

NHDES Front End Documents - Section D Supplemental
Infrastructure, Investment and Jobs Act (IIJA)
Section 70914(a)
Build America, Buy America (BABA) Act
Rules, Regulations and Forms

**Section D Supplemental: Infrastructure Investment and Jobs Act Section 70914(a)
Build America, Buy America Act (BABA) Rules, Regulations and Forms**

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Pertinent Federal Acts and Provisions

The Contractor shall comply with the Build America, Buy America (BABA) requirements of the Bipartisan Infrastructure Law (BIL) also known as the Infrastructure Investment and Jobs Act (IIJA - Public Law 117-58), and subsequent laws that continue the requirement for the use of domestic iron, steel, manufactured products and construction materials in construction projects funded by Federal financial infrastructure investments obligated on or after May 14, 2022.

Links for more Information

- [Supplemental to OMB M-22-11 guidance](#) (Published by Office of Management and Budget on April 18, 2022)
- [Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure](#) (Published by United States Environmental Protection Agency on November 3, 2022)
- [Final Pre-publication Guidance](#) for 2 CFR Subtitle A, Section 184.1 – 184.8 (Published by Office of Federal Financial Management, Office of Management and Budget)
- [United States Environmental Protection Agency Build America, Buy America \(BABA\) Website](#)
- [BABA Approved National Waivers](#)

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A. Build America, Buy America (BABA) Act

Section 70914 of the Infrastructure Investment and Jobs Act (IIJA) ([Public Law 117-58](#)), and subsequent laws that continue the Build America, Buy America (BABA) requirements of Public Law 117-58 include “ Build America, Buy America” requirements for construction projects funded by a Federal financial assistance program for infrastructure, including the Clean Water and Drinking Water State Revolving Fund (SRF) programs. Under these laws, all Clean Water and Drinking Water SRF funded infrastructure projects must use iron, steel, manufactured products and construction materials that are produced in the United States. The Contractor shall comply with these BABA requirements.

Office of Management and Budget (OMB) and Environmental Protection Agency (EPA) BABA Guidance

[EPA’s Build America, Buy America Requirement](#) website includes detailed information on Build America, Buy America requirements and waivers.

The paragraphs in *italics* below are excerpts from the OMB & EPA BABA guidance available at the EPA website. Words in plain text are clarifications added by NHDES.

Application of a Buy America Preference

By May 14, 2022, agencies must ensure that all applicable programs comply with section 70914 of the Act, including by the incorporation of a Buy America preference in the terms and conditions of each award with an infrastructure project (1). Absent a waiver, all iron, steel, manufactured products, and construction materials permanently incorporated into an infrastructure project subject to the BABA requirements must be produced in the United States (2).

The Buy America preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project. Nor does a Buy America preference apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project, but are not an integral part of the structure or permanently affixed to the infrastructure project (1). For many of EPA’s Office of Water infrastructure investment programs, the vast majority of products permanently incorporated into construction, maintenance, or repair projects must comply with the BABA requirements, with the exception of select construction materials (cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives), which are specifically excepted by the BABA statute (2). The classification of an article, material, or supply as falling into one of the categories listed in the following paragraph must be made based on its status at the time it is brought to the work site for incorporation into an infrastructure project (3).

The Act requires the following Buy America preference:

- 1. Iron and Steel** - *All iron and steel used in the project **must be** produced in the United States - this means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States (1). Primarily iron or steel places constraints on the products listed in the AIS guidance in Section D. For one of the listed products to be considered subject to the BABA Iron and Steel requirements, it must be made of greater than 50% iron or steel, measured by cost. The cost should be based on the material costs.*
- 2. Manufactured Products** - *All manufactured products used in the project must be produced in the United States. This means the manufactured product was manufactured in the United States, and 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, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation (1).*

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- a. **Determining the cost of components for manufactured products** – In determining whether the cost of components for manufactured products is greater than 55 percent of the total cost of all components, use the following instructions:
- 1) For components purchased by the manufacturer, the acquisition cost, including transportation costs to the place of incorporation into the manufactured product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or
 - 2) For components manufactured by the manufacturer, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (a) of this section, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the manufactured product (3).

Q5.7: Who is responsible for documenting the 55 percent content requirement for manufactured products under BABA? What if the final manufacturer cannot trace or verify domestic origin for all components?

A5.7: The manufacturer who signs a certification letter is responsible for documenting compliance with any of the three categories of products (iron and steel, manufactured products, or construction materials). For manufactured products, BABA requires that greater than 55 percent of the total cost of all components of the manufactured product be from domestic sources. EPA recommends that the certification letter for manufactured products document whether the item passes the content test in the final product along with a statement attesting to compliance with the BABA requirements for manufactured products (2).

- 3. Construction Materials** - All construction materials used in the project must be manufactured in the United States. This means that all manufacturing processes for the construction material occurred in the United States (1).

