



# Texas Water Development Board Build America, Buy America (BABA) Act Guidance for Clean Water and Drinking Water State Revolving Fund (Equivalency) Projects

This document is not a comprehensive representation of the federal requirements. For complete details of the federal requirements visit: <https://www.epa.gov/cwsrf/build-america-buy-america-baba>

In any instance when there may be a discrepancy between this guidance and the actual federal requirements, program participants must adhere to the federal requirements.

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**Forms and Guidance:**

The Texas Water Development Board (TWDB) forms and guidance documents noted in this instruction document may be accessed through the TWDB Financial Assistance website at:

<http://www.twdb.texas.gov/financial/instructions/index.asp>

Search by either the document number or name.

## OVERVIEW

It is the intent of the Texas Water Development Board (TWDB) to ensure that Applicants, consultants, and contractors are provided with procedures and recommendations for implementation of the Build America, Buy America (BABA) Act provisions for the Clean and Drinking Water State Revolving Funds. These provisions are currently contained within the Infrastructure Investment and Jobs Act (IIJA), Pub. L. No. 117-58; the BABA Act is specifically referenced within Pub. L. 117-58, §§ 70901-52. The IIJA is also referred to as the Bipartisan Infrastructure Law (BIL).

BABA provisions require Clean Water State Revolving Fund (CWSRF) and Drinking Water State Revolving Fund (DWSRF) assistance recipients to use iron, steel, manufactured products, and construction materials that are produced in the United States for projects for the construction, alteration, maintenance, or repair of a public water system or treatment works.

### Key Takeaways

1. BABA requirements apply to *all* projects that utilize Federal financial assistance (i.e., Equivalency projects) beginning with State Fiscal Year 2023.
2. BABA requirements apply to *an entire infrastructure project*, even if the project is funded by a combination of Federal and non-Federal funds under one or more awards.

*Reminder: American Iron and Steel (AIS) applies to all state revolving fund projects. BABA supersedes AIS requirements for equivalency projects only starting with State Fiscal Year 2023.*

## EFFECTIVE DATES

BABA went into effect on May 14, 2022. BABA applies to all Equivalency State Revolving Fund (SRF) projects beginning with State Fiscal Year (SFY) 2023. This includes the CWSRF, DWSRF, the Emerging Contaminants (EC) programs, and the Lead Service Line Replacement (LSLR) program.

BABA provisions generally apply to any equivalency funded financial assistance closed on or after May 14, 2022. There are limited exceptions to the BABA requirements under the Adjustment Period Waiver (**Attachment 7**). The Applicant should contact their local Regional Water Project Development (RWPD) Team if there are questions regarding BABA exceptions.

## FEDERAL GUIDANCE

The Environmental Protection Agency (EPA) and Office of Management and Budget (OMB) has provided guidance through the following resources:

1. OMB Made in America Office guidance, M-22-11 (April 18, 2022)  
<https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>  
(Attachment 1)
2. OMB Build America, Buy America Factsheet and FAQs (July 2022)  
<https://www.whitehouse.gov/wp-content/uploads/2022/07/Build-America-Buy-America-Factsheet-and-FAQs-for-Award-Recipients.pdf> (Attachment 2)
3. Build America, Buy America Act Implementation Procedures for EPA Office of Water Federal Financial Assistance Programs (November 2022)  
<https://www.epa.gov/system/files/documents/2023-03/OW-BABA-Implementation-Procedures-Final-November-2022.pdf> (Attachment 3)
4. Office of Land and Emergency Management Build America, Buy America FAQs (February 15, 2023) [https://www.epa.gov/system/files/documents/2023-02/OLEM\\_BABA\\_FAQs\\_Final-Feb\\_15\\_2023.pdf](https://www.epa.gov/system/files/documents/2023-02/OLEM_BABA_FAQs_Final-Feb_15_2023.pdf) (Attachment 4)
5. Supplemental Questions and Answers for Build America, Buy America Act Implementation Procedures for EPA Office Of Water Federal Financial Assistance Programs (May 2023) <https://www.epa.gov/system/files/documents/2023-05/BABA-OW-Supp-FAQ-May-2023.pdf> (Attachment 5)
6. Office of Management and Budget Final Guidance (Publication Date August 23, 2023) <https://www.federalregister.gov/documents/2023/08/23/2023-17724/guidance-for-grants-and-agreements>
7. OMB Made in America Office guidance, M-24-02 (October 25, 2023)  
[www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf](https://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf) (Attachment 6)
8. EPA's Build America, Buy America webpage - <https://www.epa.gov/cwsrf/build-america-buy-america-baba>
9. Made in America Office (MIAO) webpage - <https://www.madeinamerica.gov/>

Please contact TWDB with any questions regarding the applicability of BABA requirements.

## COVERED PRODUCTS

BABA applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project, with the exception of select construction materials (cement and cementitious materials, asphalt, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives), which are specifically excluded by

BABA statute. For projects receiving CWSRF or DWSRF funds that must comply with the BABA requirements, the following must be made in America:

- 100 percent of the iron and steel used (this is the same as the American Iron and Steel [AIS] Act).
- 55 percent of the manufactured products.
- 100 percent of construction materials.

The Applicant may not use funds from non-State Revolving Fund sources, including the Applicant's own funds, to pay for a non-compliant iron or steel product, manufactured product, or construction material used in the project.

A product will only fall into one of the three categories. These three categories cover nearly every facet within a project. These three categories are further described in the following paragraphs.

## 1. Iron and Steel

BABA requirements for Iron and Steel are equivalent to those of the AIS statutory requirements. Compliance with BABA is sufficient to demonstrate compliance with AIS requirements. The following list, while not comprehensive, are products that are classified as "Iron and Steel" under BABA. These products are also classified as AIS products if made primarily (more than 50 percent) of iron or steel by material cost:

- Lined or unlined pipes or fittings
- Tanks
- Flanges
- Pipe clamps and restraints
- Structural steel
- Valves
- Hydrants
- Precast iron/steel reinforced concrete (regardless of iron/steel percentage)
- Manhole covers and other municipal castings
- Access hatches
- Ballast screens
- Iron/Steel benches
- Bollards
- Cast bases
- Cast iron hinged hatches
- Cast iron riser rings
- Catch basin inlets
- Cleanout/monument boxes
- Construction covers and frames
- Curb and corner guards
- Curb boxes
- Curb openings
- Curb stops
- Detectable warning plates
- Downspout shoes
- Drainage grates
- Drainage grate frames and curb inlets
- Inlets
- Junction boxes
- Lampposts
- Manhole rings and frames
- Manhole risers
- Meter boxes
- Service boxes
- Steel hinged hatches
- Steel riser rings
- Trash receptacles
- Tree grates
- Tree guards
- Trench grates
- Valve boxes

- Valve box covers and risers
- Access ramps
- Aeration pipes and fittings (separate from aeration/blowers)
- Angels
- Backflow preventers/double check valves
- Baffle curtains
- Iron or steel bars
- Bathroom stalls
- Beam clamps
- Cable hanging systems
- Clarifier tanks
- Coiled steel
- Column piping
- Concrete reinforcing bar, wire, and fibers
- Condensate sediment traps
- Corrugated pipe
- Couplings
- Decking
- Digester covers
- Dome structures
- Door hardware
- Doors
- Ductwork
- Expansion joints
- Expansion tanks (diaphragm, surge, and hydropneumatics)
- Fasteners
- Fencing and fence tubing
- Fire escapes
- Flanged pipe
- Flap gates
- Framing
- Gate valves
- Generic hanging brackets
- Grating
- Ground testing boxes
- Ground test wells
- Guardrails
- HVAC registers, diffusers, and grilles
- Joists
- Knife gates
- Ladders
- Lifting hooks, J-bars, connectors within and anchors for concrete
- Lockers
- Man baskets and material platforms
- Manhole steps
- Mud valves
- Municipal casting junctions
- Non-mechanical (aka stationary) louvers and dampers
- Overhead rolling doors/uplifting doors (manual open, no motor)
- Pipe connectors
- Pipe hangers
- Pipe pilings (any type of steel piling)
- Pipe spool (pipe, flanges, connectors, etc.)
- Pipe supports
- Pitless adaptors
- Prefab steel buildings/sheds (simple structure, unfurnished)
- Prestressed concrete cylinder pipe (PCCP)
- Railings
- Reduced pressure zone (RPZ) valves
- Roofing
- Service saddles
- Sheet piling
- Sinks (not part of eyewash systems)
- Solenoid valves
- Stairs
- Static mixers
- Stationary screens
- Surface drains
- Tapping sleeves
- Telescoping valves
- Tipping buckets
- Trusses
- Tubing
- Valve stem extensions
- Valve stems (excluding handwheels and actuators)
- Wall panels



- Wall sleeves/floor sleeves
- Welding rods
- Well casing
- Well screens
- Wire
- Wire cloth
- Wire rod
- Wire rope and cables

## 2. Manufactured Products

Manufactured products were defined in OMB Guidance M-22-11 as all products where, “...the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product...” The EPA has further clarified that manufactured products include complex products made up of a variety of material types and components, such as pumps, motors, blowers, aerators, generators, instrumentation and control systems, gauges, meters, measurement equipment, treatment equipment, dewatering equipment, and other mechanical and electrical items. Additional guidance regarding manufactured products is available in [2 CFR 184](#).

