states that manufactured goods used in a public works project funded with Recovery Act funds must be manufactured in the United States. The regulation at 2 CFR §176.140 defines a manufactured good as a good brought to the construction site for incorporation into the public works. Therefore, manufactured goods shipped to a construction site for incorporation into the project must be manufactured in the United States unless an exception applies or the project is covered by an international agreement. Since Itasca is not a party to an international agreement and has not obtained the necessary exception waiver, all foreign-manufactured goods sent to the construction site for incorporation into the project do not comply with the Buy American requirement of the Recovery Act.

(4) *Eaton Filtration Duplex Strainer*

The Eaton Filtration Duplex Strainer was made in China. The construction specification required that specific duplex strainer or equivalent to be used. It is the Village's understanding from oral discussions with its contractors that no equivalent was available as Eaton holds the patent on this particular duplex strainer. The Village has attempted to contact Eaton and obtain the patent materials, but was not able to obtain that information before the submittal of this response. Notwithstanding, the duplex strainer cost \$16,858.00 and a waiver is sought for its installation as referenced in Section III., below.

OIG Response 10: The village has not secured a waiver under one of the three exceptions listed in 2 CFR §176.80. Further, we do not believe the strainer qualifies under EPA's *de minimis* waiver [74 Fed. Reg. 39959-39960 (August 10, 2009)] because the strainer is not incidental to the construction such as nuts, bolts, other fasteners, tubing, gaskets, etc. The strainer was specifically included in the project specifications as part of the pressurized non-potable water system. Consequently, the strainer does not comply with the Buy American requirements of the Recovery Act.

III. WAIVERS

ARRA generally prohibits the use of its funding for projects unless all of the iron, steel, and manufactured goods used in the project are produced in the United States, but provides that waivers may be granted in some circumstances for iron, steel, and manufactured goods that are not produced in the United States. (Public Law 111-5). Notwithstanding the additional documentation and information provided in this response that would eliminate any need for a waiver, two waivers are appropriate in this matter to exempt certain materials from ARRA.

A. The Nationwide Waiver for *De Minimis* Incidental Components Applies to this Project

EPA issued a nationwide waiver from the requirements of ARRA Section 1605 for *de minimis* incidental components for projects financed through the Clean Water State Revolving Funds using assistance provided under the ARRA (Initially issued 74 FR 26398, June 2, 2009, revised 74 FR 39959, August 10, 2009). The waiver provides that non-domestic iron, steel and manufactured goods may be used when they comprise no more than 5% of the total cost of the materials used in and incorporated into a project. 74 FR 39959. EPA, in guidance on the nationwide waiver, set forth that an entity seeking the nationwide *de minimis* waiver does not need to apply for the waiver but must only maintain documentation of the total cost of all components under the *de minimis* waiver and the total cost of the project.

The nationwide waiver for *de minimis* incidental components is applicable to any of the above described items that OIG determines remain non-compliant, notwithstanding the additional documentation and information provided in this response. The total cost of materials and construction, as bid, is \$34,080,000. The bid cost of materials, alone, was \$16,086,000. The total cost of the items referenced in the OIG Draft Report that were not otherwise swapped out (or are scheduled to be swapped-out) for American-made replacements is \$221,327.78, approximately 0.6% of the total bid and 1.3% of the bid material costs.

General Stainless Steel Pipe and Fittings (also estimated by Tobin at \$18,000 and, originally, without the invoice documentation, by Baxter & Woodman at \$120,000)	\$89,579.78
2 Stainless Steel Drop Pipes (\$695.00 x 2)	\$1,390.00
GM15L Blower Stage component of the 4 Aerzen positive displacement blower assemblies	\$68,500.00
4 Watson-Marlow 620N Bredal Pumps	\$25,000.00
Magnetic Flowtubes	\$20,000.00
Eaton Filtration Duplex Strainer	\$16,858.00
TOTAL	\$221,327.78

The Village cannot complete its *de minimis* waiver documentation until all change orders have been processed for the WWTP construction. At this point in the project, that has not occurred, thus, the total cost is not yet known. In addition, the Village is still obtaining documentation on items that were not included in OIG's Draft Report to determine whether those items are sufficiently documented as made in the United States or whether they fall under this waiver. Notwithstanding, given the 1.3% of the total bid materials cost, the Village is well-within the parameters of this waiver. Therefore the waiver applies to this Project and the non-domestic items are exempted from ARRA.

