

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

JUL 06 2012

SUBJECT: American Recovery and Reinvestment Act Site
Visit of the Botanic Garden of Western
Pennsylvania
OIG Report No. 12-R-0321

FROM: Shawn M. Garvin
Regional Administrator, Region III

TO: Arthur A. Elkins, Jr.
Inspector General

Thank you for the opportunity to review and to provide comments on the final report on the American Recovery and Reinvestment Act Site Visit of the Botanic Garden of Western Pennsylvania, No. 12-R-0321 dated March 8, 2012. The Region does not dispute the facts; however our interpretation of the facts and applicable requirements reflects a different perspective and conclusion. In the matter of the Botanic Garden of Western Pennsylvania, the Region's knowledge of the entire project and history versus the Inspector General's (IG) perspective of the project may have caused the Region's frame of reference to differ from that of the IG.

In Chapter 2 the IG's Conclusion states:

*The Botanic Garden received Recovery Act funding to build three irrigation ponds. The Botanic Garden contracted with WG Land to build sediment ponds for Mashuda's mining reclamation activities that will **eventually** [emphasis added] be turned into irrigation ponds. These ponds are not currently being used for their stated purpose under the funding agreement between the Botanic Garden and PENNVEST, and whether the ponds will ever be used for irrigation is uncertain. Therefore, these costs are not eligible or allowable under the Recovery Act and the terms and conditions of the funding agreement, and they should be recovered.*

IG Recommendation 1: Recover from the Pennsylvania Infrastructure and Investment Authority (PENNVEST) all Recovery Act funds awarded to the Botanic Garden of Western Pennsylvania totaling \$1,368,894.

Region III Response:

Region III disagrees with this Recommendation for the following reasons:

The goal of the Clean Water State Revolving Loan Fund (CWSRF) program is to implement projects that address an existing water quality problem. This project meets this



eligibility criteria. The costs incurred for the ponds are eligible and the ponds are being used for the stated purpose in the Funding Agreement.

The CWSRF program does not require or expect a financing agreement to include the complete design, plans and specifications for a project. The Funding Agreement incorporates the project plans and contracts by reference on pages 7-8. Botanic Garden's contract with WG Land states the ponds "will initially be utilized as surface water and sediment control structures by Mashuda..." Therefore, the use of the ponds as sedimentation control for the mine reclamation was incorporated into the Funding Agreement.

The Recovery Act application, the Funding Agreement, and the contract all mention future irrigation needs. From the Region's perspective reference to "future irrigation needs" and "eventually" being turned into irrigation ponds imply that the ponds' use for irrigation is not immediate. The IG conducted its site visit on May 17, 2011 and issued its draft report before the Botanic Garden project was completed. As PENNVEST stated in its response to the draft report, the project is expected to be completed by June 2013. To date:

- A culvert, 2 permanent ponds, and 1 temporary pond are constructed.
- Although the project is not yet completely constructed, one pond is being used for the irrigation of a tree nursery at the site.
- A third permanent pond will be constructed, the temporary pond will be made permanent and underground storage will be installed.

In response to the IG report, we have monitored this project and will continue to closely do so as it proceeds to construction completion. We requested that PENNVEST conduct an interim audit of the costs incurred to date, and we requested the Pennsylvania Department of Environmental Protection (PADEP) to conduct a site inspection. We will continue to obtain quarterly status reports from PENNVEST until the project construction is complete. We have included a list of the additional oversight monitoring we conducted and plan to conduct for this project (attachment 1).

IG Recommendation 2: Prevent the continued use of CWSRF funding for this project.

Region III Response:

Region III disagrees with the recommendation for the same reasons stated for Recommendation 1.

In Chapter 3, the IG's Conclusion states:

The Botanic Garden will generate revenue through Mashuda's mining reclamation. The sediment ponds built with Recovery Act funds are integral to mining activities. Therefore, mining revenues should be considered program income under federal regulations, and program income must be deducted from the total cost of the project. However, the Botanic Garden did not identify the potential coal proceeds as program income. By not offsetting the project costs with the program income, EPA Recovery Act funds are subsidizing the Botanic Garden's mining operation and increasing its potential mining revenue.