The IJA finds that “construction materials” includes an article, material, or supply— other than an item of primarily iron or steel; a manufactured product; cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives— that is or consists primarily of following (with the standard for the material to be considered “produced in the United States”:

- a) **Non-ferrous metals:** All manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly, occurred in the United States.
- b) **Plastic and polymer-based products:** All manufacturing processes, from initial combination of constituent plastic or polymer-based inputs, or, where applicable, constituent composite materials, until the item is in its final form, occurred in the United States.
- c) **Glass:** All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States.
- d) **Fiber optic cable (including drop cable):** All manufacturing processes, from the initial ribboning (if applicable), through buffering, fiber stranding and jacketing, occurred in the United States. All manufacturing processes also include the standards for glass and optical fiber, but not for non-ferrous metals, plastic and polymer-based products, or any others.
- e) **Optical fiber:** All manufacturing processes, from the initial preform fabrication stage through the completion of the draw, occurred in the United States.
- f) **Lumber:** All manufacturing processes, from initial debarking through treatment and planing, occurred in the United States.
- g) **Drywall:** All manufacturing processes, from initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels, occurred in the United States.
- h) **Engineered wood:** All manufacturing processes from the initial combination of constituent materials until the wood product is in its final form, occurred in the United States (3).

Note: To provide clarity to item, product, and material manufacturers and processors, we note that items that consist of two or more of the listed materials that have been combined together through a manufacturing process, and items that include at least one of the listed materials combined with a material

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that is not listed through a manufacturing process, should be treated as manufactured products, rather than as construction materials (1).

B. BABA Waivers

1. General Applicability Waivers

a. De Minimis Waiver

EPA's October 21, 2022 Decision Memorandum established a Public Interest Waiver for De Minimis BABA components, further referred to as De Minimis General Applicability Waiver of Section 70914(a) of Public Law 117-58, Build America, Buy America Act, 2021 for U.S. Environmental Protection Agency Financial Assistance Awards and Procurements. The De Minimis Waiver is made part of this guidance and is available for use on this project. Contractors who wish to use this waiver must consult with the Owner when determining the items to be covered by this waiver, and shall retain and provide to the Owner relevant documentation (i.e., invoices) for those items for the Owner's project files. The Contractor shall summarize in reports to the Owner: the types and/or categories of items to which this waiver is applied; the total cost of the components covered by the waiver for each type or category (including copies of invoices). **The Contractor shall include a complete and up-to-date [De Minimis Report](#) in each application for payment.** The Contractor shall also provide the report to the Owner upon request.

De Minimis Waiver Decision - *Section 70914(b)(1) of the Infrastructure Investment and Jobs Act authorizes the Administrator to waive the requirements of Build America, Buy America if implementation would be inconsistent with the public interest. Due to the critical need to reduce the administrative burden for recipients and agencies and to ensure recipients can effectively carry out the EPA funded activity in a timely manner, it is in the public interest to waive Build America, Buy America requirements for products used in and incorporated into a project that cumulatively comprise no more than 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 will review this waiver every five years after the date on which the waiver is issued (4).*

There is no dollar cap for this waiver and the calculation basis will be total project cost. The five percent threshold can be used for any product, independent of the purpose of the project (does not need to be incidental to the project purpose as with AIS de minimis).

b. Minor Components Waiver

EPA's April 11, 2023 Decision Memorandum established a Public Interest Waiver for Minor (Ferrous) Components of Iron and Steel Products, further referred to as Minor Components General Applicability Waiver of Section 70914(a) of Public Law 117-58, Build America, Buy America Act, 2021 for U.S. Environmental Protection Agency Financial Assistance Awards and Procurements. The waiver applies only to iron and steel products subject to the Build America, Buy America Act requirements and concerns only the iron and steel (ferrous) components of an otherwise domestically manufactured iron and steel good. The Build America, Buy America Act requires that the iron and steel used in a product is melted and/or poured in the United States and all subsequent operations occur domestically. This waiver would allow 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. Like the American Iron and Steel Minor Components waiver, the EPA recommends that manufacturers acknowledge use of this Minor Components waiver when providing notice through their certification letters to document their product's compliance with the Build America, Buy America iron and steel and American Iron and Steel requirements (5).

2. National Short-Term Waivers

Q4.3: If a manufactured product is not readily available domestically, will EPA provide short-term "limited availability" product waivers?

A4.3: *EPA will address the unavailability of domestic products through the waiver process, including potential national short-term waivers for specific products, if appropriate. To the extent practicable and with the intent to maximize domestic market and supply chain development, EPA intends to address issues of broad product*

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unavailability with targeted, time-limited, and conditional waivers, as prescribed in OMB Guidance M-22-11. EPA will follow its robust and thorough product research processes (those put into place for the AIS requirements for the SRF and WIFIA programs and expanded for the new BABA requirements) to identify and determine those products for which proposed national/general applicability waivers may be appropriate (2).

3. Project Specific Waivers

a. Nonavailability Waiver

Pursuant to Section 70914(c) of the Act, the head of a Federal agency may waive the application of a Buy America preference under an infrastructure program in any case in which the head of the Federal agency finds that types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality. Before issuing a waiver, the head of the Federal agency must make publicly available on the agency's website a detailed written explanation for the proposed determination to issue the waiver and provide at least 15 days for public comment on the proposed waiver. General applicability waivers are subject to a minimum 30-day public comment period (1).

Q4.1: Who may apply for a waiver and how do you apply?

A4.1: Assistance recipients and their authorized representatives may apply for a project specific waiver. EPA does not accept waiver requests from suppliers, distributors, or manufacturers unless the assistance recipient endorses and submits the request on its own behalf to the funding authority. In the case where multiple programs are providing federal funds to the project, the assistance recipient should submit the waiver request to the cognizant program, the one providing the greatest amount of federal funds for the project. In the case of indirect federal assistance, such as the SRF programs, the state authority reviews and conveys the waiver request to EPA (2).