The following list, while not comprehensive, are products that are classified as “manufactured products” under BABA requirements, even if the item might be composed of primarily iron and steel by materials costs. These items are not subject to AIS requirements.

- Actuator superstructures/support structures
- Aeration nozzles and injectors
- Aerators
- Analytical instrumentation
- Analyzers (e.g. ozone, oxygen)
- Automated water fill stations
- Blowers/aeration equipment
- Boilers and boiler systems
- Chemical feed systems (e.g., polymer, coagulant)
- Chemical injection quills
- Chemical injectors
- Clarifier mechanisms/arms
- Compressors
- Controls and switches
- Conveyors
- Cranes
- Desiccant air dryer tanks
- Dewatering equipment
- Dewatering roll-offs
- Disinfection systems
- Drives (e.g. variable frequency drives)
- Electric/Pneumatic/Manual accessories used to operate valves (e.g., actuators)
- Electrical cabinetry and housings (e.g., electrical boxes/enclosures)
- Electrical conduit
- Electrical junction boxes
- Electronic door locks
- Elevator systems (hydraulic, etc.)
- Emergency life systems (includes eyewash stations, emergency safety showers, fire extinguishers, fire suppression systems, etc.)
- Exhaust fans
- Fall protection anchor points
- Fiberglass tank with appurtenances
- Filters and appurtenances (including underdrains and

- backwash systems)
- Flocculators
- Fluidized bed incinerators
- Galvanized anodes/cathodic protection
- Gear reducers
- Generators
- Geothermal systems
- Grinders
- Heat exchangers
- HVAC (excluding ductwork)
- HVAC Dampers (if appurtenances to aerators/blowers)
- HVAC louvers (mechanical)
- Intake and exhaust grates (if appurtenances to aerators/blowers)
- Instrumentation
- Laboratory equipment
- Ladder fall prevention systems
- Ladder safety posts
- Lighting fixtures
- Lightning and grounding rods
- Mechanical or actuated louvers/dampers
- Membrane bioreactor systems
- Membrane filtration systems
- Metal office furniture (fixed)
- Meters (includes flow, wholesale, water, and service connections)
- Motorized door (unit)
- Motorized mixers
- Motorized screens (such as traveling screens)
- Motors
- Pelton wheels
- Pipeline flash reactors (similar to injectors)
- Plate settlers
- Precast concrete without iron/steel reinforcement
- Furnished prefabricated buildings
- Presses (including belt presses)
- Pressure gauges
- Pump cans/barrels and strainers
- Pumps
- Mechanical rakes
- Safety climb cable
- Sampling stations (unless also acts as hydrant)
- Scrubbers
- Sensors
- Sequencing batch reactors (SBR)
- Steel shelving (fixed)
- Slide and sluice gates
- Spray header units
- Steel cabinets (fixed interior/furniture)
- SCADA systems
- Trace wire
- Valve manual gears, actuators, and handles
- Voltage transformer
- Water electrostatic precipitators (WESP)
- Water heaters
- Weir gates

### 3. Construction Materials

Construction materials are defined by the EPA as primarily consisting of non-ferrous metals, plastic and polymer-based products, lumber, and drywall, as noted OMB Guidance M-22-11. The following list, while not comprehensive, are products that are classified as “construction materials” under BABA requirements:

- Nonferrous metals
- Plastic and polymer-based products (PVC, etc.)
- Glass (including optical glass)

- Optical fiber
- Lumber
- Drywall
- Engineered wood

Select construction materials are excluded from BABA. These materials include cement and cementitious materials and asphalt, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives, and nonpermanent/temporary items.

## WAIVERS

BABA provisions permit EPA to issue waivers for a case or category of cases where EPA finds (1) that applying these requirements would be inconsistent with the public interest; (2) types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent.

EPA granted several nationwide waivers that apply to water and wastewater infrastructure projects and are attached hereto as **Attachment 7**. A brief summary of the most applicable waivers is provided below.

- a) The *De Minimis* waiver, pursuant to Section 70914(a) of P.L. 117-58, permits the use of products when they are incidental components to the project (i.e., not integral to the project purpose). Funds used for de minimis incidental components cumulatively may not exceed five percent of the total project cost.
- b) The Small Project waiver, pursuant to Section 70914(a) of P.L. 117-58, permits projects of less than \$250,000 a waiver from BABA requirements.
- c) The Amended Adjustment Period waiver, pursuant to Section 70914(a) of P.L. 117-58, permits projects financed by CWSRF or DWSRF that initiated the project design phase prior to May 14, 2022 the use of nondomestic manufactured products and construction materials. The statutory AIS requirements still apply. This waiver applies to projects funded under the 2022 and 2023 federal fiscal year appropriations that were expended after November 13, 2023.
- d) The Adjustment Period waiver, pursuant to Section 70914(a) of P.L. 117-58, permits projects financed by CWSRF or DWSRF that initiated the project design phase prior to May 14, 2022 the use of nondomestic manufactured products and construction materials. Due to the Amended Adjustment Period waiver (see above), this waiver only applies to projects with funding obligated prior to

November 13, 2023.

- e) The Program waiver, pursuant to Section 70914(a) of P.L. 117-58, applies to projects financed by the Water Infrastructure Finance and Innovation Act (WIFIA) that initiated the project design phase prior to May 14, 2022. This waiver does not affect WIFIA's AIS requirements.
- f) Regarding public interest: The Minor (Ferrous) Components of Iron and Steel Products waiver, pursuant to Section 70914(a) of P.L. 117-58, for applies to manufacturers that may have small iron or steel components within their product that are nondomestic or of unknown origin. This waiver allows manufacturers of iron and steel products to utilize a small portion (up to five percent by product material cost) of nondomestic or unknown origin iron and steel minor components within their otherwise domestically manufactured iron and steel products.

Applicants must inform the TWDB in writing of request to apply one of the nationwide waivers to the project. Applicants may use the form provided in **Attachment 8**. All approved waivers will be on the EPA's Build America, Buy America website: [www.epa.gov/cwsrf/build-america-buy-america-baba-approved-waivers](http://www.epa.gov/cwsrf/build-america-buy-america-baba-approved-waivers).

## 1. Waiver Process

EPA has implemented a waiver application process to allow the State, on behalf of the Applicant, to apply for a waiver(s) of the BABA requirement directly to EPA Headquarters. Only waiver requests received from the State will be considered. A waiver application may be submitted at any time during the project, however until a waiver is granted by EPA, the BABA requirement stands. It is highly recommended to submit a waiver request as early in the project as possible. It is not recommended to request a waiver after the advertisement for bids or after the start of construction.

To apply for a project waiver, the Applicant should email the request in the form of a Word document (.doc) to the TWDB project manager. Proper and sufficient documentation must be provided by the Applicant, refer to **Attachment 8**. A waiver request must demonstrate that one or more of the three statutory conditions listed above is met. In general, these requests should include:

1. A brief summary of the project;
2. A description and explanation of the need for the waiver;
3. A brief summary of the due diligence for a domestic alternative;
4. Quantity and material of product in question;
5. All engineering specifications and project design considerations relevant to the product in question;

6. Approximate unit cost of items and estimated cost of materials and overall project;
7. The date the products will be needed to avoid significant project schedule disruptions; and
8. Any other pertinent information.

Additional information is included in **Attachment 8** for project-specific waiver requests. After receiving an application for waiver of the BABA requirements, TWDB will review the request to ensure all necessary information has been provided. Requests deemed complete will be forwarded to EPA. After the EPA reviews the requested waiver submittal, EPA Headquarters submit the proposed waiver to the Made In America Office (MIAO). After review by MIAO, the EPA will publish the request on its website for 15 days and receive informal comment. EPA Headquarters will then determine whether the application properly and adequately documents and justifies the statutory basis cited for the waiver – that it is quantitatively and qualitatively sufficient; and to determine whether or not to grant the waiver. The EPA submits a proposed waiver to the MIAO after the public comment period is completed. The MIAO reviews the proposed waiver and will notify the EPA of its determination.