IG Recommendation 3: If the full Recovery Act funds of \$1,368,894 are not recovered, reduce the project costs to be funded by the Recovery Act by the amount of program income earned by the Botanic Garden from mining operations and recover the amount earned in program income.

Region III Response:

For the following reasons, we are not in agreement with this conclusion and the subsequent IG recommendation to reduce the project costs by the amount of program income earned from mining operations:

1. The Funding Agreement between PENNVEST and the Botanic Garden is a loan, not a grant. In response to the draft report, EPA and PENNVEST responded explaining that loan recipients under the CWSRF are not subject to the federal grant regulations and the grant regulations, by their terms, do not apply to loan recipients. Several regulatory sections were cited to support this position.
2. During the exit conference on December 8, 2011, the IG informed the call participants that focus was being placed on the Funding Agreement document. In response, on January 20, 2012, PENNVEST provided a letter to the Region (attachment 2). The letter explains the Information Technology (IT) limitations associated with new Recovery Act requirements and provides several documents demonstrating the State's intent of the funding being a loan with principal forgiveness. For example, the first paragraph of Section B of the Botanic Garden Funding Agreement dated November 10, 2009, reads as follows:

"[t]he Authority has approved funding for the Project in the amount set forth in the Project Specific Terms, attached hereto as Exhibit A. Notwithstanding references to Loan Amount and the Funds Disbursement, all references to Loan amount shall be intended repayment amount and all references to Grant Amount shall be the intended principal forgiveness amount."

The supporting documentation referenced in PENNVEST's letter (Funding Offer, Funding Agreement, PENNVEST Green Infrastructure Addendum to IUP, Botanic Garden Board Book Summary Page, and PENNVEST Board Meeting Minutes July 21, 2009) is available and will be provided upon request.

3. The IG report refers to Addendum Item 19 of the Funding Agreement. The Addendum states that the Contractor shall comply with all **applicable** [emphasis added] laws, regulations and program guidance. A non-exclusive list of statutes, regulations and/or guidance commonly applicable to Federal funds is provided. Item 19 lists 10 different statutes, one of which is OMB Circular A-110 (2 CFR Part 215) which includes program income as one of 73 different cost principles. The reference does not make such regulations applicable where they are not applicable under the plain language of the Federal grant regulations. Moreover, the terms of the agreement between PENNVEST and the Botanic Garden do not usurp the authority or application of

federal grant regulations.

For the reasons stated above and in our response to the draft report, the federal grant regulations on program income, by their terms, do not apply to a loan recipient. As such a corrective action is not suggested.

Lastly, we have included a document to better explain the many areas that the final IG report has potentially mischaracterized the Botanic Garden project (attachment 3). Should you have any questions regarding this response, please contact Lorraine H. Reynolds, Associate Director of the Office of Infrastructure and Assistance at 215-814-5435.

Attachments

cc: Kathy Sedlak O'Brien, Director (2721A)
Office of Planning, Analysis and Accountability