Project-specific waiver requests should generally include:

- (1) Brief summary of the project,*
- (2) Description and explanation of the need for the waiver for the product(s) in question,*
- (3) Brief summary of the due diligence conducted in search of domestic alternatives (which could include correspondence between assistance recipient and supplier/distributors),*
- (4) Quantity and materials of the product(s) in question,*
- (5) all engineering specifications and project design considerations relevant to the product(s) in question,*
- (6) the approximate unit cost of items (both foreign and domestic) in addition to an estimated cost of the materials and overall project,*
- (7) the date any products will be needed on site in order to avoid significant project schedule disruptions, and*
- (8) any other pertinent information relevant to EPA's consideration of the waiver (e.g., if relevant for SRF projects: whether the project is designated as an equivalency project, the date the 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) (2).*

Q4.6: How can assistance recipients and construction contractors address product delivery delays?

A4.6: Assistance recipients should reasonably plan for material procurement to account for known potential supply chain issues or extended lead times and shall notify the funding authority well in advance of the issues so that prompt attention can be given to explore options. Where extended lead times for compliant products are impacting project schedules and may significantly impact construction progress, timely communication with the funding agency is important. For products that are unavailable within a reasonable timeframe to meet the objectives and schedule of a project, EPA may consider a non-availability waiver with adequate justification. An assistance recipient would need to apply for the waiver and contact its funding authority (such as EPA and/or a state) to initiate the waiver process (2).

Q4.2: Can an assistance recipient request a waiver based on a specification written for a specific brand or model of product (that is, a specification that names a branded item or model)?

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A4.2: In most cases, performance-based specifications are expected and required for the majority of infrastructure projects funded by EPA's financial assistance programs. In rare cases where "branded" or product-specific sourcing may be included in project specifications, it is suggested that the specifications include the item in question (that is, not simply a catalog page, but also materials of construction, sizing, quantities, and applicable engineering performance design characteristics for the project, etc.) in addition to the standard phrase "or equal." For the purposes of product alternative market research, EPA will evaluate the BABA requirements based on performance-based engineering specifications for the product(s) in question. If the project's specifications do not include performance-based specifications, or at least an "or equal" designation, EPA will base its research on an "or equal" designation using best professional judgment to the extent practicable (2).

C. BABA Compliance

1. Certifications

The Contractor, through its subcontractors, suppliers and manufacturers shall provide to the Owner written certification that all BABA materials provided for the project comply with the BABA requirements of Section 70914 of the Infrastructure Investment and Jobs Act (IIJA) ([Public Law 117-58](#)) as applicable for the SRF programs. The manufacturers have responsibility to provide adequate and accurate documentation of the products manufactured. Manufacturer certification letters must include the following:

- Manufacturer name;
- SRF construction project name and location;
- A list of specific product(s) delivered to the project site;
- A statement that the product is in compliance with the Buy America, Build America requirement of the Infrastructure Investment and Jobs Act (IIJA) as mandated by EPA's SRF programs;
- The location of the foundry/mill/factory where the product was manufactured (City and State); and
- A signature by a manufacturer's responsible party.

EPA OW BABA Implementation Procedures dated November of 2022 contains additional guidance on manufacturer certifications as follows:

Q5.3: How can product compliance with the BABA requirements be demonstrated?

A5.3: Assistance recipients and their representatives should ensure that the products delivered to the construction site are accompanied by proper documentation that demonstrate compliance with the law and be made available to the funding authority upon request. The documentation may be received and maintained in hard copy, electronically, or could be embedded in construction management software. The use of a signed certification letter for the project is the most direct and effective form of compliance documentation for ensuring products used on site are BABA-compliant prior to their installation; however, other forms of documentation are also acceptable as long as collectively, the following can be demonstrated:

- (1) *Documentation linked to the project. For example, this can be in the form of the project name, project location, contract number, or project number.*
- (2) *Documentation linked to the product used on the project. For example, description of product(s) (simple explanation sufficient to identify the product(s)), or an attached (or electronic link to) purchase order, invoice, or bill of lading.*
- (3) *Documentation includes statement attesting that the products supplied to the assistance recipient are compliant with BABA requirement. Reference to the Infrastructure Investment and Jobs Act ("IIJA") or the Bipartisan Infrastructure Law (BIL) are also acceptable. For iron and steel items under BABA, references to the American Iron and Steel (AIS) requirements are also acceptable and reciprocal with BABA for such items.*
- (4) *Documentation that manufacturing occurred in the United States, which could include, for example, the location(s) of manufacturing for each manufacturing step that is being certified. It is acceptable for manufactured products to note a single point of manufacturing, documenting that the final point of manufacturing is in the United States. Note that each BABA category may require different determinations for compliance.*

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- (5) *Signature of company representative (on company letterhead and signature can be electronic). The signatory of the certifying statement affirms their knowledge of the manufacturing processes for the referenced product(s) and attests that the product meets the BABA requirements (2).*

2. Installation

All iron and steel, manufactured products, and construction materials, as defined herein, shall be produced in the United States in accordance with the Build America, Buy America requirements of the Infrastructure Investment and Jobs Act as mandated by the Clean Water and Drinking Water State Revolving Fund programs. If a potentially non-compliant product is installed in the permanent work and not eligible for a waiver, the Contractor will be required to remove the non-domestic item from the project.

