



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

OFFICE OF WATER

September 2, 2022

DECISION MEMORANDUM

SUBJECT: Temporary Public Interest Waiver of Section 70914 of P.L. 117-58, Build America, Buy America Act, 2021 for Selected EPA Funding Programs

FROM: Radhika Fox
Assistant Administrator

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Introduction

As the Biden-Harris Administration implements the historic Bipartisan Infrastructure Law (BIL), and many other infrastructure funding and financing programs, the U.S. Environmental Protection Agency (EPA) is committed to maximizing the use of American made products and materials. Alongside the BIL, Congress passed the Build America, Buy America Act (BABA), which establishes strong and permanent domestic sourcing requirements across all federal financial assistance programs. EPA is honored to play a leadership role in the effort to implement these provisions and is proud of its nearly decade of successful implementation of American Iron and Steel (AIS) provisions in its marquee State Revolving Fund (SRF) and Water Infrastructure Finance and Innovation Act (WIFIA) programs.

Moving forward, the Agency is in a strong position to build off this foundation to implement BABA across its federal financial assistance programs. EPA's WIFIA and SRF programs – which in FY22 will collectively account for the vast majority of the agency's funding and financing assistance obligations – are proposing temporary adjustment period waivers (for manufactured products and construction materials only) that clarify requirements for projects already in various phases of design/bid. Through these efforts, EPA will support whole of government efforts to catalyze domestic manufacturing, resilient supply chains, and good jobs – while successfully delivering a wide range of critical infrastructure projects for states, local communities, counties, tribal nations and farms, factories, and businesses across the United States.

Getting to full, long-term adoption of BABA provisions will require extensive consultation with stakeholders (including both potential funding recipients and industry) and a carefully calibrated adjustment period, leveraging the authority granted by Congress to issue public interest waivers, creating an appropriate on-ramp to requirements. In particular, several of EPA's smaller financial assistance programs do not have the same history of domestic sourcing requirements as do the SRF and WIFIA programs. The Agency, potential awardees, and the supply chains that serve them will need time to gather data and build the capacity and processes necessary to successfully comply with all of BABA's provisions.

EPA provides a temporary public interest waiver covering all BABA provisions for selected EPA water infrastructure and water resources protection programs for a period expiring six months after the issuance of this waiver. EPA provides this transitional “adjustment period waiver” to prepare for compliance with the new Made in America standards. During this time period, EPA expects states, industry, and other partners to begin developing compliance processes. EPA, using feedback from continued engagement through the waiver period, will work to ensure the creation of robust enforcement and compliance mechanisms, as well as tools to support funding recipients. Suppliers and other stakeholders are encouraged to inform EPA of currently sufficient domestic availability of categories of iron and steel, manufactured products, and construction materials to help EPA shorten the transitional waiver or narrow its applicability to rapidly incentivize and cultivate domestic manufacturing.

Program Waiver

EPA hereby grants a program waiver of the requirements of Section 70914 of the IIJA (BABA), pursuant to Section 70914(b)(1) (public interest waiver), for eligible projects funded or financed by the programs noted below. This waiver will apply to all funds obligated by these programs for a period expiring six months after the issuance of this waiver. Projects covered by this waiver include those obligated under the following programs:

- National Estuaries Program (CWA Section 320)
- Geographic Programs¹
- Clean Water and Drinking Water Grants to U.S. Territories and District of Columbia
- Clean Water Indian Set-aside (and any associated Interagency Agreements with the Indian Health Service)
- Drinking Water Infrastructure Grant – Tribal Set-Aside (and any associated Interagency Agreements with the Indian Health Service)
- Congressionally Directed Spending/Community Project Funding (aka Community Grants)
- Sewer Overflow and Stormwater Reuse Municipal Grants (OSG)
- 319 Nonpoint Source Management Program Implementation
- Gulf Hypoxia Program
- U.S.-Mexico Border Water Infrastructure Program
- Small and Disadvantaged Community Grants Program, including Emerging Contaminants and Drinking Water Infrastructure Resilience & Sustainability (SDWA §1459A)
- Reducing Lead in Drinking Water Grant Program (SDWA §1459B)
- Voluntary School and Child Care Program Lead Testing and Remediation Grant Program (SDWA 1464(d))
- USMCA Implementing Legislation (Section 821 and Title IX, USMCA Supplemental Appropriations, 2020)
- Alaska Native Villages and Rural Communities Water Grant Program (ANV) (and any associated Interagency Agreements with the Indian Health Service)
- Coastal Wetlands Planning, Protection and Restoration Act, (CWPPRA) Programs

¹ Geographic Programs include: Great Lakes Restoration Initiative, Chesapeake Bay, San Francisco Bay, Puget Sound, Long Island Sound, Gulf of Mexico, South Florida, Lake Champlain, Lake Pontchartrain, Southern New England Estuaries, Columbia River Basin, Pacific Northwest.

