

**AMERICAN IRON AND STEEL GUIDANCE FOR WATER POLLUTION
CONTROL REVOLVING LOAN FUND PROJECTS FUNDED JANUARY
17, 2014 THROUGH SEPTEMBER 30, 2014**

Mississippi Department of Environmental Quality
Office of Pollution Control
Surface Water Division
Construction Branch

June 9, 2014

This document contains guidance for compliance with funding requirements from Section VI.D of the FY 2014 Water Pollution Control Revolving Loan Fund (WPCRLF) Intended Use Plan (IUP) that are in addition to those of the WPCRLF Program Regulations Effective for Projects Funded on and After December 19, 2004. This document is based on the American Iron and Steel (AIS) guidance memorandum entitled "Implementation of American Iron and Steel provisions of P.L. 113-76, Consolidated Appropriations Act, 2014" issued by EPA Headquarters on March 20, 2014. This document has been prepared using the best known information available as of the date above. However, it is possible that additional directives will be issued; therefore it is subject to change accordingly.

As a project proceeds through the program, the Mississippi Department of Environmental Quality (MDEQ) Project Manager will document compliance with these requirements in the "Checklist for WPCRLF Projects With AIS Requirements" (Attachment 3).

I. INTRODUCTION

For details on what iron and steel products are covered by this requirement, see EPA's AIS guidance memorandum. The information provided therein should be helpful to Loan Recipients and Consultants in crafting bidding documents and ensuring compliance for a given project. The Loan Recipient has the ultimate responsibility for compliance with the AIS requirement. Legal counsel should be sought as necessary.

There are basically four ways to comply: 1) Ensure and document that all of the iron and steel products used **in** the project are produced in the U.S., 2) Request and be granted an individual item/project waiver from EPA for foreign produced items, 3) Comply and document conformance with an existing categorical/nationwide waiver, or 4) (This is not applicable for any Mississippi WPCRLF Loan Recipients) Where a Loan Recipient has a direct international agreement with a foreign country with which the AIS clause conflicts, there are some very complicated exceptions.

A waiver can be based on a) the public interest, b) insufficient quality/quantity, or c) 25% total project (not item or contract) cost increase. Public interest waivers are expected to be nationwide, whereas the others are expected to be project/item specific.

On the basis of public interest, EPA Headquarters has issued a nationwide waiver for *de minimis* incidental components. These are miscellaneous, generally low-cost components where the country of origin and availability of alternatives are not readily or reasonably identifiable prior to procurement in the normal course of business. This waiver covers situations where the cost of such items is no more than 5% of the total cost of materials (not labor, rentals, etc.) used in and incorporated into the project (not the total contract cost) and no individual item exceeds 1% of the total cost of materials.

Additional documentation requirements apply if a waiver is being requested after the contract is executed; this is strongly discouraged.

Given the extensive documentation involved, the number of people involved, and the fact that these waivers are going to be reviewed for nationwide consistency and published on the EPA Headquarters website, one might expect that relatively few individual waivers will be issued.

Individual waiver requests must be submitted to MDEQ. The required content of such a request is described in the checklist included in Appendix 1 of EPA's AIS guidance memorandum. In order to expedite processing, all waiver requests submitted to MDEQ must be accompanied by a copy of the checklist which has been completed and notated to clearly identify where in the waiver request documents each specific checklist item is addressed. Once determined complete by MDEQ, the request will be sent to cwsrfwaiver@epa.gov with a copy to EPA Region IV.

The EPA AIS guidance memorandum, issued waivers, and other relevant information is available at water.epa.gov/grants_funding/aisrequirement.cfm.

II. DESIGN/BIDDING

Specific AIS provisions must be included in each contract for treatment works (wastewater and storm water, but not non-point source or estuary) projects. Sample language is included in Attachment 1.

During design and bidding, good faith efforts must be made to identify and use domestic products. Contractors and suppliers should be contacted to determine availability and cost. If a specification is so strict as to rule out a domestic product, there must be strong justification and a waiver will be required.

Although unlikely, where the total project (not item or contract) cost might overrun 25% or more due to AIS requirements, an alternate bid for foreign products could be solicited as documentation to support a waiver request.

EPA is expecting that the construction contract documents will make compliance with this requirement a matter of bidder responsiveness and/or responsibility and/or a factor in determining the best bid, with significant penalty for noncompliance. The bidder is expected to provide domestic products and documentation to verify compliance where possible. Otherwise, the bidder is expected to provide complete, timely information necessary to demonstrate qualification for an existing nationwide waiver (e.g., *de minimis*) or such documentation necessary for the Loan Recipient to apply for an individual waiver.

In order to avoid delays and other issues associated with a potential bid protest, the information for bidders should be very clear regarding the method of award in cases where alternate bids are used and/or a waiver request is anticipated.

The project cannot be split up to use non-WPCRLF funds on a portion of a project in order to avoid the AIS requirement for that portion.

The AIS requirement should be discussed at a (perhaps mandatory) pre-bid meeting.

III. CONSTRUCTION

A. Manufacturer Certification: EPA recommends the use of a step certification process, similar to one used by the Federal Highway Administration. The step certification process is a method to ensure that producers adhere to the AIS requirement and Loan Recipients can verify that products comply with the AIS requirement. The process also establishes accountability and better enables States to take enforcement actions against violators.

Step certification creates a paper trail which documents the location of the manufacturing process involved with the production of steel and iron materials. A step certification is a process under which each handler (supplier, fabricator, manufacturer, processor, etc.) of the iron and steel products certifies that their step

in the process was domestically performed. Each time a step in the manufacturing process takes place, the manufacturer delivers its work along with a certification of its origin. A certification can be quite simple. Typically, it includes the name of the manufacturer, the location of the manufacturing facility where the product or process took place (not its headquarters), a description of the product or item being delivered, and a signature by a manufacturer's responsible party. EPA's sample certification is in Attachment 2. These certifications should be collected and maintained by the Loan Recipient.

