



MEMORANDUM

To: American Farmland Trust

From: Sarah Matthews
Sarah Thompson (Law Clerk)

Date: December 13, 2021

Re: Responses to Additional Questions Regarding ARPA

American Farmland Trust (“AFT”) has asked us additional questions about the American Rescue Plan Act (“ARPA”), which became law on March 11, 2021 and allocated \$350 in direct aid to state and local governments. The following answers are based on the language in the Interim Final Rule, the applicable FAQ, and other government resources.

Are ARPA funds considered federal funds?

ARPA funds are considered federal funds. The American Rescue Plan Act is a federal stimulus bill which provided emergency funding for state, local and territorial and tribal governments.¹ The Interim Final Rule further specifies that “payments from the Fiscal Recovery Funds are also subject to pre-existing limitations provided in other Federal statutes and regulations and may not be used as non-Federal match for other Federal programs whose statute or regulations bar the use of Federal funds to meet matching requirements.”² Since the funds may not be used where use of federal funds is prohibited, this further supports that ARPA funds are federal funds. To request ARPA funds, eligible jurisdictions must go through the U.S. Department of the Treasury portal, a federal entity.³ While we believe we have appropriately answered the question on its face, we may be able to provide additional color if we know more about AFT’s particular concerns.

¹ NAT’L CONF. OF STATE LEGISLATURES, ARPA STATE FISCAL RECOVERY FUND ALLOCATIONS (2021).

² 31 CFR § 35(III)(C) (2021).

³ U.S. DEP’T OF THE TREASURY, *Request Funding* (2021), <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/state-and-local-fiscal-recovery-fund/request-funding>.

Can funds be used to hire staff at a state agency to oversee a state program such as the Massachusetts Department of Agriculture’s Agricultural Climate Resiliency and Efficiencies Program?

ARPA does not explicitly allow for hiring of new staff at state agencies. The Interim Final Rule states that an eligible use of funds is for “payroll, covered benefits, and other costs associated with rehiring public sector staff, up to the pre-pandemic staffing level of the government.”⁴ This emphasizes that the funds may be used to rehire staff, but does not state hiring new staff as an eligible use. The Interim Final Rule and SLFRP FAQ specify that hiring additional staff, above pre-pandemic levels, may be appropriate where the pandemic has impacted either the amount of work (police forces) or the backlog of work (court staff).⁵

Can ARPA funds be used to start a new program, or do they have to be applied to an existing program?

ARPA funds may be used to establish a new program. The SLFRP FAQ states that “the Interim Final Rule also provides flexibility for recipients to use Fiscal Recovery Funds for programs or services that are not identified on these non-exclusive lists but which meet the objectives of section 603(c)(1)(A) or 603(c)(1)(A) by responding to the COVID-19 public health emergency with respect to COVID-19 or its negative economic impacts.”⁶ Further, the SLFRP FAQ specifies that funds may be used to establish a public jobs program, confirming that new programs may be established.⁷ However there should be some caution in establishing new programs that require ongoing financial commitments because ARPA funds are non-recurring.⁸

Can ARPA funds be used for land acquisition in areas prone to flooding or protect farmland in an easement that is prone to flooding?

Yes, ARPA funds may be used for land acquisition in areas prone to flooding. CWSRF and DWSRF eligible uses both include the acquisition of land when required for certain projects.⁹ The Interim Final Rule aligns eligible ARPA funds uses for infrastructure with the eligible uses of CWSRF and DWSRF funds, meaning that land acquisition is also an eligible use of ARPA

⁴ 31 CFR § 35(II)(A)(2) (2021).

⁵ U.S. DEP’T OF THE TREASURY, *Coronavirus State and Local Fiscal Recovery Funds Frequently Asked Questions*, 9 (2021).

⁶ U.S. DEP’T OF THE TREASURY, *Coronavirus State and Local Fiscal Recovery Funds Frequently Asked Questions*, 4 (2021).

⁷ U.S. DEP’T OF THE TREASURY, *Coronavirus State and Local Fiscal Recovery Funds Frequently Asked Questions*, 9 (2021).

⁸ GOV’T FIN. OFFICERS ASS’N, *American Rescue Plan Spending: Recommended Guiding Principles* (2021), <https://www.gfoa.org/american-rescue-plan-spending-guiding-principles>.