Conditional and Time-Limited

The waiver covers projects using funds obligated after the issuance of this waiver for a period of six months. This six-month timeframe is critical due to the funding cycles of these programs and to enable EPA, potential applicants and recipients, and the unique supply chains serving these programs the time needed to build capacity, determine what projects and products will be covered by BABA requirements, and build processes to ensure and document compliance. EPA will review information gathered through implementation over this period and may shorten the duration of this waiver for specific programs as the availability of domestic products and materials becomes clear and as the capacity of programs and potential awardees matures. EPA may consider extensions of this waiver, on a program-by-program basis, and for targeted areas (iron and steel products, manufactured goods, or construction materials) as applicable, though strong preference will be given to narrower product-specific and/or project-level waivers.

Program-Wide Scope

The new nature of these requirements for the programs specified here necessitates a program waiver to cover projects that receive this funding and meet the conditions of the waiver. The financial assistance programs covered by this waiver have had limited or no experience with implementing domestic preference requirements. The new requirements and impacts of BABA – government-wide guidance for which was first published on April 18, 2022 – have not yet been fully assessed for these programs, which need time to build the network and structure of support that the mature SRF and WIFIA programs built over the past eight years implementing American Iron and Steel requirements. The programs require the time to evaluate the level of program support necessary to successfully implement the new requirements without sacrificing critical Agency mission programs. The Agency will also use this adjustment period to identify products and projects within these programs that are covered and that will be impacted by BABA. This information will be used to build processes and capacity within the Agency, among applicants and awardees, and across suppliers. It will also allow EPA to understand what narrower and targeted waivers are necessary in the future.

Anticipated Program and Project Impacts Absent a Waiver

The financial assistance programs for water infrastructure and water resources protection covered by this waiver, though smaller in scale compared to EPA's SRF and WIFIA programs, play crucial roles in addressing critical public and environmental health protections, from lead remediation in schools, daycares, and disadvantaged communities to restoring impaired waters. These programs, and the applicant pools and supply chains that support them, do not have a history of applying domestic preference requirements. Absent a waiver for an adjustment period, EPA anticipates a range of impacts, including:

- **Increased project and construction costs:** This waiver is necessary to avoid sudden increases in costs for projects already in planning and design. Re-evaluating procurement and other planning decisions, particularly among programs not yet experienced with domestic preference requirements would require communities to reevaluate their goals and priorities specific to the funding. Assistance recipients may need to reassess funding sources thereby potentially evaluating additional designs, which could limit the scope of proposed and planned projects.
- **Delay in compliance with Clean Water Act and Safe Drinking Water Act Requirements, and in achieving water quality and other goals:** This adjustment waiver covers a range of

programs that assist investments in essential drinking water, clean water infrastructure, and water resources protection, and support compliance with SDWA and CWA requirements. Communities that are required to redesign systems will not only face increased planning, design, and construction costs, but will also be forced to delay improvements necessary to meet regulatory requirements, public health, and other water quality goals.

- **Delay of implementation of Bipartisan Infrastructure Law (BIL) and other infrastructure funding:** Many water systems and communities across the nation (and particularly disadvantaged communities) that lack adequate water infrastructure also face challenges with administrative, technical, and financial capacity. BABA requirements will place a new series of administrative and technical burdens related to asset management, reporting, and other areas, on potential applicants at a time when the Agency is working to lower barriers to applying for federal water infrastructure funds. Without an adjustment period to educate potential applicants and the suppliers they rely on, and to build technical assistance programs to support them with compliance moving forward, the Agency anticipates immediate delays in the implementation of BIL and other critical infrastructure improvements.
- **Re-evaluation of design decisions:** The design process often includes estimation of project benefits and costs to evaluate design alternatives and in many cases, involves complex environmental assessments, permitting, site reviews, local funding processes, and prioritization efforts. Processes are influenced by pre-established community priorities, approved program workplans, the expected availability of supplies, materials, manufactured products, equipment, packaged technological solutions, local budget approvals, and even siting options.
- **A decline in the use of EPA funds or a shift away from infrastructure projects when using EPA funds:** Multiple assistance programs covered by this waiver (listed above, e.g., 319 NPS, NEP, Gulf Hypoxia) are largely driven by voluntary efforts with local groups and landowners to improve water quality. A small percentage of the work funded in these grants will likely be covered by BABA. Though the impacts will be limited, the funded community has no prior experience or processes in place to understand requirements and compliance processes. Concerns over domestic preference compliance may discourage participation by potential grantees and prevent or delay water quality improvement, and natural infrastructure project implementation.