3. Question and Answers (provided for clarification purposes)

a) Q2.4: Which category will valves fall under for BABA? Will it differ from the American Iron and Steel (AIS) requirements?

A2.4: For programs that are subject to BABA and AIS (SRF, WIFIA, and Community Project Funding), projects using valves should classify them as iron and steel products under BABA as long as their material cost is made up of more than 50 percent iron and/or steel. Valves with 50 percent or less iron and/or steel by material cost would be considered manufactured products under the BABA requirements. In accordance with OMB Guidance M-22-11, an article, material, or supply should be classified into only one of the three categories: iron and steel, manufactured products, or construction materials. Under the AIS requirements, all valves made primarily of iron and steel (that is, those with iron and/or steel material cost greater than 50 percent) must comply with the AIS requirements. For BABA, EPA interprets Section IV of OMB Guidance M-22-11 to mean that iron and steel products are those items that are primarily iron and steel, the same as for the AIS requirements (2).

b) Q2.5: Does EPA have a list of products to be classified as “Iron and Steel” under BABA?

A2.5: *Although this list is not comprehensive, the following products were classified as AIS products if made primarily (more than 50 percent) of iron and/or steel by materials cost (for programs subject to both AIS and BABA, this list would be equivalent for “iron and steel” items or products under either requirement):*

c) Products likely made “primarily” of iron and steel to be classified as Iron and Steel under BABA

Lined and Unlined Pipe, Lined and Unlined Fittings, Tanks, Flanges, Pipe Clamps and Restraints, Structural Steel, Valves, Hydrants, Pre-Cast, Iron/Steel Reinforced Concrete (of all types, regardless of iron/steel content percentage), Manhole Covers and other Municipal Castings, Access Hatches, Ballast Screens, Iron or 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 Gate 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), Angles, Backflow Preventers/Double Check Valves, Baffle Curtains, Iron or Steel Bar, 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-bar, 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, Pre-fab Steel Buildings/Sheds (simple structure, unfurnished), Pre-stressed 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 Drain, Tapping Sleeves,

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Telescoping Valves, Tipping Buckets, Trusses, Tubing, Valve Stem Extensions, Valve Stem (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).

d) Q2.6: Does EPA have a list of products to be classified as “Primarily” of iron and steel but would be classified as “manufactured products” under BABA?

A2.6: Although this list is not comprehensive, the following products would be considered “manufactured products” under the BABA requirements, even if the item might be composed primarily of iron and steel by material cost (Note: These items are not subject to the AIS requirement):

Products likely made “primarily” of iron and steel to be classified as Manufactured Products under BABA
Actuator Superstructures/Support Structures, Aeration Nozzles and Injectors, Aerators, Analytical Instrumentation Analyzers (e.g., ozone, oxygen), Automated Water Fill Stations, Blowers/Aeration Equipment, Boilers, Boiler Systems, Chemical Feed Systems (e.g., polymer, coagulant, treatment chemicals), 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 (such as electric valve actuators), Electrical Cabinetry and Housings (such as electrical boxes/enclosures), Electrical Conduit, Electrical Junction Boxes, Electronic Door Locks, Elevator Systems (hydraulic, etc.), Emergency Life Systems (including eyewash stations, emergency safety showers, fire extinguishers, fire suppression systems including sprinklers/piping/valves, first aid, etc.), Exhaust Fans, Fall Protection Anchor Points, Fiberglass Tank w/Appurtenances, Filters (and appurtenances, including underdrains, 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 Post, Lighting Fixtures, Lightning and Grounding Rods, Mechanical or Actuated Louvers/Dampers, Membrane Bioreactor Systems, Membrane Filtration Systems, Metal Office Furniture (fixed), Meters (including flow, wholesale, water, and service connection), Motorized Doors (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 Pre-fab Buildings (such as furnished with pumps, mechanics inside), Presses (including belt presses), Pressure Gauges, Pump Cans/Barrels and Strainers, Pumps Mechanical Rakes, Safety Climb Cable, Sampling Stations (unless also act as hydrant,) Scrubbers, Sensors, Sequencing Batch Reactors (SBR), Steel Shelving (fixed), Slide and Sluice Gates, Spray Header Units, Steel Cabinets (fixed interior/furniture), Supervisory Control and Data Acquisition (SCADA) Systems, Tracer Wire, Valve Manual Gears, Actuators & Handles, Voltage Transformer, Water Electrostatic Precipitators (WESP), Water Heaters, Weir Gates (2).

e) Q2.7: Is asphalt a covered product under BABA?

A2.7: No. EPA interprets Section 70917(c) of the IJIA to exclude asphalt from BABA requirements. Asphalt paving is a type of concrete composed of an aggregate material mixed with a binder (bitumen). EPA considers asphalt concrete to be excluded by section 70917(c) due to its similarities with cement and cementitious materials (2).

f) 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?

A8.2: No, BABA requirements do not apply to purposefully decaying and decomposing items, such as coir mats, or temporary shoring items not intended to be permanently affixed to or incorporated into a structure. According to the OMB Guidance (M-22-11), BABA “does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project. Nor does a Buy America preference apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project[,] but are not an integral part of or permanently affixed to the structure (6).