Once the EPA receives notification from MIAO, the EPA will notify TWDB that a waiver request has been approved or denied. Approved waivers will be posted on the EPA website. The Applicant should keep a copy of the signed waiver in their BABA Certification File.

## COMPLIANCE

In order to ensure compliance with the BABA requirement, specific BABA contract language must be included in each contract, including the construction material purchase agreements (see **Attachment 9** for example language). The Applicant should be aware that BABA requirements will apply to the project through the TWDB commitment resolution.

It is the Applicant's responsibility to: (1) ensure that all construction and purchase contracts are executed in compliance with BABA, (2) maintain a record of all forms and certifications necessary to demonstrate compliance with BABA, and (3) show this documentation upon request or audit. To demonstrate compliance with BABA requirements the Applicant must provide adequate documentation (hard copy, electronically, or embedded in construction management software) to demonstrate the following:

1. Documentation linked to the project, such as project name, project location, contract number, or project number.

2. Documentation linked to the product used on the project, such as description of product(s), purchase order, invoice, or bill of lading.
3. Documentation including a statement attesting that the products supplied are compliant with BABA requirements. Reference to Infrastructure Investment and Jobs Act (IIJA) or Bipartisan Infrastructure Law (BIL) are also acceptable. For iron and steel products under BABA, certifications should reference BABA, but references to AIS are acceptable. The EPA recommends that certification letters include direct reference to the product/material content requirements under BABA for manufactured products and construction materials.
4. Documentation that manufacturing occurred in the United States. This could include the location(s) of manufacturing for each manufacturing step that is being certified, or documentation of the single point of manufacturing. Note that each BABA category may require different determinations for compliance.
5. Signature of company representative on company letterhead (can be a digital signature such as DocuSign or Adobe PDF). The signatory of the certifying statement affirms their knowledge of the manufacturing processes for the referenced product(s) and attests that the product meets BABA requirements. The document must include the printed name and title of the company representative signing the statement.

It is acceptable, in many cases, especially for highly complex manufactured products that utilize many subcomponents, for the final point of assembly to certify without using “step certification” process. Multiple certifications (i.e., step certification) or a singular certification can be used for a product, as long as the certifying official is willing to attest to the product’s compliance with BABA requirements in all stages of manufacturing.

Material Test Reports (MTRs, commonly referred to as “Mill Certifications” or “Mill Certs”) are acceptable in lieu of a BABA certification for iron and steel. If an MTR accompanies the delivery of steel or iron to a project site with an invoice or bill of lading, EPA will consider it sufficient to demonstrate compliance (equivalent to a certification letter) as long as the MTR includes the manufacturer representative’s signature in addition to the location (city and state) of the mill/foundry. It is common for MTRs to be the first letter in a “step certification” if the product is further fabricated or painted, etc., by another manufacturer.

TWDB relies on self-certification by the Applicant to document compliance with BABA and requires the Applicant to submit a Monthly Build America, Buy America Certificate of Compliance with each outlay request for funds associated within construction contracts.

Failure to submit the Monthly Build America, Buy America Certificate of Compliance could delay the release of funds.

At a minimum, BABA compliance documentation must be retained in accordance with [2 CFR 200.334](#). Sample certifications are included in **Attachment 10**.

## 1. TWDB Compliance Procedures

To be in compliance and satisfy TWDB's requirements for implementation of BABA requirements, applicants will need to do the following:

1. The Applicant shall prepare and submit any waiver request to the TWDB project manager as soon as identified. TWDB will review the request, request additional information (if needed), and forward all requests to EPA. **Any waiver to BABA requirements must be issued by the EPA.** Until a waiver is approved by EPA, all BABA requirements must be met. A checklist detailing the types of information required for a waiver to be processed, and EPA's waiver determination checklist, is located within **Attachment 8**.
2. Applicants for all applicable construction contracts funded by the TWDB **shall** include the following language in the advertisement/contract bid solicitation:  
*Bidders must comply with Section 70901 of P.L. 117-58 of the Bipartisan Infrastructure Law, 2021 (regarding the Build America, Buy America Act).*
3. Applicants **shall** include the BABA requirements in all applicable construction contracts. Sample contract language is included in **Attachment 9**.
4. Applicants **shall** include the following language on the General Notes Plan Sheet(s).  
*This project is subject to Section 70901 of P.L. 117-58 of the Bipartisan Infrastructure Law, 2021, which includes Build America, Buy America (BABA) Act requirements.*
5. The Applicant, thru the prime construction contractor, must obtain certifications from the final manufacturer that delivers the products to the worksite, vendor, or contractor asserting that all manufacturing processes occurred in the United States. For products not delivered to the project site, the Applicant, thru the prime contractor, must obtain the Final Manufacturer's certification from the supplier. The supplier must certify that the products being provided to the contractor for the project are BABA compliant and the contractor and Applicant must each retain copies of the supplier's certification. Note: EPA has determined that a comparable manufacturer's certification letter that makes reference to

the American Iron & Steel (AIS) requirements would be acceptable for iron and steel products.

6. The prime construction contractor and Applicant are each responsible for inspecting iron and steel products for any readily visible identification labels indicating the country of origin. Note: A country of origin stamp alone is not sufficient verification of compliance with BABA and should not be solely relied upon to ensure compliance.
7. The prime construction contractor and Applicant are each responsible for inspecting manufactured products and construction materials for BABA compliance, in accordance with submitted and approved documentation.
8. The prime construction contractor and Applicant will each be required to maintain a file that contains the certifications from the final manufacturers, any approved waivers, and the De Minimis log (if needed). This file must be available for review by TWDB upon request. Sample certification letters and step certification log are included in **Attachment 10**.
9. The Applicant must submit a Monthly Build America, Buy America (BABA) Certificate of Compliance with each outlay request for funds associated with construction contracts (i.e., covering construction-related invoices), attached as **Attachment 10**.
10. The Applicant shall provide a final certification, after the completion of the construction contract and prior to issuance of a Certificate of Approval by the TWDB, stating the project was completed in compliance with the BABA requirements, **Attachment 10**.

## 2. **Recommendations and Best Management Practices**

The following recommendations are not required but should be considered by the Applicant in implementation of the BABA requirements:

1. BABA requirements should be addressed in the engineering feasibility study to determine availability of BABA products and determine if any requests for waivers need to be initiated.
2. While a waiver application may be submitted at any time during the project, the Applicant should consider EPA's review schedule (15-day comment period plus review time) and MIAO's review schedule when scheduling projects. It is not recommended to request a waiver after the advertisement for bids or after start of construction.



3. Develop procedures for maintaining a record of BABA documentation.
4. Consideration of BABA compliance documentation when developing the contractor submittal procedures for shop drawings, material lists, and manufacturer certifications, etc.
5. Discuss BABA requirements during pre-bid conference and pre-construction conference, to address contractor's responsibilities, and availability of products needed to complete the project.

## ATTACHMENTS

### 1. OMB Made in America Office Guidance, M-22-11 (April 18, 2022)

(available at [www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf](http://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf))




EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

April 18, 2022

M-22-11

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Shalanda D. Young  
Director 

SUBJECT: Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure

On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act (“IIJA”), Pub. L. No. 117-58, which includes the Build America, Buy America Act (“the Act”). Pub. L. No. 117-58, §§ 70901-52. The Act strengthens Made in America Laws<sup>1</sup> and will bolster America’s industrial base, protect national security, and support high-paying jobs. The Act requires that no later than May 14, 2022—180 days after the enactment of the IIJA—the head of each covered Federal agency<sup>2</sup> shall ensure that “none of the funds made available for a Federal financial assistance program for infrastructure, including each deficient program, may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.”<sup>3</sup>

The Act affirms, consistent with Executive Order 14005, *Ensuring the Future Is Made in All of America by All of America’s Workers* (“the Executive Order”), this Administration’s priority to “use terms and conditions of Federal financial assistance awards to maximize the use of goods, products, and materials produced in, and services offered in, the United States.”<sup>4</sup>

The Act provides statutory authorities for the Made in America Office (“MIAO”) in the Office of Management and Budget (“OMB”) to maximize and enforce compliance with Made in

<sup>1</sup> “Made in America Laws” means all statutes, regulations, rules, and Executive Orders relating to Federal financial assistance awards or Federal procurement, including those that refer to “Buy America” or “Buy American,” that require, or provide a preference for, the purchase or acquisition of goods, products, or materials produced in the United States, including iron, steel, and manufactured products offered in the United States. Made in America Laws include laws requiring domestic preference for maritime transport, including the Merchant Marine Act of 1920 (Pub. L. No. 66-261), also known as the Jones Act. Exec. Order No. 14,005, 86 Fed. Reg. 7475, § 2(b) (Jan. 28, 2021), available at <https://www.federalregister.gov/documents/2021/01/28/2021-02038/ensuring-the-future-is-made-in-all-of-america-by-all-of-america-workers>. Made in America Laws also include laws that give preference to Indian-owned and -controlled businesses, such as the Buy Indian Act (25 U.S.C. 47), that produce items in the United States.