OIG Response 11: We do not agree that the manufactured goods listed in the table above are eligible under the *de minimis* waiver. The *Notice of Revised Nationwide Waiver of Section 1605 (Buy American Requirement) of American Recovery and Reinvestment Act of 2009 (ARRA) Based on Public Interest for de minimis Incidental Components of Projects Financed Through the Clean or Drinking Water State Revolving Funds Using Assistance Provided Under ARRA* [74 Fed. Reg. 39959 (August 10, 2009)] states that the waiver is not to be used for relatively small number of high-cost components incorporated into the project that are iron, steel, and manufactured goods, such as pipe, tanks, pumps, motors, instrumentation, and control equipment. The waiver is for low-cost components that are essential for, but incidental to, the construction such as nuts, bolts, other fasteners, tubing, gaskets, etc. The components included in the Itasca's calculation are all major components of the new facility and not incidental to the project

B. The General Public Interest Waiver Also Applies to the WWTP

Section 1605(c) of ARRA provides that the Buy America requirement may be waived "when applying the domestic preference would be inconsistent with the public interest." *See also*, 2 C.F.R. 176.60(c). The Village submits, in the alternative to the *de minimis* waiver that a site-specific waiver should be granted by EPA in this matter, because of the mitigating circumstances and doing so is in the public interest and supports the overall goals and purposes of ARRA.

In considering the public interest involved, it is necessary to put this project in the context of ARRA and consider the timing of the various actions involved. Initially, as ARRA sets forth, a goal was to identify projects that were already planned, "shovel-ready," and to get the funding in place for them as soon as possible to spur economic recovery. The economic necessity and the need to move very quickly required the use of a "fire, ready, aim" approach to providing funding for projects and distributing funds to selected recipients. This Project, indeed, was very early in the ARRA process and many of the regulations and guidance documents published by the federal and state authorities were not in place when the Village bid the project and started construction. EPA has allowed two nationwide waivers for early projects, having incurred debt or been bid within specified timeframes. Although the Village incurred debt from itself to fund this project within the timeframe specified, it did not incur WPCLP loan debt within that period. Notwithstanding the same rationale that provided the basis for those nationwide waivers applies here, where you have a project very early in the ARRA process, moving sometimes faster than the guidance is

developed. It is clearly against public interest to penalize those municipalities, like the Village, who had qualified projects and were already applying for state funding when ARRA came along.

There are circumstances, as described above, where interpretation could lead to a different conclusion. For example the steel contractors asserted ARRA compliance through substantial transformation and, alternatively, free trade agreements. When that became an issue, where the interpretation was in doubt, the Village had the process stopped and new product was made. However, in some cases, it is clearly not economically practical, feasible, and not in the public interest to replace already installed products (e.g., installed steel pipe).

Consequently, because this Project by the Village met the goals and purposes and Recovery Act and the Village met the spirit and intent of the Buy American provision of the Act, it is in the public interest to provide a waiver for the non-domestic items that were used in the Project.

OIG Response 12: One of the permissible exceptions identified in Section 1605 of the Recovery Act is that the application of the requirements would be inconsistent with the public interest. The process for requesting, and EPA’s authority for granting, such an exception is described in 2 CFR Part 176.