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References

1. **Executive Office of the President, Office of Management and Budget.** M-22-11. *Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure.* April 18, 2022.
2. **Federal Financial Assistance Programs, United States Environmental Protection Agency Office of Water.** Build America, Buy America Act Implementation Procedures for EPA Office of Water. *Build America, Buy America Act Implementation Procedures for EPA Office of Water.* November 3, 2022.
3. **Office of Federal Financial Management, Office of Management and Budget.** Pre-publication version of 2 CFR Parts 184 and 200 – Guidance for Grants and Agreements. August 14, 2023.
4. **United States Environmental Protection Agency.** 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. *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.* October 21, 2022.
5. **United States Environmental Protection Agency** —. 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. *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.* April 11, 2023.
6. **United States Environmental Protection Agency Office of Water.** Supplemental Questions and Answers for Build America, Buy America Act Implementation Procedures for Office of Water Federal Financial Assistance Programs. *Supplemental Questions and Answers for Build America, Buy America Act Implementation Procedures for Office of Water Federal Financial Assistance Programs.* November 3, 2022.

Appendices

Forms

**BUILD AMERICA, BUY AMERICA (BABA)
BIDDERS ACKNOWLEDGEMENT**

Public Law 117-58 Build America, Buy America (BABA) Act

Instructions: This acknowledgement form must be completed and signed by the bidder's authorized representative, and conveyed to owner with bid submittal. You will find NHDES bid information in [Section A](#) of the front-end documents.

Project Name _____ City/ Town/ Entity _____
Bidder Name _____ Bidder Address _____

With submittal of this Bid, the Bidder acknowledges to and for the benefit of the ____ ("Owner") and the State of New Hampshire ("State") that it understands the goods and services under this Agreement are being funded with federal monies and 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 Bid.

The Bidder hereby presents and warrants to and for the benefit of the Owner and State that (a) the Bidder has reviewed and understands the Build America, Buy America Requirement, (b) all of the iron, steel, manufactured products, and construction materials used in the project will be and/or have been produced and assembled in the United States in a manner that complies with the Build America, Buy America Requirement, unless a waiver of the requirement is approved, and (c) the Bidder will provide any further verified information, certification or assurance of compliance with this Acknowledgement, or information necessary to support a waiver of the Build America, Buy America Requirement, as may be requested by the Owner or the State

Notwithstanding any other provision of the Contract Documents, any failure to comply with this Acknowledgement by the Bidder shall permit the Owner or State to recover as damages against the Bidder any loss, expense, or cost (including without limitation attorney's fees) incurred by the Owner or State resulting from any such failure (including without limitation any impairment or loss of funding, whether in whole or in part, from the State or any damages owed to the State by the Owner). *If the Contractor has no direct contractual privity with the State, as a lender or awardee to the Owner for the funding of its project, the Owner and the Contractor agree that the State is a third-party beneficiary and neither this paragraph (nor any other provision of this Agreement necessary to give this paragraph force or effect) shall be amended or waived without the prior written consent of the State.*

Additionally, The Bidder hereby acknowledges that Bidder must include in all contracts and purchase agreements for this project the following Build America, Buy America contract language: *"(Subcontractor/Supplier) acknowledges to and for the benefit of the (Owner) and the State of New Hampshire (State) that it understands the goods and service under this contract or purchase agreement (Agreement) are being funded with monies that are subject to statutory requirements commonly known as "Build America, Buy America" of the Infrastructure Investment and Jobs Act (IIJA) (Public Law 117-58), that requires all of the iron, steel, manufactured products, and construction materials used in the project to be produced in the United States ("Build America, Buy America Requirement") including iron, steel, manufactured products, and construction materials provided under this contract or Agreement. The Subcontractor/Supplier hereby represents and warrants to and for the benefit of the Owner and the State that (a) the Subcontractor/Supplier has reviewed and understands the Build America, Buy America Requirement, (b) all of the iron, steel, manufactured products, 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 Requirement, unless a waiver of the requirement is approved, and (c) the Subcontractor/Supplier 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 Requirement, as may be requested by the Owner or the State."*

(Signature of Certifying Bidder Representative)

Date

Printed Name

**BUILD AMERICA, BUY AMERICA (BABA)
MANUFACTURER EXAMPLE CERTIFICATION**

Date

Manufacturer Name
Manufacturer Street Address
City, State ZIP

RE: Project Name, Project Location

I, _____ (Authorized Manufacturer Representative), certify that the following products and/or materials shipped/provided to the subject project are in full compliance with the Build America, Buy America (BABA) requirement as mandated by the Infrastructure Investment and Jobs Act (IIJA), Public Law 117-58, Section 70901-52 for all projects funded by a Federal financial assistance program for infrastructure, including each deficient program.

Item, Product and/or Materials

Item, Product and/or Materials

Item, Product and/or Materials

Item, Product and/or Materials

Item, Product and/or Materials

Manufacturing of the above items, products and/or materials took place at the following location(s):

Additionally, if any of the above compliance statements change while providing material to this project _____ (Manufacturer) will immediately notify _____ (Contractor) and the _____ (Owner).

Manufacturer's Signature

Note: The signature must be by manufacturer's authorized responsible party, not the material distributor or supplier.