<sup>2</sup> For the purposes of this guidance, the terms “Federal agency” and “agency” mean any authority of the United States that is an “agency” (as defined in section 3502 of title 44, United States Code), other than an independent regulatory agency (as defined in that section). IIJA, § 70912(3).

<sup>3</sup> IIJA, § 70914(a).

<sup>4</sup> Exec. Order No. 14,005 (see footnote 1).

## 2. OMB Build America, Buy America Factsheet and FAQs for Award Recipients (July 2022)

(Available at [www.whitehouse.gov/wp-content/uploads/2022/07/Build-America-Buy-America-Factsheet-and-FAQs-for-Award-Recipients.pdf](http://www.whitehouse.gov/wp-content/uploads/2022/07/Build-America-Buy-America-Factsheet-and-FAQs-for-Award-Recipients.pdf))



OFFICE OF MANAGEMENT AND BUDGET  
MADE IN AMERICA OFFICE  
WASHINGTON, D.C. 20502

### What Is Build America, Buy America?

When Congress passed the Bipartisan Infrastructure Law—also known as the Infrastructure Investment and Jobs Act—it not only made a once-in-a-generation investment in our nation’s infrastructure, it also created a historic opportunity to increase domestic manufacturing in communities across the country. With this game-changing law, we are rebuilding America’s roads, bridges and rails, expanding access to clean drinking water, ensuring every American has access to high-speed internet, tackling the climate crisis, advancing environmental justice, and investing in communities that have too often been left behind, all while maximizing the use of American iron and steel, manufactured goods and construction materials.

We are building a national network of 500,000 electric vehicle chargers across the country. We are making sure that every child—and every American—has clean water to drink. We are creating good-paying union jobs, helping to revitalize American manufacturing, and positioning the United States to lead the 21st century.

By requiring the use of Made in America content, the Build America, Buy America provisions in the Bipartisan Infrastructure Law will help stimulate private sector investments in domestic manufacturing, bolster critical supply chains, and support the creation of good-paying union jobs so that America’s workers and firms can compete and lead globally for years to come.

As we’ve learned from the pandemic, America’s critical supply chains have gaps. Manufacturers will need time to find on-shore suppliers and scale up production to meet demand. Agencies have the authority to issue waivers from Build America, Buy America requirements, but will do so judiciously—only as needed—and strategically, with an aim toward ensuring that Made in America goods will be used once firms make needed investments to expand domestic production. Waivers will be limited, targeted, and, where appropriate, conditional. They will cover specific items or specific periods of time to enable agencies, recipients, and the private market to build capacity and respond to the new conditions.

Waivers will not be an *alternative* to increasing domestic production, but a *tool* to promote investment in our domestic manufacturing base, strengthen critical supply chains, and position U.S. workers and businesses to compete and lead globally in the 21<sup>st</sup> century. Unlike in the past, Build America, Buy America waivers will not foreclose American manufacturing, but send clear market signals, creating an incentive for American firms to invest in America and create good jobs in our communities.

Importantly, Build America, Buy America applies to Federal financial assistance programs for infrastructure, *whether or not those programs received funding in the Bipartisan Infrastructure Law*. These new, across-the-board domestic content requirements present an unprecedented opportunity to support good-paying construction *and* manufacturing jobs while strengthening our industrial base and promoting American innovation for years to come.

Successful Build America, Buy America implementation will create an opportunity for a “virtuous cycle” in which infrastructure investment, critical supply chain efforts, and other Biden-Harris Administration priorities, including sustainability and equity, align and support each other.

### 3. Build America, Buy America Act Implementation Procedures for EPA Office of Water Federal Financial Assistance Programs (November 3, 2022)

(Available at [www.epa.gov/system/files/documents/2023-03/OW-BABA-Implementation-Procedures-Final-November-2022.pdf](http://www.epa.gov/system/files/documents/2023-03/OW-BABA-Implementation-Procedures-Final-November-2022.pdf))




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

OFFICE OF WATER

November 3, 2022

#### **MEMORANDUM**

**SUBJECT:** Build America, Buy America Act Implementation Procedures for EPA Office of Water Federal Financial Assistance Programs

**FROM:** Radhika Fox  
Assistant Administrator 

**TO:** EPA Regional Water Division Directors, Regions I – X  
EPA Office of Water Office Directors

#### **OVERVIEW**

The Biden-Harris Administration recognized the Nation's critical need for infrastructure investment, championing the Bipartisan Infrastructure Law (BIL), which Congress passed on November 15, 2021 (also known as the Infrastructure Investment and Jobs Act (IIJA)). The BIL will provide an unprecedented level of federal investment in water and wastewater infrastructure in communities across America.

In Title IX of the IIJA, Congress passed the Build America, Buy America (BABA) Act, which establishes strong and permanent domestic sourcing requirements across all Federal financial assistance programs for infrastructure. The U.S. Environmental Protection Agency (EPA) Office of Water is honored to help lead the implementation of these provisions and is proud of its near decade of successful implementation of the American Iron and Steel (AIS) provisions for its flagship water infrastructure programs.

This is a transformational opportunity to build a resilient supply chain and manufacturing base for critical products here in the United States that will spur investment in good-paying American manufacturing jobs and businesses. EPA's efforts to implement BABA will help cultivate the domestic manufacturing base for a wide range of products commonly used across the water sector but not currently made domestically. This will take time, and flexibility will be important to ensure that EPA can leverage critical water investments on time and on budget to protect public health and improve water quality.

## 4. Office of Land and Emergency Management Build America, Buy America FAQs (February 15, 2023)

(Available at [www.epa.gov/system/files/documents/2023-02/OLEM\\_BABA\\_FAQs\\_Final-Feb\\_15\\_2023.pdf](http://www.epa.gov/system/files/documents/2023-02/OLEM_BABA_FAQs_Final-Feb_15_2023.pdf))

### Frequently Asked Questions for Build America, Buy America Act (BABA)

#### Office of Land and Emergency Management

The following frequently asked questions (FAQs) are for federal financial assistance programs under the purview of the Environmental Protection Agency (EPA) Office of Land and Emergency Management (OLEM). Responses are based on Build America, Buy America Act (BABA)<sup>1</sup>, Office and Management and Budget (OMB) guidance<sup>2</sup>, and EPA guidance, among other resources.

The FAQs will be updated as necessary if regulations recently proposed by the Office of Management and Budget are finalized<sup>3</sup>. The FAQs are to assist federal financial assistant recipients and EPA Project Officers determine whether Build America, Buy America Act (BABA) applies to projects planned with federal funding. Recipients are encouraged to work with their EPA project officer and EPA project officers are encouraged to work with their headquarters contacts. Questions may also be submitted to [BABA-OLEM@epa.gov](mailto:BABA-OLEM@epa.gov).

OLEM programs include, but are not limited to, grants or cooperative agreements awarded pursuant to:

- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) 104(d) – Superfund Cooperative Agreements;
- CERCLA 104(k) and 128(a) Brownfields Cooperative Agreements;
- Leaking Underground Storage Tank Corrective Action Cooperative Agreements under section 9003(h) of the Solid Waste Disposal Act (SWDA);
- Solid Waste Infrastructure for Recycling (SWIFR) Grants under 42 U.S.C. 4282(a);
- Recycling Education and Outreach Grants under section 70402(b) of Public Law 117-58; and;
- Anaerobic Digester Grants under section 8001 of the SWDA.