⁹ EPA, *OVERVIEW OF CLEAN WATER STATE REVOLVING FUND ELIGIBILITIES* (2016); EPA, *DRINKING WATER STATE REVOLVING FUND ELIGIBILITY HANDBOOK* (2017).

funds.¹⁰ Further, Florida and Indiana have already allocated funds through water infrastructure and general infrastructure uses to acquire land for water quality protection and conservation.¹¹

Are anaerobic digesters considered storm water and waste management infrastructure?

Anaerobic digesters are likely not considered as included within storm water and waste management infrastructure. The Interim Final Rule aligns eligible uses of ARPA funds for water and sewer infrastructure with the CWSRF and DWSRF eligible uses.¹² The CWSRF and DWSRF handbooks do not mention anaerobic digesters, indicating that this is not an eligible use of funds.¹³ Further, based on information we could find, no ARPA funds have currently been allocated for this purpose nationwide.¹⁴

Can ARPA funds be used to pay for farmers to purchase new equipment like no-till drills?

ARPA funds could be used to purchase new equipment for farmers if the underlying infrastructure project is eligible for ARPA funds. ARPA funds eligible uses for water and sewer infrastructure align with CWSRF and DWSRF as stated in the Interim Final Rule.¹⁵ CWSRF and DWSRF both allow purchasing equipment for many of the eligible uses.¹⁶ Of funds that have already been allocated, Oregon allocated \$3 million for the purchase and deployment of surface water and groundwater data collection equipment, and Maine has allocated \$475,000 to provide funding to purchase and upgrade equipment for public health monitoring related to shellfish and water quality.¹⁷

Legally speaking, can ARPA funds be used to prioritize funding for historically underserved/socially disadvantaged producers?

While the Interim Final Rule does emphasize the importance of providing aid to underserved and disadvantaged populations, this aid is generally focused on families or neighborhoods. For example, the SLFRP FAQ specifies that resources should be channeled to qualified census tracts to address health disparities, build stronger neighborhoods, address educational disparities,

¹⁰ 31 CFR § 35(II)(D)(1) (2021).

¹¹ NAT'L CONF. OF STATE LEGISLATURES, ARPA STATE FISCAL RECOVERY FUND ALLOCATIONS (2021).

¹² 31 CFR § 35(II)(D)(1) (2021).

¹³ EPA, OVERVIEW OF CLEAN WATER STATE REVOLVING FUND ELIGIBILITIES (2016); EPA, DRINKING WATER STATE REVOLVING FUND ELIGIBILITY HANDBOOK (2017).

¹⁴ NAT'L CONF. OF STATE LEGISLATURES, ARPA STATE FISCAL RECOVERY FUND ALLOCATIONS (2021).

¹⁵ 31 CFR § 35(II)(D)(2) (2021).

¹⁶ EPA, OVERVIEW OF CLEAN WATER STATE REVOLVING FUND ELIGIBILITIES (2016); EPA, DRINKING WATER STATE REVOLVING FUND ELIGIBILITY HANDBOOK (2017).

¹⁷ NAT'L CONF. OF STATE LEGISLATURES, ARPA STATE FISCAL RECOVERY FUND ALLOCATIONS (2021).

and promote healthy childhood environments.¹⁸ ARPA funds may, however, be used to address the economic impact of COVID-19 on small businesses.¹⁹ The Interim Final Rule states that “recipients may consider additional criteria to target assistance to businesses in need,” and lists part of the criteria as “businesses with less capacity to weather financial hardship, those with less access to credit, or those serving disadvantaged communities.”²⁰ Therefore, if a producer’s business has been impacted by COVID-19, and it serves disadvantaged communities, it may be able to be prioritized for funds.

¹⁸ U.S. DEP’T OF THE TREASURY, *Coronavirus State and Local Fiscal Recovery Funds Frequently Asked Questions*, 7 (2021).

¹⁹ 31 CFR § 35(II)(A) (2021).

²⁰ 31 CFR § 35(II)(A)(2) (2021).