Manufacturer Certification Checklist

- ✓ Manufacturer name;
- ✓ SRF construction project name and location;
- ✓ A list of specific product(s) delivered to the project site;
- ✓ A statement that the product is in compliance with the Build America, Buy America (BABA) requirement as mandated by the Infrastructure Investment and Jobs Act (IIJA), Public Law 117-58, Section 70901-52;
- ✓ The location of the foundry/mill/factory where the product was manufactured (City and State); and
- ✓ A signature by a manufacturer's responsible party.



**BUILD AMERICA, BUY AMERICA
CONTRACTORS CERTIFICATION
NHDES CLEAN WATER AND DRINKING WATER
STATE REVOLVING FUND**



PUBLIC LAW: 117-58

This form will be submitted with each payment request and disbursement request.

Payment Application #:	Payment Application End Date:
Project Name:	Project Number:
Project Location:	
Contractor Name:	

Contractor Address Street Name and Number:
City State and ZIP:

I hereby certify that the “Buy America, Build America Act” provisions of the Infrastructure Investment and Jobs Act ([Public Law 117-58, Section 70901-52](#)), and subsequent laws that continue the requirement for the use of Buy America, Build America products in construction projects funded by Federal financial assistance programs for infrastructure as applicable, have been met, and that all iron, steel, manufactured products, and construction materials used in the project named above have been produced and assembled in the United States in a manner that complies with Build America, Buy America Requirements, and/or that applicable EPA-approved waivers have been obtained to comply with American Iron and Steel requirements. By signing payment applications and recommending payment, Contractor certifies they have reviewed documentation for all products and materials submitted for payment, and documentation is sufficient to demonstrate compliance Build America, Buy America Act requirements.

Contractor Signature:	Printed Name:
Title:	Date:

www.des.nh.gov

29 Hazen Drive • PO Box 95 • Concord, NH 03302-0095
[\(603\) 271-3503](tel:6032713503) • TDD Access: Relay NH [1-800-735-2964](tel:18007352964)



BUILD AMERICA, BUY AMERICA
DE MINIMIS TRACKING REPORT
NHDES CLEAN WATER AND DRINKING WATER
STATE REVOLVING FUND



(To be submitted with each application for payment.)

Public Law 117-58 Build America, Buy America Act (BABA)

De Minimis Waiver Section 70914(b)(1)

Contractors who wish to use the BABA De Minimis waiver must consult with the owner when determining the items to be covered by this waiver, and shall retain and provide to the owner relevant documentation (i.e., invoices) for those products. The contractor shall summarize in reports to the owner the types and/or categories of items to which this waiver is applied; the total cost of products covered by the waiver for each type or category (including copies of invoices); and the calculations by which contractor determined the total cost of materials used in and incorporated into the project. The contractor shall include a complete and up-to-date De Minimis Tracking Report in each application for payment. The contractor shall also provide the report to the owner upon request.

CWSRF/DWSRF Project #: Pay App Date:

Owner:

Project Name:

Contractor:

Has the contractor purchased or used BABA materials that will be covered under this waiver?

- Yes. Please continue to the next section.
No. Please simply sign below.

Total Project Cost: De Minimis 5% Limit:

Is this your final report?

- Yes. To be considered a final report all materials for the project have been delivered.
No.

Table with 7 columns: Product Description, Date Added, Country of Origin, Quantity, Cost Per Unit, Product Total Cost, How is cost documented?

Total Cost of De Minimis Products

- I have included Attachment A.

Contractor Signature: Printed Name:

Title: Date:

NOTE: The De Minimis waiver is only applicable to the cost of materials incorporated into the project. Do not include other project costs (labor, installation costs, etc.) in the "Total Cost of Materials." The cost of a material must include delivery to the site and any applicable tax. Contractor must provide sufficient documentation to support all costs included in this calculation.

1 Use Attachment A only if your products exceed the number of rows available in the table.
2 Documentation must demonstrate confirmation of the products' actual costs (invoice etc.).



BUILD AMERICA, BUY AMERICA
PROJECT CERTIFICATION
NHDES CLEAN WATER AND DRINKING WATER
STATE REVOLVING FUND



(To be submitted upon substantial completion of the project.)

Build America, Buy America Project Certification
Public Law 117-58 Build America, Buy America Act (IIJA)

Section 70914(a)

This certification must be completed and signed by the authorized representative of the contractor, acknowledged by the authorized representative of the owner, and submitted to the New Hampshire Department of Environmental Services **upon substantial completion** of the project.

Project Name:	Town/ City/ Entity:
Contractor Name:	CWSRF/DWSRF Project #:
Contractor Address Street Name and Number:	
City State and ZIP:	

I hereby certify on behalf of the above-named contractor. (Please check **one** of the following **and** provide documentation as necessary.)

That the “Build America, Buy America” provisions of the Infrastructure Investment and Jobs Act (Public Law 117-58), and subsequent laws that continue the requirement for the use of Build America, Buy America products in construction projects funded by Federal financial assistance programs for infrastructure, including each deficient program, (Build America, Buy America Requirement, BABA) **have been met** and that all iron, steel, manufactured products, and construction materials used in the project named above have been produced and assembled in the United States in a manner that complies with the Build America, Buy America Requirements.