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<sup>1</sup> Build America, Buy America Act (BABA). Pub. L. No. 117-58, §§ 70901-52

<sup>2</sup> <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>

<sup>3</sup> <https://www.federalregister.gov/documents/2023/02/09/2023-02617/guidance-for-grants-and-agreements>

## 5. Supplemental Questions and Answers for Build America, Buy America Act Implementation Procedures for EPA Office Of Water Federal Financial Assistance Programs (May 2023)

(Available at [www.epa.gov/system/files/documents/2023-05/BABA-OW-Supp-FAQ-May-2023.pdf](http://www.epa.gov/system/files/documents/2023-05/BABA-OW-Supp-FAQ-May-2023.pdf))



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

OFFICE OF WATER

### MEMORANDUM

**SUBJECT:** Supplemental Questions and Answers for Build America, Buy America Act Implementation Procedures for Office of Water Federal Financial Assistance Programs

### OVERVIEW

Subsequent to issuing the Build America, Buy America Act Implementation Procedures for Office of Water Federal Financial Assistance Programs (Implementation Procedures), the U.S. Environmental Protection Agency (EPA) received additional inquiries from recipients and key stakeholders. EPA is providing these supplemental questions and answers to respond to new topics brought to the agency's attention through its outreach. The Implementation Procedures, dated November 3, 2022, are available at: [www.epa.gov/system/files/documents/2022-11/OW-BABA-Implementation-Procedures-Final-November-2022.pdf](http://www.epa.gov/system/files/documents/2022-11/OW-BABA-Implementation-Procedures-Final-November-2022.pdf). Because the Implementation Procedures ended with Section 7, the supplemental questions and answers below begin with Section 8.

### QUESTIONS AND ANSWERS

#### SECTION 8: SUPPLEMENTAL TOPICS

- Q8.1: Adjustment Period Waivers. If an assistance recipient covered by the Temporary Public Interest Waiver for Selected EPA Funding Programs was awarded EPA funding for an infrastructure project on or after May 14, 2022, but before the six-month adjustment period waiver was approved, would the project be subject to Build America, Buy America Act (BABA) requirements?
  - A8.1: It depends on the timing of expenditures. The project is covered by the waiver if the assistance recipient of EPA funding for the project did not expend EPA funds (purchased BABA covered products) prior to waiver approval, provided it meets the terms of the waiver. The project is not covered if an assistance recipient expended these funds prior to the waiver approval.
- Q8.2: Product Coverage. Are products and materials that purposefully decay or decompose (such as biodegradable coir material used for erosion control) considered permanently affixed items that are subject to the BABA requirements?

## 6. OMB Made in America Office Guidance, M-24-02 (November 13, 2023)

(Available at [www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf](http://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf))



THE DIRECTOR

EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

October 25, 2023

M-24-02

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Shalanda D. Young *Shalanda D. Young*

SUBJECT: Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure

This memorandum provides supplemental implementation guidance to Federal agencies on: (1) the application of a Buy America preference<sup>1</sup> to Federal financial assistance programs for infrastructure; and (2) the process for waiving such a Buy America preference — including the circumstances under which waivers may be justified as consistent with applicable law and policy.<sup>2</sup> This memorandum rescinds and replaces Office of Management and Budget (OMB) Memorandum M-22-11. In addition, this memorandum removes direct conflicts between the earlier Memorandum M-22-11 and subsequent guidance issued by OMB in part 184 of Title 2 of the Code of Federal Regulations (“CFR”).<sup>3</sup> This memorandum also provides updated guidance on a limited number of topics — including the waiver process — which modifies earlier guidance provided by OMB in Memorandum M-22-11. To the extent that any guidance provided in this memorandum conflicts with guidance in 2 CFR part 184, the guidance in part 184 prevails.

On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act (“IIJA”), Pub. L. No. 117-58, which includes the Build America, Buy America Act (“BABA”). Pub. L. No. 117-58, §§ 70901-27. BABA strengthens Buy America preferences associated with Federal financial assistance for infrastructure and will bolster America’s industrial base, protect national security, and support high-paying jobs. BABA requires that the head of each covered Federal agency<sup>4</sup> must ensure that none of the funds made available for a Federal financial assistance program for infrastructure are obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.<sup>5</sup>

BABA affirms, consistent with Executive Order 14005, *Ensuring the Future Is Made in All of America by All of America’s Workers* (“the Executive Order”), this Administration’s priority to

<sup>1</sup> 2 CFR 184.3.

<sup>2</sup> 2 CFR 184.7; Executive Order 14005, “Ensuring the Future Is Made in All of America by All of America’s Workers,” 86 FR 7475 (Jan. 28, 2021).

<sup>3</sup> 88 FR 57750 (Aug. 23, 2023).

<sup>4</sup> For the purposes of this guidance, the terms “Federal agency” and “agency” mean any authority of the United States that is an “agency” (as defined in section 3502 of title 44, United States Code), other than an independent regulatory agency (as defined in that section). IIJA, § 70912(3).

<sup>5</sup> IIJA, § 70914(a).

## 7. EPA Approved Waivers

a. De Minimis Waiver pursuant to Section 70914(a) of PL 117-58 (Oct. 21, 2022)  
(Available at [www.epa.gov/system/files/documents/2022-10/EPA%20BABA%20De%20Minimis%20Waiver%20Final%20Oct%202022.pdf](http://www.epa.gov/system/files/documents/2022-10/EPA%20BABA%20De%20Minimis%20Waiver%20Final%20Oct%202022.pdf))



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

OCT 21 2022

THE ADMINISTRATOR

### DECISION MEMORANDUM

**SUBJECT:** Public Interest: *De Minimis* General Applicability Waiver of Section 70914(a) of P.L. 117-58, Build America, Buy America Act, 2021 for U.S. Environmental Protection Agency Financial Assistance Awards and Procurements

**FROM:** Michael S. Regan

Handwritten signature of Michael S. Regan in black ink.

#### Introduction

Congress passed, and the President signed in November 2021 the Infrastructure Investment and Jobs Act, which included the Build America, Buy America Act. This is a transformational opportunity to build a resilient supply chain and manufacturing base for critical products here in the United States that will catalyze new and long-term investment in good-paying American manufacturing jobs and businesses. Consistent with the policy direction of Executive Order 14005: Ensuring the Future is Made in All of America by All of America's Workers, section 70914 of the Infrastructure Investment and Jobs Act establishes governmentwide Buy America conditions on all federal financial assistance programs and the projects funded through federal financial assistance funded after May 14, 2022.

The U.S. Environmental Protection Agency remains committed to implementing Build America, Buy America to cultivate the domestic manufacturing base for a range of products. Products that qualify for a *de minimis* waiver cumulatively may comprise no more than a total of five percent of the total project cost. This waiver is not additive with the existing American Iron and Steel national *de minimis* waiver. The EPA's infrastructure programs vary widely from small community projects costing thousands of dollars up to large billion-dollar regional infrastructure projects. The EPA solicited public comment on including a dollar cap per project. The EPA received no public comments supporting including a cap. Based on an assessment of agency infrastructure projects, many larger projects in a variety of covered infrastructure programs have such significant material costs that a dollar cap would not provide the flexibility intended by the *de minimis* waiver. After consideration of the public comments received, the EPA is not including a dollar cap for its waiver.

#### Build America, Buy America *De Minimis* Waiver

The Office of Management and Budget's April 18, 2022, memorandum, "Initial Implementation Guidance on Application of Buy American Preference in Federal Financial Assistance Programs for Infrastructure" (M-22-11) encourages agencies to consider whether a general applicability public interest waiver should apply to infrastructure project purchases below a *de minimis* threshold to reduce the administrative burden for recipients and agencies. OMB directs agencies to ensure that recipients



- b. Small Projects Wavier pursuant to Section 70914(a) of PL 117-58 (Sep. 26, 2022)  
(Available at [www.epa.gov/system/files/documents/2022-09/Small%20Proj%20Gen%20App%20Waiver%20BABA%20EPA.pdf](http://www.epa.gov/system/files/documents/2022-09/Small%20Proj%20Gen%20App%20Waiver%20BABA%20EPA.pdf))



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

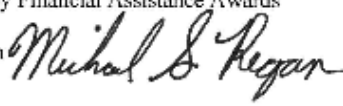
WASHINGTON, D.C. 20460

SEP 26 2022

THE ADMINISTRATOR

**DECISION MEMORANDUM**

**SUBJECT:** Public Interest: Small Project General Applicability Waiver of Section 70914(a) of P.L. 117-58, Build America, Buy America Act, 2021 for U.S. Environmental Protection Agency Financial Assistance Awards

**FROM:** Michael S. Regan 

Introduction

In November 2021 Congress passed, and the President signed the Infrastructure Investment and Jobs Act, which included the Build America, Buy America Act. This is a transformational opportunity to build a resilient supply chain and manufacturing base for critical products here in the United States and that will catalyze new and long-term investment in good-paying American manufacturing jobs and businesses. Consistent with the policy direction of Executive Order 14005: Ensuring the Future is Made in All of America by All of America's Workers, section 70914 of the IJA establishes governmentwide Buy America conditions on all federally funded infrastructure projects funded after May 14, 2022.