Alternatively, the final manufacturer that delivers the iron or steel product to the worksite, vendor, or contractor, may provide a certification asserting that all manufacturing processes occurred in the US. While this type of certification may be acceptable, it may not provide the same degree of assurance. Additional documentation may be needed if the certification is lacking important information. Step certification is the best practice.

- B. *De Minimis* Items:** To comply with this waiver (see Section I), throughout construction the Loan Recipient must maintain all relevant materials invoices. The Loan Recipient must keep a running total of all material types and costs and those that fall under the waiver and must include this information in a report with calculations that demonstrate that the total cost of *de minimis* items falls under the 5% of total material cost threshold and that individual item cost falls under the 1% of total material cost threshold. **The Loan Recipient must submit the final *de minimis* report to MDEQ within 30 days of the final construction observation.**

- C. MDEQ Site Visits:** During periodic site visits, the (MDEQ) Project Manager will discuss the AIS compliance status with the Loan Recipient and Consultant including the status of any waivers, *de minimis* reports, manufacturer's certifications, etc. **If noncompliance is noted, Project Manager will inform Loan Recipient/Consultant that item must be removed/replaced (with other than WPCRLF funds); otherwise, entire project may be declared non-WPCRLF eligible, and immediate repayment of all project-related WPCRLF funds may be required.** Project Manager will also discuss with Engineering Coordinator and Branch Chief regarding how to proceed.

IV. CLOSEOUT

After receiving the final *de minimis* report, the MDEQ Project Manager will ensure that the "Checklist for WPCRLF Projects With AIS Requirements" (Attachment 3) is fully completed and file it in the Project Closeout file.

ATTACHMENT 1

SAMPLE AIS CONSTRUCTION CONTRACT LANGUAGE

ALL CONTRACTS FOR TREATMENT WORKS (DOES NOT APPLY TO NON-POINT SOURCE OR ESTUARY PROJECTS) MUST HAVE A CLAUSE REQUIRING COMPLIANCE WITH THE AIS REQUIREMENT. THIS IS AN EXAMPLE OF WHAT COULD BE INCLUDED. MDEQ MAKES NO CLAIMS REGARDING THE LEGALITY OF THIS CLAUSE WITH RESPECT TO STATE OR LOCAL LAW:

The Contractor acknowledges to and for the benefit of Owner that it understands the goods and services under this Agreement are being funded with monies made available by the Water Pollution Control Revolving Loan Fund (WPCRLF) that have requirements commonly known as "American Iron and Steel;" that requires all of the iron and steel products used in the project to be produced in the United States ("American Iron and Steel Requirement") including iron and steel products provided by the Contractor pursuant to this Agreement. The Contractor hereby represents and warrants to and for the benefit of the Owner that (a) the Contractor has reviewed and understands the American Iron and Steel Requirement, (b) all of the iron and steel products used in the project will be and/or have been produced in the United States in a manner that complies with the American Iron and Steel Requirement, unless a waiver of the requirement is approved, and (c) the Contractor will provide any further verified information, certification or assurance of compliance with this paragraph, or information necessary to support a waiver of the American Iron and Steel Requirement, as may be requested by the Owner. Notwithstanding any other provision of this Agreement, any failure to comply with this paragraph by the Contractor shall permit the Owner to recover as damages against the Contractor any loss, expense, or cost (including without limitation attorney's fees) incurred by the Owner resulting from any such failure (including without limitation any impairment or loss of funding, whether in whole or in part, from the WPCRLF).

ATTACHMENT 2 SAMPLE STEP CERTIFICATION

(Company Letterhead)

Date

Company Name

Company Address

City, State Zip

Subject: American Iron and Steel Step Certification for WPCRLF Project No. SRF
C280 ___-__

I, (company representative), certify that the (melting, bending, coating, galvanizing, cutting, etc.) process for (manufacturing or fabricating) the following products and/or materials shipped or provided for the subject project is in full compliance with the American Iron and Steel requirement as mandated by Section 436 of the Consolidated Appropriations Act, 2014 (P.L. 113-76).

Item, Products and/or Materials:

1. Xxxx
2. Xxxx
3. Xxxx

Such process took place at the following location:

If any of the above compliance statements change while providing material to this project we will immediately notify the prime contractor and the engineer.

Signed by company representative

**ATTACHMENT 3
CHECKLIST FOR WPCRLF PROJECTS WITH AIS
REQUIREMENTS**

Loan Recipient: _____

Project Name: _____

Project Number: SRF C280_____

Guidance Section	Action	Date Completed	PM Initials/Date
II.	AIS construction contract provisions included in P/S/CD:		
	Contract 1		
	Contract 2		
	Contract 3		
	Contract 4		
III.	For each active construction contract, Project Manager has discussed the AIS compliance status (waivers, <i>de minimis</i> report, certifications, etc.) with the Loan Recipient/Consultant:		
	Observation No. 1		
	Observation No. 2		
	Observation No. 3		

	Observation No. 4		
	Observation No. 5		
	Observation No. 6		
	Observation No. 7		
	Observation No. 8		
III.	For each construction contract, Project Manager has received the final <i>de minimis</i> report within 30 days after the final construction observation:		
	Contract 1		
	Contract 2		
	Contract 3		
	Contract 4		
VI.	After the final <i>de minimis</i> report is received, Project Manager files this checklist in the Project Closeout File		