**Additional Monitoring and Oversight Actions
Botanic Garden of Western Pennsylvania**

1. PENNVEST's oversight includes an audit of the costs incurred at the end of each American Recovery and Reinvestment Act (ARRA) project. We requested PENNVEST to conduct an interim audit of the Botanic Garden project after Phase I was complete. PENNVEST agreed. The audit was conducted by an independent consultant hired by Pennsylvania's Office of Budget, and a final report issued on October 24, 2011. All costs that were reimbursed by PENNVEST were determined to be eligible and allowable.
2. Region 3 conducted a review of PENNVEST's and PADEP's project file for the Botanic Garden on March 28, 2012. Among other documents, the review included the application, the Funding Offer, and the Funding Agreement including the ARRA Addendum. All required documents were included in the State's files and the documents included all of the required elements. In addition, Region 3 ensured that the documents in the project file fully supported the project being included within the Commonwealth's 20 percent Green Project Reserve for ARRA. The project as described in the project plans and contracts, which are incorporated by reference into the Funding Agreement, is eligible and allowable under ARRA and the CWSRF program.
3. Region 3 requested PADEP to conduct a site inspection of the Botanic Garden project. Representatives from PENNVEST, PADEP and Pennsylvania's District Mining Office (DMO) were all present during the site inspection on February 8, 2012. The site inspection, as documented in a PADEP report dated February 28, 2012, confirms that Phase 1 of the project is complete. Ponds 2, 5, and 6 were inspected. The ponds were designed and constructed to a higher standard than is typical for storm water sedimentation ponds because of the plan for their long term use for water storage as well as the aesthetic impact on the botanic gardens. Pond 5 is currently being used as source water for irrigation to a tree nursery on the site. The nursery is growing trees that will be planted in the Garden.
4. PADEP initiated the development of an innovative priority ranking system specifically designed for the nonpoint source projects. Region 3 worked with PADEP on the development of this priority ranking system. PADEP issued the priority ranking system for its nonpoint source projects on March 23, 2010. PADEP plans to evaluate how effectively the system screens the water quality elements of the various nonpoint source projects. Region 3 plans to participate in the process. PADEP expects to complete this evaluation and to issue a final priority ranking system for nonpoint source projects next fiscal year.
5. Phase 2 of the project will be completed May 2013. Region 3 will obtain status reports from PENNVEST on this project at least quarterly until the project is complete. Region 3 will ensure that PENNVEST conducts another review of the costs incurred under Phase 2 of the project.



GOVERNOR'S OFFICE OF GENERAL COUNSEL

January 20, 2012

SUBJECT: EPA OIG Re-characterization of Issues
Draft Site Visit Report:
American Recovery Reinvestment Act
Site Visit of Botanic Garden of Western
Pennsylvania
Project No. OA-FY11-A-0218

FROM: Jayne B. Blake
Chief Counsel
Pennsylvania Infrastructure Investment Authority

TO: Lori Reynolds
Associate Director
Office of Infrastructure and Assistance

A handwritten signature in black ink, appearing to read "Jayne B. Blake", written over the printed name in the "FROM:" field.

Thank you for providing the Pennsylvania Infrastructure Investment Authority ("PENNVEST") an opportunity to comment on the EPA OIG re-characterization of the issue(s) at the exit conference on December 8, 2011, for the Botanic Garden of Western Pennsylvania draft site visit report. The draft report references two findings of fact and conclusions of law:

1. "The Botanic Garden used Recovery Act funds to construct ponds that are not being used for their stated purpose. The Botanic Garden's loan agreement with Pennvest states that the Botanic Garden will build irrigation ponds to collect, store, and recycle water for future irrigation needs. However, the ponds are being used as sediment ponds to capture runoff from a **mining operation**. Therefore, amounts claimed by the Botanic Garden for building the ponds are not eligible or allowable project costs under the Recovery Act and the terms and conditions of the loan agreement between the Botanic Garden and Pennvest" *emphasis added*; and

2. "The Botanic Garden is operating, through a contractor, a for-profit surface mining operation that will generate revenue for the Botanic Garden. EPA Recovery Act funds were used to construct required mine sediment ponds that allow the mine to operate. The Botanic Garden's loan agreement with Pennvest contains an addendum that states that the recipient must comply with all relevant federal regulations. The Code of Federal Regulations (CFR) at Title 2 CFR 215.24(b)(3), given the facts here, requires all federal assistance agreement award recipients to deduct program income from the total cost of a project or program funded with federal monies. The revenue generated by the mining activity would be program income that must be used to offset the Recovery Act-funded project costs. By not offsetting the project costs with the program income, **Recovery Act funds are reducing mining operation costs and thereby increasing the Botanic Garden's potential mining revenue.**" *Emphasis added.*

At the exit conference we were advised that EPA OIG now recognizes the activities as reclamation activities, not mining activities and further, that the transaction was a grant and not a principal forgiveness loan. That said, EPA OIG stated the audit findings and conclusions would remain unchanged in the final report.

It is to the latter re-characterization of facts and conclusion of law that this memo is focused. This transaction is a principal forgiveness loan as EPA OIG articulated in their draft report; it is not a grant as factually re-characterized (by them) at the exit conference. We will evidence the same through the following: 1. The Funding Agreement. 2. The PENNVEST American Recovery Reinvestment Act (ARRA) Green Intended Use Plan ("ARRA Green IUP Addendum dated July 2009") 3. The PENNVEST Board approval. Copies of documents are attached for convenience.