IV. CONCLUSION

Despite being part of a fast-paced process with guidance that was being passed as the project was bid and constructed, the Village made a concerted effort to comply with ARRA. The Village’s contractors were required to comply. As shown by the supporting ARRA documentation dating as early as 2009, WBCI was obtaining ARRA documentation for the project. (e.g., **Exhibit M-2**). Further, in February 2010, prior to the OIG inspections, Baxter & Woodman notified WBCI of what appeared to be ARRA deficiencies and notified WBCI, as it initiated an investigation.

EPA has recognized timing issues with passage of ARRA, the “push” to move the ARRA funds quickly into “shovel ready” projects, and the potential conflict with projects being “shovel ready” yet thrown into a set of regulations and guidance documents that it did not know would exist when it was committed, by providing for general waivers on “debt incurred” and projects bid during specified time frames.

Even though the Village incurred debt, had over \$1.5 million in expenses, and the WWTP was fully designed prior to the passage of ARRA, it does not fit within the parameters of the existing general waivers for debt incurred or going to bid. Indeed, although Village does not meet the dates of such waivers, it does meet the spirit of them. However, the Village, despite the timing of ARRA as relates to its bid and construction timeline, added ARRA to its project and sought compliance from its contractors.

Further, when questions about sufficiency of the project ARRA documentation were raised as a result of the OIG inspections, the Village immediately, through Baxter & Woodman and WBCI began to follow-up on the OIG-identified issues. As part of this follow-up, Baxter &

Woodman sent several requests to EPA and Illinois EPA seeking guidance. Likewise, one of the manufacturers, Aqua, sent its own request for assistance. None of these requests were answered.

Even if OIG determines documentation provided (and to be provided for parts not yet replaced) is not sufficient, then the *de minimis* waiver applies and OIG should find compliance. Alternatively, even if the *de minimis* waiver was not applicable, EPA should grant a site-specific waiver to allow the Village, particularly under these circumstances, to be found in compliance.

However, even if all of the above requests are denied by EPA and OIG, the remedy, pursuant to ARRA, should not be to require the withdraw of all ARRA funds from the project, but rather to reduce the ARRA loan by the amount of the non-compliant products. Removing any items determined by OIG to be non-compliant that have not already been replaced is cost prohibitive and would substantially interfere with current operations, requiring the shut-down of the newly operating WWTP.

Finally, given the Village's intent and attempt at compliance with ARRA and the mitigating circumstances described in this response, if OIG finds the documentation and explanations provided herein to not be sufficient for compliance, and if EPA declines to apply the *de minimis* waiver (or consider the Village's proposal to submit a site-specific public interest waiver), then the Village requests that any amounts sought to be refunded from the loan be limited to the cost differential of the non-compliant parts versus American-made parts. Alternatively, that any recommended scope of penalty be limited to the cost of the non-compliant parts and that the Village be allowed to satisfy any penalty by investing the determined sum into a local project that would further benefit the Village and put more people to work (*e.g.*, along the lines of a Supplemental Environmental Project). The Village requests that to the extent OIG makes any recommendation of non-compliance in its final report, that it identify the maximum monetary amount that would be sought, such that the Village has monetary parameters with which to work on resolution of any such issues with its contractors.

OIG Response 13: The region's authorities and responsibilities for addressing noncompliance with Section 1605 of the Recovery Act are found at 2 CFR §176.130. Our recommendation is for EPA to use this regulation to resolve any noncompliance. We have also recommended that EPA reduce the amount of Recovery Act funds authorized by the costs associated with acquiring or using the foreign iron, steel, and manufactured goods.

The Village is grateful for the ARRA funding and has worked to meet the intent and spirit of ARRA in the construction of its new WWTW.

WHEREFORE, the Village respectfully request that OIG determine the documentation and information supplied herein to be sufficient and find compliance. Alternatively, if questions remain, that the remedies specified above, including but not limited to waivers, be allowed.

Respectfully submitted,

VILLAGE OF ITASCA, ILLINOIS

Original signed by: _____ Mayor Jeffrey Pruyn

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