The U.S. Environmental Protection Agency remains committed to implementing Build America, Buy America to cultivate the domestic manufacturing base for a range of products. This waiver allows the EPA's state, local, tribal and nonprofit recipients to manage their federally funded activities more efficiently. For the purposes of this general applicability waiver, the EPA will include small projects, where assistance agreements or subawards under assistant agreements are less than \$250,000.

Build America, Buy America Small-Projects Waiver

The Office of Management and Budget's April 18, 2022, memorandum, "Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure" (M-22-11), encourages agencies to consider whether it is in the public interest to waive application of a Buy America preference to awards below the Simplified Acquisition Threshold. The EPA has identified a need for such a waiver in the initial years after enactment of the Infrastructure Investment and Jobs Act, but the agency anticipates that the waiver may be phased out as the EPA develops more efficient waiver review capabilities.

c. Amended Adjustment Period Wavier pursuant to Section 70914(a) of PL 117-58 (Nov. 13, 2023)

(Available at [www.epa.gov/system/files/documents/2023-11/epa-amend-srf-design-planning-waiver2.pdf](http://www.epa.gov/system/files/documents/2023-11/epa-amend-srf-design-planning-waiver2.pdf))



**ASSISTANT ADMINISTRATOR FOR WATER**

WASHINGTON, D.C. 20460

November 13, 2023

**DECISION MEMORANDUM**

**SUBJECT:** Amended Public Interest Waiver of Section 70914(a) of P.L. 117-58, Build America, Buy America Act, 2021 for State Revolving Fund and Water Infrastructure Projects that Initiated Design Planning prior to May 14, 2022

**FROM:** Radhika Fox

A handwritten signature in blue ink, appearing to be "R. Fox", is written over the name "Radhika Fox".

**Introduction**

The nation's water infrastructure is decades old, with some systems tracing their construction back a century. Over the past 30 years, investment in water infrastructure has plummeted, leaving communities with pipes, treatment plants, and pumps at the end of their lifespans. Cities, suburbs, and rural areas desperately need to upgrade and build new infrastructure but doing so can lead to rate increases and make water unaffordable or inaccessible for the most vulnerable communities. With the need for such investment apparent, the Biden-Harris Administration championed, and Congress passed the *Bipartisan Infrastructure Law* (also known as the *Infrastructure Investment and Jobs Act*), which President Biden signed on November 15, 2021. The BIL will provide an unprecedented level of federal investment in water infrastructure in communities, including disadvantaged communities, across America, with broad eligibilities for drinking water and clean water projects through the State Revolving Funds.

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. The U.S. Environmental Protection Agency is honored to play a leadership role in implementing these provisions and is proud of its nearly decade of successful implementation of American Iron and Steel provisions in its State Revolving Fund programs. Through these efforts, the EPA will support efforts to catalyze domestic manufacturing, resilient supply chains, and good jobs – while successfully delivering a wide range of infrastructure projects.

This is a transformational opportunity to build a resilient supply chain and manufacturing base for critical products here in the United States that will catalyze investment in good-paying American manufacturing jobs and businesses. The EPA's efforts to implement BABA will help cultivate the domestic manufacturing base for a wide range of products commonly used across the water sector but not made domestically. This will take time, and flexibility will be important to ensure that the agency, states, and the water sector can leverage water investments on time and on budget.

d. Adjustment Period Waiver pursuant to Section 70914(a) of PL 117-58 (Sep. 2, 2022)  
(Available at [www.epa.gov/system/files/documents/2022-09/EPA%20-%20SRF%20-%20Final%20Waiver%20-%20Adjustment%20Period\\_September%202022%20-%20Signed.pdf](http://www.epa.gov/system/files/documents/2022-09/EPA%20-%20SRF%20-%20Final%20Waiver%20-%20Adjustment%20Period_September%202022%20-%20Signed.pdf))



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

OFFICE OF WATER

September 2, 2022

**DECISION MEMORANDUM**

**SUBJECT:** Adjustment Period Waiver of Section 70914(a) of P.L. 117-58, Build America, Buy America Act, 2021 for SRF Projects that have Initiated Design Planning

**FROM:** Radhika Fox  
Assistant Administrator

A handwritten signature in black ink, appearing to be "R. Fox", with a horizontal line extending to the right.

**Introduction**

The nation's water infrastructure is decades old, with some systems tracing their construction back a century. Over the past 30 years, investment in water infrastructure has plummeted, leaving communities with pipes, treatment plants, and pumps at the end of their lifespans. Cities, suburbs, and rural areas desperately need to upgrade and build new infrastructure but doing so can lead to rate increases and make water unaffordable or inaccessible for the most vulnerable communities. With the need for such investment apparent, the Biden-Harris Administration championed, and Congress passed the Bipartisan Infrastructure Law (BIL, also known as the Infrastructure Investment and Jobs Act), which President Biden signed on November 15, 2021. The BIL will provide an unprecedented level of federal investment in water infrastructure in communities, including disadvantaged communities, across America, with broad eligibilities for drinking water and clean water projects through the State Revolving Funds (SRF).

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. The U.S. Environmental Protection Agency (EPA) is honored to play a leadership role in implementing these provisions and is proud of its nearly decade of successful implementation of American Iron and Steel provisions in its SRF programs. Through these efforts, EPA will support efforts to catalyze domestic manufacturing, resilient supply chains, and good jobs – while successfully delivering a wide range of infrastructure projects.

This is a transformational opportunity to build a resilient supply chain and manufacturing base for critical products here in the United States that will catalyze investment in good-paying American manufacturing jobs and businesses. EPA's efforts to implement BABA will help cultivate the domestic manufacturing base for a wide range of products commonly used across the water sector but not made domestically. This will take time, and flexibility will be important to ensure that the Agency, states, and the water sector can leverage water investments on time and on budget.

- e. Program Waiver pursuant to Section 70914(a) of PL 117-58 (Jun. 22, 2022)  
(Available at [www.epa.gov/system/files/documents/2022-06/EPA%20-%20WIFIA%20Public%20Interest%20Waiver%20-%20Design%20Planning\\_22JUN2022.pdf](http://www.epa.gov/system/files/documents/2022-06/EPA%20-%20WIFIA%20Public%20Interest%20Waiver%20-%20Design%20Planning_22JUN2022.pdf))




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

OFFICE OF WATER

June 22, 2022

**DECISION MEMORANDUM**

**SUBJECT:** Program Waiver of Section 70914(a) of P.L. 117-58, Buy America, Build America Act, 2021 for Projects in Design Planning

**FROM:** Radhika Fox  
Assistant Administrator 

**Introduction**

The nation's water infrastructure is decades old, with some systems tracing their construction back a century. Over the past 30 years, the federal government's investment in water infrastructure has plummeted, leaving us with pipes, water plants, and pumps at the end of their lifespans. Water utilities are stuck between a rock and a hard place. Cities desperately need to upgrade infrastructure but doing that alone could lead to rate increases and make water inaccessible for our most vulnerable neighbors.

With the need for such investment apparent, Congress passed the Build America, Buy America Act (BABAA) concurrently with the Infrastructure Investment and Jobs Act (IIJA) in November 2021. This is a transformational opportunity to build a resilient supply chain and manufacturing base for critical products here in the United States and will catalyze new and long-term investment in good-paying American manufacturing jobs and businesses. The U.S. Environmental Protection Agency's (EPA) efforts to implement BABAA will help cultivate the domestic manufacturing base for a wide range of products that we know are commonly used across the water sector but not made domestically. EPA, and specifically the Office of Water, is in a strong position to implement BABAA as smoothly as possible, building on a very successful and sophisticated near decade of implementing the American Iron and Steel (AIS) requirements. This will take time, and flexibility will be important to ensure that we can leverage water investments on time and on budget.

**Program Waiver**

EPA hereby grants a program waiver of the requirements of Section 70914(a) of the IIJA (BABAA), pursuant to Section 70914(b)(1) (public interest waiver), for eligible projects to be financed by the Water Infrastructure Finance and Innovation Act (WIFIA) program that have initiated project design planning prior to May 14, 2022, the effective date of BABAA requirements as OMB's guidance includes WIFIA as a program covered by BABAA.

- f. Minor (Ferrous) Components of Iron and Steel Products Waiver pursuant to Section 70914(a) of PL 117-58 (Apr. 11, 2023)

(Available at [www.epa.gov/system/files/documents/2023-04/BABA%20Minor%20Components%20Waiver.pdf](https://www.epa.gov/system/files/documents/2023-04/BABA%20Minor%20Components%20Waiver.pdf))



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

APR 11 2023

THE ADMINISTRATOR

**DECISION MEMORANDUM**

**SUBJECT:** Public Interest: Minor (Ferrous) Components of Iron and Steel Products General Applicability Waiver of Section 70914(a) of P.L. 117-58, Build America, Buy America Act, 2021 for U.S. Environmental Protection Agency Financial Assistance Awards

**FROM:** Michael S. Regan

Handwritten signature of Michael S. Regan in black ink.