OR

That the “Build America, Buy America” provisions of the Infrastructure Investment and Jobs Act (Public Law 117-58), and subsequent laws that continue the requirement for the use of Build America, Buy America products in construction projects funded by Federal financial assistance programs for infrastructure, including each deficient program, (Build America, Buy America Requirement, BABA) **were unable to be met**. Not all the iron, steel, manufactured products, and construction materials used in the project named above have been produced and assembled in the United States. Items that do not meet BABA requirements are as follows:

Attach all documentation including EPA-approved waivers for all iron, steel, manufactured products and construction materials that do not meet the BABA Requirement.

Certifying Contractor Signature: _____ Printed Name: _____

Title: _____ Date: _____

Owner Acknowledgement Signature: _____ Printed Name: _____

Title: _____ Date: _____

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U.S. Environmental Protection Agency (EPA) Decision Memorandums

Public Interest: De Minimis General Applicability Waiver of Section 70914(a) of P.L. 117-58, Build America, Buy America Act, 2021 for US EPA Financial Awards and Procurements



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

A handwritten signature in black ink that reads "Michael S. Regan".

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

and federal agencies make efficient use of limited resources, especially if the cost of processing the individualized waiver would risk exceeding the value of the items waived.

This waiver advances Build America, Buy America by reducing the administrative burden to potential assistance recipients where the costs of compliance could distract from the focus on higher value compliant items. Failure to provide recipients such flexibilities could delay the award for infrastructure projects as assistance recipients must exert considerable effort accounting for the sourcing for miscellaneous, low-cost items.

Anticipated Program Impacts Absent a Waiver

Build America, Buy America impacts more than 60 EPA programs. The agency is committed to robust implementation of the act's Buy American Preference in an efficient and effective manner. This waiver seeks to significantly reduce the administrative burden on recipients while exempting a small share (five percent or less) of the total project cost from the Buy American Preference requirement.

Infrastructure projects often contain a relatively small number of high-cost products incorporated into the projects. In solicitations for a project, these high-cost products are generally described in detail via project specific technical specifications. For these major products, recipients are generally familiar with the conditions of availability, the potential alternatives for each detailed specification, the approximate cost, and the country of manufacture of the available components.

Infrastructure projects also involve the use of potentially thousands of miscellaneous, generally low-cost products that are essential for construction and are incorporated into the physical structure of the project. For many of these miscellaneous products, the country of manufacture and the availability of alternatives are not always readily or reasonably identifiable prior to procurement in the normal course of business; for other miscellaneous products, the country of manufacture may be known but the miscellaneous character in conjunction with the low cost, individually or procured in bulk, mark them as potentially *de minimis* items.

Failure to grant such a waiver creates significant administrative burden for the EPA and recipients as both sides must negotiate such products on a project-by-project basis, which will increase the cost to the taxpayer, delay the award of assistance agreements and procurement, and has negligible relevance to the intent of Build American, Buy American. With application of this waiver, federally funded infrastructure projects would be aided in meeting the critical public health protection and environmental project purposes on time and on budget. By focusing the programs' attention on high-value domestic products (representing most of the federal infrastructure investment), the EPA will be well-positioned to catalyze resilient domestic supply chains and invest in good-paying American manufacturing jobs and businesses. Absent the waiver, critical public-health protection and environmental infrastructure projects could expend resources inefficiently, potentially failing to deliver on the critical goals of projects and the domestic preference requirements.

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. The EPA's analysis has concluded that this

assessment is not applicable to this waiver, as this waiver allows only a small, *de minimis* value of products to be waived relative to the total cost of a project. The EPA will perform additional market research as it implements the Build America, Buy America requirements to better understand the market and to limit the use of waivers caused by dumping of foreign-sourced products.

Public Notice

The EPA published July 27, 2022, a notice proposing to issue this waiver, and the comment period was open until August 15, 2022. The agency received 41 comments during the public comment period: one representing a federal agency; nine representing manufacturers and the manufacturing industry; 21 representing state agencies; three representing territories; and seven representing rural partnerships and water associations. Most comments were supportive of the waiver with many requesting a threshold higher than the proposed five percent, usually 10 to 15 percent. Of the few comments on a cap, some were opposed, and others supported a cap contingent on a threshold higher than the proposed five percent. Some commenters opposed the waiver because the waiver could reduce opportunities for American manufacturing. Other commenters requested that the Build America, Buy America *de minimis* waiver mirror the American Iron and Steel *de minimis* waiver.

The EPA received comments on the use of material cost as the calculation basis for the threshold versus using project costs. The EPA agrees that material costs are often built into contracts along with other costs, making it difficult to consistently determine an appropriate threshold for projects. Using project cost and not material cost will simplify the calculation and would alleviate burden and confusion for assistance recipients. Therefore, the EPA has changed the calculation basis from material cost to project cost.

The EPA also received many comments on the five percent threshold itself. No comments requested that the threshold be lowered, a few comments agreed with the EPA's threshold, and many requested that the threshold be increased (to up to 20 percent with most requesting an increase to 15 percent) or requested that the threshold be modified so the five percent limit would apply to each of the three subcategories (five percent for iron and steel, five percent for construction materials and five percent for manufactured products). With the cost calculation changing from material costs to project costs, this will functionally increase the amount of products that can be covered by this waiver for most projects. Therefore, after consideration of these comments, the EPA is finalizing the proposed five percent threshold.