THE FUNDING AGREEMENT.

The intentions of the parties are memorialized in the Funding Agreement dated November 10, 2009 executed by Botanic Gardens of Western Pennsylvania (the "Funding Recipient") and PENNVEST (hereinafter the "Authority" or "PENNVEST"). Section B of the Funding Agreement provides for the characterization of the Financial Assistance. The first paragraph of that section reads as follows:

"[t]he Authority has approved funding for the Project in the amount set forth in the Project Specific Terms, attached hereto as Exhibit A. **Notwithstanding references to Loan Amount and /or Grant Amount in the Funding Documents, the Funding Offer and the Funds Disbursement, all references to Loan amount shall be intended repayment amount and all references to Grant Amount shall be the intended principal forgiveness amount.**"...emphasis added.

Our first preference would have been to reflect the financial assistance as principal forgiveness in

the Project Specific Terms set forth in Exhibit A to the Funding Agreement. PENNVEST had not awarded principal forgiveness prior to ARRA nor did PENNVEST have plans to do so going forward at that time. Given that the structure was not in place and PENNVEST is a paperless organization, we had to find a way to accommodate the change within the constraints of our electronic system and to do so with in the compressed time frame imposed by ARRA.

The PENNVEST electronic document builder system and settlement matrix system allow PENNVEST to manage hundreds of transactions simultaneously without having to draft and revise terms and conditions. The Settlement Documents, in this case the Funding Agreement, build on demand based upon the designated type of financial assistance, the funding source, the collateral required, the type of entity receiving the funding and the type of project, to name of few driving conditions. Some of the text of the documents change dependent upon the variables and the terms of the transaction are generally captured in the exhibits. At that time, the types of financial assistance driving the system included State loan, Federal Loan, Federal Bond Purchase and State Grant. The hard-coded data fields available to characterize these types of financial assistance in Exhibit A to the Funding Agreement were then and remain loan and grant.

The Legal Office met with the PENNVEST IT Department and requested the addition of principal forgiveness as an option for the characterization of financial assistance and an expansion of the available data fields. The IT department advised that adding principal forgiveness as a type of financial assistance and a data field would require a major system redesign and they could not accomplish the same in time for the ARRA stimulus funds. What they could do was add ARRA as a funding source fairly quickly allowing us to pull designated language into the text of the document when ARRA funds were being used to fund the project.

With the above stated programmatic constraints, we memorialized the understanding of the Funding Recipient and PENNVEST as to the characterization of the financial assistance in section B of the Funding Agreement and the text of the Funding Offer by indicating that where it states Grant in the document that we intend the document to read principal forgiveness. We did this by pulling in designated text where ARRA was the identified funding source. Since the computer system only offered two data fields we chose to use the Grant data field to be read as principal forgiveness because it was not amortizing. The Loan data field required amortization and the principal forgiveness like a Grant is not amortizing.

ARRA GREEN IUP

By federal statute, PENNVEST was required to award 50% of the ARRA funding in the form of additional subsidization. Early on and after discussion with EPA Region III regarding our available options, PENNVEST decided it would award the majority of the ARRA funding as principal forgiveness. It was PENNVEST's intention to award as near as possible to the 100% of the ARRA stimulus funds as principal forgiveness in order to maximize the effect of the ARRA stimulus. This decision maximized the intended purpose of the stimulus resulting in the highest number of projects moving forward at the same time. Given that PENNVEST and the DEP took extraordinary measures and well documented outreach effort to announce the Green Project type and the use of the ARRA stimulus; the Project communities were very aware of the subsidization component of the ARRA funds and our intention to disburse as near to 100% of those funds as principal forgiveness as possible.

Evidence of our intention to provide principal forgiveness loans was referenced in the first paragraph of the ARRA Green IUP Addendum dated July 2009 wherein we also discuss the electronic limitations we were facing in doing so. Further, in the question and answer portion of the

ARRA Green IUP Addendum dated July 2009, PENNVEST advised the Project community that principal forgiveness was a Loan that did not require repayment.