MEMORANDUM

To: American Farmland Trust

From: Sarah Matthews
Sarah Thompson (Law Clerk)

Date: October 29, 2021

Re: Use of ARPA Funds for Agricultural Expenditures Related to Soil and Soil Health

The American Rescue Plan Act of 2021 (ARPA) became law on March 11, 2021, thus allocating \$350 billion in direct aid to state and local governments through the Coronavirus State and Local Fiscal Recovery Funds (the “ARPA Funds”).¹ Local governments in Massachusetts are set to receive \$3.4 billion in ARPA Funds and can use these funds on eligible activities defined in ARPA and the Interim Final Rule published by the US Treasury, 31 CFR Part 35 (the “Interim Final Rule”).² American Farmland Trust (AFT) has asked us for advice about whether ARPA Funds can be used to fund agricultural expenditures related to soil, in particular those related to soil health, such as upgrades to equipment for the UMass Soil and Plant Nutrient Testing Laboratory or to support regenerative farming practices.

ARPA amended Title VI of the Social Security Act by adding Section 602, “Coronavirus State Fiscal Recovery Fund”, and Section 603, “Coronavirus Local Fiscal Recovery Fund.”³ Under sections 602(c) and 603(c) of the Social Security Act, a state or local government may use ARPA Funds:

- (a) to respond to the public health emergency or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality;

¹ 135 Stat. 1 (2021) <https://www.congress.gov/117/plaws/publ2/PLAW-117publ2.pdf>.

² 135 Stat. 1 (2021) <https://www.congress.gov/117/plaws/publ2/PLAW-117publ2.pdf>; 31 CFR § 35 (2021) <https://home.treasury.gov/system/files/136/FRF-Interim-Final-Rule.pdf>.

³ 135 Stat. 223, 228 (2021) <https://www.congress.gov/117/plaws/publ2/PLAW-117publ2.pdf>.

- (b) to respond to workers performing essential work during the COVID-19 public health emergency by providing premium pay to eligible workers;
- (c) for the provision of government services to the extent of the reduction in revenue due to the COVID-19 public health emergency relative to revenues collected in the most recent full fiscal year prior to the emergency; and
- (d) to make necessary investments in water, sewer, or broadband infrastructure.⁴

Further guidelines and limitations on the use of ARPA Funds are set out in the Interim Final Rule.⁵ The eligibility guidelines for use of ARPA Funds set forth in ARPA and the Interim Final Rule do not explicitly provide for use of ARPA Funds for agricultural expenditures related to soil and soil health. Therefore, we think that use of funds for agricultural purposes related to soil can best be justified if framed as a response to the public health emergency brought by COVID-19 under category (a) outlined above, or as an investment in water infrastructure under category (d) outlined above. Although not related to soil health, there may be an additional opportunity to receive funding to directly benefit farm workers under category (c) above.

I. Response to the COVID-19 Public Health Emergency

Under sections 602(c)(1) and 603(c)(1) of the Social Security Act, ARPA funds may be used “to respond to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19) or its negative economic impacts, including assistance to house-holds, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality.”⁶ By connecting soil health to combatting the food insecurity many households are facing due to COVID-19, AFT and other organizations may be eligible to receive ARPA funds for use to improve soil health aimed at increasing the availability of locally sourced food resilience for Massachusetts residents.

To further elaborate on this eligible use of ARPA funds, the Interim Final Rule states, “Assessing whether a program or service “responds to” the COVID-19 public health emergency requires the recipient to, first, identify a need or negative impact of the COVID-19 public health emergency and, second, identify how the program, service, or other intervention addresses the identified need or impact.”⁷ During the ongoing COVID-19 pandemic, many households have faced food insecurity. In fact, the Interim Final Rule states that the severe recession brought on by COVID-19 “amplified food and housing insecurity, with an estimated nearly 17 million adults living in households where there is sometimes or often

⁴ 42 U.S.C. §§ 801-02 <https://www.govinfo.gov/content/pkg/COMPS-15671/pdf/COMPS-15671.pdf>.

⁵ 31 CFR § 35 (2021) <https://home.treasury.gov/system/files/136/FRF-Interim-Final-Rule.pdf>.

⁶ 42 U.S.C. §§ 801-02 <https://www.govinfo.gov/content/pkg/COMPS-15671/pdf/COMPS-15671.pdf>.