**ISSUE**

Congress passed and the President signed in November 2021 the Infrastructure Investment and Jobs Act, which included the Build America, Buy America Act. This is a transformational opportunity to build a resilient supply chain and manufacturing base for critical products here in the United States that will catalyze new and long-term investment in good-paying American manufacturing jobs and businesses. Consistent with the policy direction of Executive Order 14005: Ensuring the Future is Made in All of America by All of America's Workers, section 70914 of Infrastructure Investment and Jobs Act establishes governmentwide Buy America conditions on all federally funded infrastructure projects funded after May 14, 2022.

The U.S. Environmental Protection Agency remains committed to implementing Build America, Buy America to cultivate the domestic manufacturing base for a range of products. This waiver allows the EPA's assistance recipients to manage their federally funded activities more efficiently. For the purposes of this general applicability waiver, for only the iron and steel products covered by Build America, Buy America, the EPA would allow up to five percent of the total material cost of a product to include nondomestically produced miscellaneous minor iron or steel components without further need for a product-specific waiver.

This waiver for manufacturers differs from the EPA's *De Minimis* waiver.<sup>1</sup> The EPA's *De Minimis* waiver reduces administrative burden on assistance recipients by waiving entire products that in total are no more than five percent of a total project cost. This Minor (Ferrous) Components of Iron and Steel Products waiver will reduce administrative burden on manufacturers that seek to ensure that their iron and steel products comply with Build America, Buy America but may have small iron or steel components within their product that are nondomestic or of unknown origin.

<sup>1</sup> <https://www.epa.gov/system/files/documents/2022-10/EPA%20BABA%20De%20Minimis%20Waiver%20Final%20Oct%202022.pdf>

## **8. EPA Waiver Request**

Included in this attachment are the following:

- a) Build America, Buy America (BABA) Act Waiver Request
- b) Review Checklist for Waiver Request

### **Build America, Buy America (BABA) Act Waiver Request**

A waiver from the Build America, Buy America (BABA) Act requirements of the Bipartisan Infrastructure Law of 2021 is requested for the following reason(s):

- Products incorporated into the project cumulatively comprise no more than five percent (5%) of the total project cost.
- EPA funding is less than \$250,000.
- Project design planning was initiated prior to May 14, 2022.
- The BABA requirements increase the overall project cost more than 25 percent.
- Products are unavailable within a reasonable timeframe.

Detailed supporting documentation for this request is enclosed. No materials will be installed prior to approval of this waiver request by EPA. Until this waiver is approved, it is understood that the project will abide by BABA requirements.

\_\_\_\_\_ Additional sheets attached.

This waiver request relates to a proposed contract between \_\_\_\_\_ and  
(contractor)

\_\_\_\_\_ in conjunction with \_\_\_\_\_  
(owner) (project)

to be funded through the TWDB.

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Name and Title of Signer (please print)

### Review Checklist for Waiver Request

The purpose of this checklist is to help ensure that all appropriate and necessary information is submitted to EPA. EPA recommends that States review requests carefully and provide all appropriate information to EPA. This checklist is for informational purposes only and does not need to be included as part of a waiver application.

Review Items	Provided?	Notes
<b>General Information for all Waivers</b>		
Funding recipient name		
Project Name, Funding Number, and Location		
Project Summary, Schedule, and Current Status		
Total Project Cost, Amount of funding from all sources		
Name and description of waiver being requested and justification		
Signature of Authorized Representative of Applicant		
Anticipated impact if waiver request is denied		
<b>De Minimis General Applicability Waiver</b>		
List of <i>de minimis</i> materials and/or products, their quantity, and their individual cost (include source of cost information)		
Detailed budge showing total project construction cost		
Calculation showing total cost of <i>de minimis</i> items as a percentage of total project cost is no more than five percent (5%)		
<b>Small Project General Applicability Waiver</b>		
Request for waiver showing the amount of funding from EPA as below the \$250,000 threshold		
<b>Adjustment Period Waiver</b>		
Documentation showing project design planning was initiated prior to May 14, 2022:		
1. Submitted preliminary engineering report, or equivalent (to State or Applicant)		
2. Issued a Request for Proposal (RFP) or execution of a contract for design or engineering serves (regardless of funding sources)		
3. Execution of an SRF funding agreement that includes design		
4. For project designed by Applicant, documentation of design initiation		
5. Solicitation of construction contract bids.		
6. Submitted plans and specifications to state authority		
7. Public referendum or public meeting held regarding proposed project.		
8. Evidence of new bonds passed, or another new funding backing secured for project.		



Review Items	Provided?	Notes
9. Other (evidence showing the project is significantly far enough along in the planning process that complying with BABA would be a detriment to the project proceeding may qualify the project for the waiver subject to EPA approval.		
<b>Cost Waiver</b>		
Description of the foreign and domestic materials and/or products involved in the waiver request.		
Detailed project cost estimates or bid tabulations showing the overall project cost increases more than 25 percent with BABA		
Quantities and unit costs of products and/or materials		
Cost estimates from other domestic manufacturers or suppliers confirming the relative cost of the highest cost products and/or materials.		
A certification that there was a good faith effort to solicit bids for domestic products supported by documentation such as requests for proposals, contracts, and communications with suppliers.		
List of manufacturers and suppliers involved and their contact information.		
Demonstration of good faith efforts to obtain American made products or materials.		
All engineering specifications and project design considerations relevant to the product(s) in question.		
<b>Product Non-Availability Waiver</b>		
Description of the foreign and domestic materials and/or products involved in the waiver request.		
Documentation from a reasonable number of manufacturers and/or suppliers indicating the timeframe for delivery of both domestic and proposed foreign products and/or materials and the impact of both on the project schedule. project cost estimates or bid tabulations showing the overall project cost increases more than 25 percent with BABA requirements.		
Documentation regarding investigations into using alternative products and/or materials that are American made.		
Letter from prime contractor confirming the non-availability of American made products and/or materials.		
All engineering specifications and project design considerations relevant to the product(s) in question.		
The date any products will be needed on site in order to avoid significant project schedule disruptions.		
Other pertinent information such as the date plans and specifications were submitted to the state, the date of construction initiation, expected date of project completion, any special considerations such as local zoning and building ordinances, seismic requirements, or noise or odor control requirements.		
Demonstration of good faith efforts to obtain American made products or materials.		

<b>Review Items</b>	<b>Provided?</b>	<b>Notes</b>
Quantities and unit costs of products and/or materials involved.		
List of manufacturers and suppliers involved and their contact information.		

## 9. Contract Language

### a. TWDB Loan Agreement Language

*Note that “Participant” will be replaced with the name of the entity receiving the financing.*

ALL FEDERAL FINANCIAL INFRASTRUCTURE ASSISTANCE AGREEMENTS MUST HAVE A CLAUSE REQUIRING COMPLIANCE WITH THE BABA REQUIREMENTS. THIS IS AN EXAMPLE OF WHAT COULD BE INCLUDED IN AN ASSISTANCE AGREEMENT (E.G., SRF LOAN AGREEMENT). EPA MAKES NO CLAIMS REGARDING THE LEGAL SUFFICIENCY OF THIS CLAUSE WITH RESPECT TO STATE LAW:

Comply with all federal requirements applicable to the assistance received (including those imposed by the Infrastructure Investment and Jobs Act (“IIJA”), Public Law No. 117-58) which the Participant understands includes, but is not limited to, the following requirements: that all of the iron and steel, manufactured products, and construction materials used in the Project are to be produced in the United States (“Build America, Buy America Requirements”) unless (i) the Participant has requested and obtained a waiver from the cognizant Agency<sup>1</sup> pertaining to the Project or the Project is otherwise covered by a general applicability waiver; or (ii) all of the contributing Agencies have otherwise advised the Participant in writing that the Build America, Buy America Requirements are not applicable to the Project.

Comply with all record keeping and reporting requirements under all applicable legal authorities, including any reports required by the funding authority (such as EPA and/or a state), such as performance indicators of program deliverables, information on costs and project progress. The Participant understands that (i) each contract and subcontract related to the Project is subject to audit by appropriate federal and state entities and (ii) failure to comply with the applicable legal requirements and this Agreement may result in a default hereunder that results in a repayment of the assistance agreement in advance of the maturity of the Bonds, termination and/or repayment of grants, cooperative agreements, direct assistance or other types of financial assistance, and/or other remedial actions.