**PENNVEST BOARD AUTHORIZATION FOR THE TRANSACTION
INDICATES PRINCIPAL FORGIVENESS**

Not only is PENNVEST's intention to characterize the financing as principal forgiveness stated in the Funding Offer, the Funding Agreement, referenced in the ARRA Green IUP Addendum, July 2009; it is also the directed form of financial assistance approved by the PENNVEST Board for the Botanic Gardens project and the implemented methodology used by PENNVEST as evidenced by the Comptroller memo's from PENNVEST directing the coding of the funds as principal forgiveness.

Pursuant to the PENNVEST Bylaws only the Board of Directors may approve financial assistance. The July 21, 2009 Minutes of the PENNVEST Board reflect that the Board approved financial assistance for this Project in the form of Principal Forgiveness to the Horticultural Society of Western PA. The Board Summary Sheet submitted to the Board and signed by Paul Marchetti as the completed staff work and recommendation of the staff to the Board recommends principal forgiveness as the suggested form of funding to be awarded for this project. The memo drafted by PENNVEST directing the coding of funds as loan, bond purchase, grant, or principal forgiveness directs the Comptroller's Office to code the disbursement of funds as principal forgiveness.

CONCLUSION

PENNVEST memorialized this transaction as principal forgiveness in accordance with precepts of contract law. While admittedly not the way we might have liked to have documented the same, it was a work around solution that provided the client with an opportunity to meet the mandate of ARRA to get the money out to shovel ready projects in the compressed time frame, which did not allow time for the re-design of hard-coded data fields.

We disagree with EPA OIG that the conclusions they made in the draft report should remain unchanged. Their prior conclusion was legally incorrect. And their re-characterization of the facts stated at the Exit conference are inaccurate. PENNVEST made a principal forgiveness loan to the Funding Recipient. Principal forgiveness loans are not subject to program income requirements.

Further, principle forgiveness was included in the FY 2010 and FY 2011 appropriations and PENNVEST has been looking at various solutions to better accommodate a variety of financial assistance subsidies that may not require amortization, including principal forgiveness, as opposed to our current system where only grant awards are offered as the hard coded subsidy.

cc. L. Fleury

Areas of Potential Misinterpretation Botanic Garden of Western Pennsylvania

Inconsistent reference to “mining activity” opposed to “re-mining”

There is a significant difference between mining for profit and re-mining to improve a previously mine scared land. Re-mining is any operation where additional mining occurs subsequent to the original mining or site abandonment. Land reclamation through re-mining is an effective method for lessening acid mine drainage (AMD) and eliminating hazards and subsidence. The final report fails to recognize that the nonprofit-private partnership formed in 2008 is an innovative solution to reclaim the abandoned mine site.

The final report makes several references to the site history and the necessary reclamation activity prior to garden development which include:

- The top of page 2 states that “The leased land was the site of significant coal mining in the 1920s.” This statement supports the Region’s position that the mining occurred in the distance past and the current activity is mine reclamation.
- Page 2 of the report states that in 2003 it was determined that the main water source was so polluted that it could not be used for irrigation. This statement supports the Region’s position that the project is addressing an historic water quality problem.
- Chapter 1 has a section titled “Reclamation Efforts”. The first sentence on page 2 is “The Botanic Garden contracted with Mashuda Corporation in February 2008 to reclaim the abandoned mine site.”
- Page 4 of the report acknowledges that “The project narrative in the application (surface mining permit application) says “remediating former deep mining conditions,” not for “mining purposes.”

Despite the acknowledgement of re-mining activity, several areas in the report mischaracterize the site preparation activity as mining:

- Page 2 states that “...a surface mining permit is included...”. However, the permit was issued under Subchapter F of the Mining Regulations which applies to re-mining sites with a pre-existing mining discharge where the outcome of the project will be an improvement in local water quality.
- Page 5 states “...that the ponds will initially be used for mining purposes.” The activity is re-mining as part of site preparation.
- The heading in Chapter 2: “**Recovery Act Funds Used to Construct Sediment Ponds for Mining Activity**” again mischaracterizes the work being done at the site as “mining” activity.
- The opening paragraph of Chapter 3 incorrectly references “mining” activity.