Program Implementation Considerations

EPA's implementation of AIS requirements for the SRF and WIFIA programs has assured almost all iron and steel products in water, wastewater, and stormwater infrastructure projects are domestically sourced. However, because the programs (and their applicants and other stakeholders) covered by this waiver do not have experience complying with AIS requirements, these programs and the potential applicants and their suppliers will need appropriate time to develop procurement, implementation, and compliance processes.

The domestic availability of other non-ferrous construction materials and manufactured products incorporated in projects is largely unknown at this time. Furthermore, many programs and their potential awardees will need time to establish processes to determine what projects and products may be subject to BABA requirements, and to determine if domestic sources of those products and materials are available. The list of items included on these projects can be vast, and even for smaller projects the domestic availability and source tracing for critical products is unknown and will take time to document. For example, the WIIN grant programs will have to establish and determine the list of products,

currently estimated at over 2,000 known items, and which types of projects/activities will require BABA domestic source and material disclosures. Other programs, such as the National Estuaries Program and 319 Nonpoint Source program, have smaller number of projects at a comparatively smaller scale where BABA is applicable. These programs will need time to establish best approaches to implement BABA with the multiple partners including local organizations and landowners so that work can continue with uninterrupted impact on the intended public interest – improving water quality.

To further support the administration’s priorities to steward investments to build a better America and promote domestic manufacturing and jobs, the Agency will aim to learn from projects covered by this waiver to help evaluate the domestic market availability of commonly used infrastructure products.

Assessment of Cost Advantage of a Foreign-Sourced Product

Under OMB Memorandum M–22–11, agencies are expected to assess “whether a significant portion of any cost advantage of a foreign-sourced product is the result of the use of dumped steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products” as appropriate before granting a public interest waiver. EPA’s analysis has concluded that this assessment is not applicable to this waiver, as this waiver is not based on the cost of foreign-sourced products. EPA will perform additional market research as it implements the BABA requirements to better understand the market and to limit the use of waivers caused by dumping of foreign-sourced products.

BABA Implementation Steps During Adjustment Period

Since the enactment of IIJA, EPA has worked diligently to provide notification of the BABA requirements. Consistent with the requirements of Section 70913 of IIJA, EPA produced a report that identifies and evaluates all of EPA’s Federal Financial Assistance programs with potentially eligible uses of funds that include infrastructure as defined by the Act to determine which programs will need to comply with the BABA requirements, and which would be considered inconsistent with Section 70914 of IIJA and thus “deficient” as defined by Section 70913(c). EPA also hosted three widely advertised webinars, with sessions soliciting input on the BABA requirements from the following: (1) potentially affected manufacturers, suppliers, distributors, and representative organizations; (2) water sector and water infrastructure organizations, associations, and professional trade groups; and (3) states, state associations, EPA Regions, and potential assistance recipients.

During the waiver period, EPA expects that implementing partners – including the Agency, states, and communities, and potential applicants and awardees, as well as the manufacturing and construction contracting community – will take rapid action to prepare for compliance with the new requirements, as many in the SRF and WIFIA community currently do for iron and steel, for example, including:

1. Working to identify products and materials used in projects and assessing their baseline of compliance with BABA requirements;
2. Establishing certification processes by assistance recipients to determine BABA compliance;
3. Working with industry to ensure that manufacturers are prepared to demonstrate that their products meet applicable BABA standards;
4. Ensuring construction contractors and subcontractors are prepared to certify compliance with BABA requirements for iron and steel products, manufactured goods, and construction materials, and provide all relevant information, including contract provisions prescribing BABA requirements;

5. Establishing appropriate diligence by state agencies, tribal, and territorial agencies, contracting agencies, and other relevant agencies, including audits and reviews, as appropriate;
6. Providing further data and information to EPA on the domestic availability of manufactured goods and construction materials, in particular comment by suppliers on products and materials that currently can meet BABA standards.