<sup>1</sup>From OMB Guidance M-22-11: To avoid a need for duplicative waiver requests from entities that receive funding for one infrastructure project through multiple Federal agencies, the Federal agency contributing the greatest amount of Federal funds for the project should be considered the “Cognizant Agency for Made in America” and should take responsibility for coordinating with the other Federal awarding agencies. Such coordination will provide uniform waiver criteria and adjudication processes, minimize duplicative efforts among Federal agencies, and reduce burdens on recipients. The Cognizant Agency for Made in America shall be responsible for consulting with the other Federal awarding agencies, publicizing the proposed joint waiver, and submitting the proposed joint waiver for review to MIAO.

b. Required Language in Advertisement for Bid

*The following language is required to be included with the Advertisement for Bids.*

Bidders must comply with Section 70901 of P. L. 117-58 of the Bipartisan Infrastructure Law, 2021 (regarding the Build America, Buy America Act).

c. Construction Contract Language

*The following language must be included in all construction and purchase contracts associated with applicable TWDB programs. All construction contracts must have a clause requiring compliance with BABA requirements.*

THIS IS AN EXAMPLE OF WHAT COULD BE INCLUDED IN A PROJECT'S CONSTRUCTION CONTRACT. EPA 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 the Owner ("Purchaser") that it understands the goods and services under this Agreement are being funded with federal monies made available by the Clean Water State Revolving Fund or Drinking Water State Revolving Fund that have statutory requirements commonly known as "Build America, Buy America;" that requires all of the iron and steel, manufactured products, and construction materials used in the project to be produced in the United States ("Build America, Buy America Requirements") including iron and steel, manufactured products, and construction materials provided by the Contractor pursuant to this Agreement. The Contractor hereby represents and warrants to and for the benefit of the Owner (a) the Contractor has reviewed and understands the Build America, Buy America Requirements, (b) all of the iron and steel, manufactured products, and construction materials used in the project will be and/or have been produced in the United States in a manner that complies with the Build America, Buy America Requirements, unless a waiver of the Requirements 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 Build America, Buy America Requirements, 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, or any damages owed to the Owner).

d. Pay Application Language for Consulting Engineers and Construction Firms

*EPA also recommends the following statement for consulting engineers and construction firms regarding pay applications during construction:*

By signing the payment application and recommending payment, the Contractor certifies they have reviewed documentation for all products and materials submitted for payment, and the certifications are sufficient to demonstrate compliance with Build America, Buy America Act requirements.

## 10. Sample Certifications

BABA Certification must document the location of the manufacturing process involved with the production of steel and iron materials, manufactured products, and construction materials.

Each handler (supplier, fabricator, manufacturer, processor, etc.) of the products and their step in the process must be recorded and certified as domestically performed.

The applicant may utilize either:

- (1) a Final Manufacturer/Supplier Certification process, in which the final manufacturer/supplier that delivers the product to the worksite, vendor, or contractor, may provide a certification identifying all the product(s) being supplied to the project, a statement attesting that the products supplied are compliant with BABA requirements, and location of the manufacturing being certified (city and state); or
- (2) a Step Certification process in which each handler of the product provides a separate certification letter certifying that their step in the process was domestically performed.

Included in this attachment are the following:

- a) Sample Certification letter
- b) Step Certification log
- c) Monthly Build America, Buy America (BABA) Act Certificate (TWDB-1110A)
- d) Final Certification

a. Sample Certification Letter

The following information is provided as a sample letter of certification for BABA compliance for manufactured products or iron and steel products. Documentation must be provided on company letterhead. The Final Manufacturer's Certification should list everyone who has handled the product, starting with the processor of the raw materials through the contractor who installs the final product.

*Date*

*Company Name*  
*Company Address*  
*City, State Zip*

*Subject: Build America, Buy America Certification for Project (XXXXX)*

*I, (company representative), certify that the following products and/or materials shipped/provided to the project site below are in full compliance with the Build America, Buy America requirement as mandated in P.L. 117-58, §§ 70901-52, and meets the 55 percent component test for manufactured products. (or meets 100 percent for iron and steel products)*

*Project Site location (City, State):* \_\_\_\_\_

*Project's Prime Contractor Name:* \_\_\_\_\_

*List for all Items, Products and/or Materials (Include all the predecessor manufacturing processes before the final manufacturer for each item on the list):*

*Item 1:* \_\_\_\_\_  
*Predecessor Manufacturing Process:* \_\_\_\_\_  
*Manufacturer's Name:* \_\_\_\_\_  
*Manufacturing location (City, State):* \_\_\_\_\_

*Predecessor Manufacturing Process:* \_\_\_\_\_  
*Manufacturer's Name:* \_\_\_\_\_  
*Manufacturing location (City, State):* \_\_\_\_\_

*Item 2:* \_\_\_\_\_  
*Predecessor Manufacturing Process:* \_\_\_\_\_  
*Manufacturer's Name:* \_\_\_\_\_  
*Manufacturing location (City, State):* \_\_\_\_\_

*Predecessor Manufacturing Process:* \_\_\_\_\_  
*Manufacturer's Name:* \_\_\_\_\_



*Manufacturing location (City, State): \_\_\_\_\_*

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

*Signed by company representative*

b. Step Certification Log

A step certification is a process under which each handler (supplier, fabricator, manufacturer, processor, etc.) of the product(s) certifies that their step in the process was domestically performed. The Step Certification process requires receipt of a separate letter from every entity that handles the product, starting with the processor through the contractor who installs the final product.

**Sample Letter for Step Certification**

The following information is provided as a sample letter of step certification for BABA compliance. Documentation must be provided on company letterhead of each handler responsible for a process of the product.

*Date*

*Company Name*

*Company Address*

*City, State ZIP Code*

*Subject: Build America, Buy America Act Step Certification for Project  
(XXXXXXXXXX)*

*I, (company representative), certify that the (melting, bending, coating, galvanizing, cutting, etc.) process for (manufacturing, fabricating, etc.) the following products and/or materials shipped or provided for (project site \_\_\_\_\_ or to \_\_\_\_\_ company) is in full compliance with the Build America, Buy America requirement as mandated in P.L. 117-58, §§ 70901-52, and that the product(s) listed meets 55% component test for manufactured products (or meets 100 percent for iron and steel products).*

*Item 1: \_\_\_\_\_*

*Manufacturing location (City, State): \_\_\_\_\_*

*Item 2: \_\_\_\_\_*

*Manufacturing location (City, State): \_\_\_\_\_*

*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*

**Sample Step Certification Log**

The following information is provided as a sample log to keep track of step certification for BABA compliance. The TWDB makes no claims regarding the legality of the step certification log with respect to BABA compliance.

**Build America, Buy America (BABA)  
Step Certification Log for**

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**(Product)**

Contractor: \_\_\_\_\_  
(Name) (Item)

Supplier: \_\_\_\_\_  
(Name) (Item)

Final Manufacturer: \_\_\_\_\_  
(Name) (Item) (Process)

Predecessor Manufacturer 1: \_\_\_\_\_  
(Name) (Item) (Process)

Predecessor Manufacturer 2: \_\_\_\_\_  
(Name) (Item) (Process)

Processor (e.g., foundry): \_\_\_\_\_  
(Name) (Item) (Process)

c. Monthly Build America, Buy America (BABA) Act Certificate (TWDB-1110-A)

This form is available under the TWDB website [Program Guidance and Forms Library](#), as [TWDB-1110-A](#).

d. Final Certification

An executed final certification must be submitted by the Applicant after the completion of the construction contract and prior to issuance of a Certificate of Approval by the TWDB, stating the project was completed in compliance with BABA requirements. Documentation can also be provided on company letterhead. This form also is available under the TWDB website [Program Guidance and Forms Library](#), as [TWDB-1110-B](#).

**Final Build America, Buy America Act Certification  
Compliance Submittal by Owner (Sub-Recipient)**

**TWDB Project No.** \_\_\_\_\_

**Loan No.** \_\_\_\_\_

I, \_\_\_\_\_, \_\_\_\_\_  
(Name) (Title)

of \_\_\_\_\_ hereby certify that all iron, steel, manufactured products, and construction materials incorporated into the construction, alteration, maintenance, or repair of the subject project were in full compliance with the Build America, Buy America requirements of P.L. 117-58 Section 70901-52, or comply with waivers granted by the U.S. Environmental Protection Agency.

I understand that a false statement herein may subject me to penalties under federal and state laws relating to filing false statements and other relevant statutes.

\_\_\_\_\_  
Signature \_\_\_\_\_

\_\_\_\_\_  
Date