Permanent vs. Temporary Stormwater Ponds

As part of the sustainable design of the Botanic Garden project, stormwater collection and storage was identified as the solution for irrigation needs. The installation of permanent ponds for water storage and irrigation is consistent with sustainable site development.

- In 2008, the Botanic Garden requested that the stormwater sediment ponds constructed on the property remain permanently on the site **for the Botanic Garden's future use** (page 3 of the report).
- The water storage impoundments being used as temporary sediment ponds during reclamation and grading, were designed and constructed according to standards for the ponds' permanent use.
- The permanent stormwater retention basins exceed minimal and temporary requirements for the reclamation project.
- The enhanced sized/permanent impoundments require significant materials handling, lift construction, compaction standards requirements, embankment slopes and outfall controls that would not otherwise be required.

Sequencing and Future Use of the Ponds

The need for reclamation prior to the garden being built was expressed. Related documents make it clear that irrigation water was for the "future use" of the Botanic Garden;

- The report states, "The leased land was the site of significant coal mining in the 1920s" and that in 2003 it was determined that the main water source was so polluted that it could not be used for irrigation (page 2).
- In 2008, the Botanic Garden requested that the stormwater sediment ponds constructed on the property remain permanently on the site **for the Botanic Garden's future use** (page 3 of the report).
- The first sentence of Chapter 2 states that "The Botanic Garden used Recovery Act funds to construct ponds that are not being used for their stated purpose." However, the very next sentence in the report states "The Botanic Garden's funding agreement with PENNVEST for CWSRF Recovery Act funds states that the Botanic Garden will build irrigation ponds to collect, store, and recycle water **for future irrigation needs** [emphasis added]."
- Page 3 states that "In the Botanic Garden's application for Recovery Act funds, the project narrative stated that the Botanic Garden is "remediating former deep mining conditions" and "grading of the site occurs in conjunction with that cleanup." As referenced in the final report, the application stated that the Botanic Garden is:

"Planning to construct 3 sediment basins that will be converted to permanent irrigation storage facilities at that time to supply the future irrigation needs of the gardens."
- On page 4 it is stated that "According to the funding agreement, the scope of the project is to:

Install three permanent irrigation ponds that will collect, store and recycle 2.5 million gallons of water to **supply the garden's future irrigation needs** [emphasis added]."
- On page 8 of the report it is noted that the funding agreement states, in exhibit C:

"The Botanic Garden of Western PA will install three permanent irrigation ponds that will collect, store and recycle 2.5 million gallons of water to **supply the garden's future irrigation needs** [emphasis added]."

The Botanic Garden made no attempt to disguise the fact irrigation ponds constructed as

permanent impoundments would temporarily be used during reclamation activities. The Recovery Act application, the Funding Agreement, and the contract all mention “future irrigation needs”:

- It is stated in the report (page 4) that:
“The contract between WG Land and the Botanic Garden for this Recovery Act Funded project stated that ponds constructed will initially be used as surface water and sediment control structures by Mashuda, as required by surface mining Reclamation activities. The contract stipulated that, when no longer needed for reclamation activities, WG Land will construct drainage control systems, related underground water piping and storage systems, and a stream-crossing culvert. This description is similar to that in the Botanic Garden’s application for Recovery Act funding.”

The Funding Agreement incorporates the project plans and contracts by reference on pages 7-8.

Green Project Reserve Ranking

It is stated on page 3 of the report that “The Botanic Garden project was evaluated by PADEP, as required for all projects on the Green Project Reserve, and scored zero points out of 100 on its evaluation. The statement underestimates the environmental benefits from the project and misrepresents the ranking of green projects.