⁷ 31 CFR § 35(II)(A) (2021) <https://home.treasury.gov/system/files/136/FRF-Interim-Final-Rule.pdf>.

not enough food to eat.”⁸ Food insecurity has thus been a negative impact of the COVID-19 public health emergency.

The Massachusetts legislature previously recognized the connection between healthy soils and providing locally sourced food as well as to climate resilience, water quality and farm viability with the passage of the Healthy Soils Amendment to the Economic Development bill in 2021.⁹ Senator Jo Comerford, who championed the passage of the Healthy Soils Amendment, said of it, “Healthy soils means less CO₂ in the atmosphere, increased earnings for farmers, and more fresh local produce available to feed the people of our Commonwealth.”¹⁰ Since the Massachusetts legislature has already recognized that healthy soils can lead to more fresh local produce, we think this same argument could be used to support expenditure of ARPA funds for soil health initiatives. If AFT requests ARPA funds to create and sustain healthy soils for the purpose of producing more fresh local produce, it can argue that this use of funds will directly speak to the amplified food insecurity caused by COVID-19.

II. Investments in Water Infrastructure

The Interim Final Rule gives governments a “wide latitude to identify investments in water and sewer infrastructure that are of the highest priority for their own communities,” and specifies that projects on privately-owned infrastructure are eligible.¹¹ This is encouraging for AFT as it suggests that ARPA funds can be used on private land such as privately owned farmland, provided funds are used for eligible water infrastructure projects. To accomplish high-priority investments, the Interim Final Rule aligns the eligible uses of ARPA Funds with categories of water infrastructure projects that would be eligible to receive assistance through the EPA’s Clean Water State Revolving Fund (CWSRF) or Drinking Water State Revolving Fund (DWSRF).¹²

Under CWSRF, projects eligible for assistance include, “projects to construct, improve, and repair wastewater treatment plants, control non-point sources of pollution, improve resilience of infrastructure to severe weather events, create green infrastructure, and protect waterbodies from pollution.”¹³ Therefore, we think that AFT could frame ARPA funding requests for soil health to fit these criteria, for example, by requesting funds for the UMass Soil and Plant Nutrient Testing

⁸ 31 CFR § 35(II)(A)(2) (2021) <https://home.treasury.gov/system/files/136/FRF-Interim-Final-Rule.pdf>.

⁹ *New State Program to Build Healthy Soils, Climate Resilience*, NOFA MASS (Feb. 2, 2021), <https://www.nofamass.org/articles/2021/02/new-state-program-to-build-healthy-soils-climate-resilience/>.

¹⁰ *New State Program to Build Healthy Soils, Climate Resilience*, NOFA MASS (Feb. 2, 2021), <https://www.nofamass.org/articles/2021/02/new-state-program-to-build-healthy-soils-climate-resilience/>.

¹¹ 31 CFR § 35(II)(D)(1) (2021) <https://home.treasury.gov/system/files/136/FRF-Interim-Final-Rule.pdf>.

¹² 31 CFR § 35(II)(D)(1) (2021) <https://home.treasury.gov/system/files/136/FRF-Interim-Final-Rule.pdf>.

¹³ 31 CFR § 35(II)(D)(1) (2021) <https://home.treasury.gov/system/files/136/FRF-Interim-Final-Rule.pdf>.

Laboratory related to protecting water bodies from pollution, or by requesting funding to support regenerative farming practices that improve both drought resilience and flood protection.¹⁴ DWSRF funds are primarily used “to assist communities in making water infrastructure capital improvements, including the installation and replacement of failing treatment and distribution systems.”¹⁵ Since DWSRF largely pertains to capital projects, it seems that the eligibility criteria for DWSRF would be less applicable than CWSRF to the projects for which AFT would like funding.¹⁶

III. Premium Pay for Essential Workers

Another eligible use of ARPA funds stated in sections 602(c)(1) and 603(c)(1) is “to respond to workers performing essential work during the COVID-19 public health emergency by providing premium pay to eligible workers of the State, territory, or Tribal government that are performing such essential work, or by providing grants to eligible employers that have eligible workers who perform essential work.”¹⁷ Although we don’t think AFT or other organizations could use this section to apply for ARPA funds for soil health, we do think AFT could apply for ARPA funds under this section to directly benefit farm workers and we see no reason that this can’t be in the context of a program where workers are engaging in activities that promote soil health.