During the waiver period, EPA will also work to prepare for implementation of new Made in America requirements for manufactured products and construction materials by:

1. Expanding the capacity of covered programs, including regional staff, to implement BABA requirements and build processes and tools to support funding applicants;
2. Assessing the applicability of existing Made in America processes in programs historically covered by AIS requirements (SRF, WIFIA) to the programs covered by this waiver. The Agency will seek, where appropriate, to align with standards and processes already in place for programs with mature domestic preference requirements.
3. Building new Made in America requirements and terms and conditions into forthcoming capitalization grants, RFAs, NOFOs, loan programs, and other financial assistance provided by the Agency, as appropriate;
4. Reviewing applicable EPA enforcement processes (including stewardship and oversight agreements with states and other external partners), risk-based reviews, and compliance assessment program reviews for non-compliance with Made in America standards to ensure the enforcement processes are effective and consistent across the Agency, as appropriate;
5. Reviewing data, information, and comments provided by states, industry, and other partners to further assess opportunities, challenges, and the availability of domestically sourced manufactured products and construction materials; and,
6. Identifying priority products for further study and coordination with key stakeholders to incentivize and rapidly cultivate domestic sources.

At the conclusion of the waiver period, EPA will re-evaluate if an extension is needed for all or a subset of products. For example, a renewed waiver might have a narrower focus and perhaps only include manufactured products or certain funding programs. If the waiver, or a portion of the waiver, is not renewed, EPA will be sure all stakeholders (assistance recipients through manufacturers) will be fully aware of the requirements and how to comply with them. All assistance agreements awarded after the conclusion of this waiver will be expected to comply with the BABA requirements, unless otherwise covered by another waiver.

Public Comment Summary and Response

The Agency received fifty-four responsive comments during the public comment period for the proposed waiver. The comments generally favored an adjustment period waiver for the OW selected programs. Three comments from manufacturers of iron and steel products opposed the adjustment period waiver because they would prefer the iron and steel requirements of BABA apply as soon as possible, also noting that other programs (SRF and WIFIA) at EPA implement iron and steel requirements. Several comments expressed concern that the waiver would not apply to projects obligated after the effective date, but before the waiver is approved (that is, retroactively). Additionally, commenters requested that EPA more closely coordinate the requirements of other EPA waivers (for SRF and WIFIA programs) with this waiver because of potential co-funded projects.

EPA concludes that the public comments support the need for the six-month adjustment period public interest waiver as proposed. EPA declines to apply the iron and steel requirements of BABA during the adjustment period because the programs utilizing this waiver do not yet have the capacity to administer the requirements, despite EPA's successes with the AIS requirements for the SRF and WIFIA programs. The complexities of adopting the BABA requirements for the programs covered by this waiver are such that, despite EPA's AIS success with SRF and WIFIA programs and the appeal of the commenters, the Agency maintains, for the reasons outlined herein, that the public interest is met through this adjustment period waiver for all BABA requirements. Nonetheless, for projects co-funded with SRF or WIFIA funding, EPA will fully comply with existing statutory requirements for these projects.

With regard to the waiver period of application, this waiver applies to all funds obligated for a period expiring six months after issuance of the waiver. Despite comments concerned with a gap in waiver coverage (that is, foregoing coverage for projects subsequent to May 13, 2022 and before the waiver issuance), EPA is providing a six-month waiver from date of issuance. For projects that may have been obligated during the window after May 13 and before waiver approval, EPA will work with the programs and recipients to assess compliance alternatives and options best suited to each situation, potentially including project-specific public interest waivers based on the justification and reasoning forming the basis of this waiver.

EPA intends to assess many aspects of the programs subject to this waiver during the adjustment period. Among the key topics that EPA will assess and survey is the coordination of funding between programs (that is, co-funding) and whether additional instructions, guidance clarifications, or possible waivers could be required to alleviate potential inefficiencies or program deficiencies in this area. At this time, EPA notes the commenters concerns for co-funded projects with different adjustment period waivers and commits to assessing and subsequently addressing these issues during the adjustment period.

Waiver Decision

Section 70914(b)(1) of the BIL authorizes the Administrator to waive the requirements of Section 70914(a) in any case or category of cases in which the Agency finds that applying subsection (a) would be inconsistent with the public interest. Due to the critical need to repair and upgrade the nation's water infrastructure, to increase the resilience of communities and ecosystems, and to efficiently implement infrastructure appropriations a timely and cost-effective manner, EPA hereby determines that it is in the public interest to temporarily delay imposing BABA requirements on the aforementioned programs, and issues this waiver on all BABA requirements for all funds obligated by these programs for a period expiring six months after issuance of the waiver.

For questions concerning the contents of this memorandum, please contact:

- For programs administered by the Office of Wastewater Management, Timothy Connor at connor.timothy@epa.gov or 202-566-1059
- For programs administered by the Office of Ground Water and Drinking Water, Kiri Anderer at anderer.kirsten@epa.gov or 202-564-3134
- For programs administered by the Office of Wetlands, Oceans, and Watersheds, or directly by the Regions, Jeff Lerner at lerner.jeffrey@epa.gov or 202-564-0426