- EPA Region 3’s response to the draft report stated that the score is not indicative of the environmental benefits associated with the project and explained that the score was the result of:
 - Non-point source projects, such as this one, are not required to be individually ranked in the CWSRF program.
 - PADEP’s project ranking system at the time the project was scored was designed for conventional stormwater projects; the system was not designed or intended to rate the environmental benefits achieved by a project of this type.
- PADEP’s October 31, 2011 response to the draft report provides an explanation of the scoring framework.
- The American Recovery and Reinvestment Act (ARRA) required states to allocate at least 20 percent of their funding to green infrastructure, water efficiency improvements, energy efficiency improvements, and environmentally innovative activities known collectively as the “Green Project Reserve.”
- ARRA was the first time that the CWSRF program required “green projects”.
- ARRA stated that projects were to be funded “notwithstanding the priority rankings they would otherwise receive...”
- The Background section of the report acknowledges that “Even though these types of projects have always been eligible for Clean Water State Revolving Loan Fund (CWSRF) financing, the 20 percent requirement was intended to accelerate the incorporation of green and sustainable concepts into wastewater and drinking water projects.”

Speculation

Conclusions and recommendations are made based on speculation rather than facts and evidence:

- At the end of Chapter 2 (page 9), it is stated “Additionally, we believe that the remaining funding of \$632,298 **may not be used** [emphasis added] for its intended purpose under

the funding agreement, the Botanic Garden **may not be able** [emphasis added] to complete phase II of the project, and the project as currently constructed is not being used for its intended purpose.”

- The conclusion paragraph (page 9) similarly states that “...whether the ponds will ever be used for irrigation is uncertain.”
- Although the project is not yet completely constructed, one pond is being used for the irrigation of a tree nursery at the site.
- Completion of the project is anticipated in June 2013.

Program Income Allegation -- Grant vs. Loan

The draft report alleged that program income was received. The Region’s response to the draft report explained that the Botanic Garden is a loan recipient, not a subgrant recipient and therefore the grant regulations regarding program income do not apply by their terms. (Note: There are several other reasons why the program income regulations do not apply, which are not discussed here.)

In the final report, it is alleged that the relationship between Botanic Garden and Pennvest is not a loan relationship because the funding agreement did not reflect that this was a loan. In addition, the report incorrectly labels the funding agreement between PENNVEST and the Botanic Garden as a grant despite PENNVEST’s expressed intent that the funding is a loan with principal forgiveness. The following support the Region’s position that the relationship between PENNVEST and Botanic Garden was a loan:

- ARRA required that each State use not less than 50 percent of the amount of its capitalization grants to provide additional subsidization to eligible recipients in the form of forgiveness of principal, negative interest loans or grants or any combination of these.
- Up until ARRA, subsidy was not a requirement of the CWSRF program.
- PENNVEST relies upon an electronic database for the generation of funding agreements.
- PENNVEST had not awarded principal forgiveness prior to ARRA nor did PENNVEST plan to do so going forward.
- The PENNVEST electronic document builder included standard language for a suite of available options i.e. State loan, Federal loan, Federal Bond Purchase or State grant.
- Adding principal forgiveness as a type of financial assistance and associated data field was a major system redesign which could not be accomplished in time for the ARRA funded projects.
- As a work around for this new funding category, the intent of the funding as a loan with principal forgiveness was memorialized with the funding recipient in the funding offer and an explanation was provided as to why grant data fields were used for projects with principal forgiveness i.e. the traditional loan field required amortization and the principal forgiveness option was not amortizing.
- The first paragraph of Section B of the Botanic Garden Funding Agreement dated November 10, 2009 reads as follows:
“[t]he Authority has approved funding for the Project in the amount set forth in the Project Specific Terms, attached hereto as Exhibit A. **Nothwithstanding references to Loan Amount and the Funds Disbursement, all references to Loan amount shall be intended repayment amount and all references to Grant Amount shall be the intended principal forgiveness amount.**” [emphasis added].

- Further evidence of PENNVEST's intent to the financing as principal forgiveness is provided in:
 - The directed form of financial assistance approved by the PENNVEST Board as evidenced by the Comptroller's memo directing the coding of funds as principal forgiveness;
 - The first paragraph of the ARRA Green IUP Addendum dated July 2009. This document discusses the limitations with the existing electronic document builder system and advises the Project community that principal forgiveness is a Loan that did not require repayment;
 - The Botanic Gardens Board Book Summary Page; and
 - PENNVEST Board Meeting Minutes July 21, 2009.