The Interim Final Rule reasons that premium pay for essential workers is needed because, “[t]hese are workers who have been and continue to be relied on to maintain continuity of operations of essential critical infrastructure sectors, including those who are critical to protecting the health and wellbeing of their communities.”¹⁸ Recognizing that farm workers and food production facilities have borne a disproportionate share of economic and health impacts of the pandemic, the Interim Final Rule explicitly recognizes these workers as eligible for premium pay.¹⁹ Premium pay is designed to be additive, and may add up to \$13 per hour to each essential

¹⁴ EPA, OVERVIEW OF CLEAN WATER STATE REVOLVING FUND ELIGIBILITIES (2016) https://www.epa.gov/sites/default/files/2016-07/documents/overview_of_cwsrf_eligibilities_may_2016.pdf.

¹⁵ 31 CFR § 35(II)(D)(1) (2021) <https://home.treasury.gov/system/files/136/FRF-Interim-Final-Rule.pdf>.

¹⁶ EPA, DRINKING WATER STATE REVOLVING FUND ELIGIBILITY HANDBOOK (2017) https://www.epa.gov/sites/default/files/2019-10/documents/dwsrf_eligibility_handbook_june_13_2017_updated_508_versioni.pdf.

¹⁷ 42 U.S.C. §§ 801-02 <https://www.govinfo.gov/content/pkg/COMPS-15671/pdf/COMPS-15671.pdf>.

¹⁸ 31 CFR § 35(II)(B) (2021) <https://home.treasury.gov/system/files/136/FRF-Interim-Final-Rule.pdf>.

¹⁹ 31 CFR § 35(II)(B) (2021) <https://home.treasury.gov/system/files/136/FRF-Interim-Final-Rule.pdf>.

workers' regular wage rates.²⁰ Additionally, premium pay may be provided retrospectively, providing further direct benefits to farm workers.²¹

IV. ARPA Data Base and Conclusion

We searched the NCSL “ARPA State Fiscal Recovery Fund Allocations” database to see whether any ARPA Funds have been awarded by other states directly to support soil health, and were only able to locate one project that has been funded so far pertaining directly to soil.²² Vermont has set aside \$250,000 of its ARPA Funds to the Agency of Agriculture “for the continuation of work in soil conservation practice and payment for ecosystem services.”²³ Although this is a promising example of use of ARPA funds for soil conservation, it is the only example we could find. It might be possible for AFT to get more leverage out of this example by speaking with relevant Vermont officials to learn more about Vermont’s ARPA-funded soil conservation program, how Vermont came to believe it fit within the ARPA framework, and whether Vermont had any communications with the U.S. Treasury about this issue. In the meantime, we recommend that AFT frame any requests for ARPA funds to support soil health in the context of responding to food insecurity created by the COVID-19 public health emergency or in the context of water infrastructure, by looking to meet CWSRF eligibility requirements as a guideline. As discussed above, outside the scope of soil health, we think AFT could request ARPA funds to directly benefit the farm workers who have worked through the COVID-19 pandemic in the form of premium pay and think use of such funds could be in the context of a program where workers are engaging in activities that promote soil health.

²⁰ 31 CFR § 35(II)(B) (2021) <https://home.treasury.gov/system/files/136/FRF-Interim-Final-Rule.pdf>.

²¹ 31 CFR § 35(II)(B) (2021) <https://home.treasury.gov/system/files/136/FRF-Interim-Final-Rule.pdf>.

²² NAT’L CONF. OF STATE LEGISLATURES, ARPA STATE FISCAL RECOVERY FUND ALLOCATIONS (2021)

²³ NAT’L CONF. OF STATE LEGISLATURES, ARPA STATE FISCAL RECOVERY FUND ALLOCATIONS (2021)

<https://app.powerbi.com/view?r=eyJrIjoiMmQ2NDRiNDYtN2NkZC00OTE2LThjYzQtYjAzNTE2ZDRjZWFiIiwidCI6IjM4MmZiOGIwLTRkYzMtNDUwNy04MGJkLTM1OTViMjQzMmZhZSIsImMiOiZ9>.