The EPA received comments and questions on the examples provided as items that, dependent on the conditions and purpose of the project, may or may not be considered *de minimis*. The EPA's intention was to provide examples to assist programs; however, this created confusion that only certain items could be covered. The five percent threshold can be used for any products, independent on the purpose of the project. The EPA is removing the examples from the text of the final waiver to avoid confusion.

After reviewing these comments, the EPA concludes that the information provided to the agency generally supports a general applicability waiver. Products that qualify for a *de minimis* waiver cumulatively may comprise no more than a total of five percent of the total project cost.

Waiver Decision

Section 70914(b)(1) of the Infrastructure Investment and Jobs Act authorizes the Administrator to waive the requirements of Build America, Buy America if implementation would be inconsistent with the public interest. Due to the critical need to reduce the administrative burden for recipients and agencies and to ensure recipients can effectively carry out the EPA funded activity in a timely manner, it is in the public interest to waive Build America, Buy America requirements for products used in and incorporated into a project that cumulatively comprise no more than 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 will review this waiver every five years after the date on which the waiver is issued.

If you have any questions concerning the contents of this memorandum, please contact Dan Coogan at EPA_BABA_Waiver@epa.gov.

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 US EPA Financial Awards and Procurements



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

A handwritten signature in black ink that reads "Michael S. Regan".

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.¹ 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.

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

DISCUSSION

Build America, Buy America Minor Components Waiver

The Office of Management and Budget's April 18, 2022, M-22-11 memorandum, "Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure," encourages agencies to consider whether it is in the public interest to waive application of a Buy America preference to minor components within iron and steel products.

This waiver advances Build America, Buy America objectives by focusing needs for domestic manufacturing on higher value items while minimizing the administrative burden on manufacturers that must account for the sourcing of minor components in an iron and steel product. The waiver expedites the process for manufacturers seeking to deem their products compliant with Build America, Buy America, which then benefits assistance recipients seeking Build America, Buy America-compliant products for their federally funded projects. This waiver supports those manufacturers making extensive efforts to produce domestic iron and steel products and signals to them to prioritize high-value domestic iron and steel products. In addition, this waiver is consistent with the EPA's existing American Iron and Steel Minor Components waiver.

The waiver applies only to iron and steel products subject to the Build America, Buy America Act requirements and concerns only the iron and steel (ferrous) components of an otherwise domestically manufactured iron and steel good. The Build America, Buy America Act requires that the iron and steel used in a product is melted and/or poured in the United States and all subsequent operations occur domestically. This waiver would allow 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.

Anticipated Program Impacts Absent a Waiver

Build America, Buy America impacts more than 60 EPA programs. The agency is committed to robust implementation of the act's Buy America Preference in an efficient and effective manner. Absent this waiver, manufacturers will face considerable challenges determining that their iron and steel products, which may contain trivial components of foreign or unknown origin, are compliant with Build America, Buy America. Such uncertainty could lead to a significant increase in product nonavailability waiver requests for these iron and steel products from assistance recipients.

Failure to grant such a waiver creates significant administrative burden for the EPA and recipients as both sides must negotiate their iron and steel products on a project-by-project basis, which would increase the cost to the taxpayer, delay the award of assistance agreements and extend projects. More broadly, absent a waiver, recipients might inefficiently expend resources for critical public health protection and environmental infrastructure projects and fail to meet project goals.

Further, this waiver impacts a subset of iron and steel products where American-made product manufacturers would greatly benefit from this waiver. The cost of the minor components of iron and steel products tend to be very small. Without the waiver, small, miscellaneous iron and steel components could prevent a manufacturer from providing critical infrastructure products that otherwise could be made with majority domestic iron and steel. As a result, not having this waiver could prevent a manufacturer from creating a Build America, Buy America-compliant product and could force a recipient to request a waiver for an altogether nondomestically sourced product.

Assessment of Cost Advantage of a Foreign-Sourced Product

Under OMB's M-22-11 memorandum 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. The 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. The EPA will perform additional market research as it implements the Build America, Buy America requirements to better understand the market and to limit the use of waivers caused by dumping of foreign-sourced products.

Public Notice

The EPA proposed to issue this waiver in January 18, 2023, and the comment period was open until February 3, 2023. The agency received 23 comments during the public comment period. Twenty-one commenters were generally supportive of the waiver with six requesting an increase in the proposed five percent of the total material cost of the minor components. Two commenters opposed the proposed waiver either because they believed that it would hinder their investments made to comply with American Iron and Steel requirements or because they believe it failed to align with the administration's priority for enhancing domestic manufacturing. Other commenters asked the EPA to clarify how nonferrous minor components of nondomestic or unknown origin would be treated.

After reviewing the comments received, the EPA concludes that the information provided to the agency generally supports a general applicability waiver of minor iron or steel components of Iron and Steel products without further need for product-specific waivers. This waiver aligns with the existing Minor Components waiver for the American Iron and Steel requirements, which also apply to only the ferrous minor components of an iron and steel product. The EPA determined that the comments generally supported maintaining five percent threshold of materials cost of the product in this waiver, which also aligns with the American Iron and Steel Minor Components waiver.

In response to comments received, the EPA clarifies that this waiver applies to only the ferrous minor components of a product made primarily of iron and steel. The nonferrous components of the otherwise primarily iron and steel product may be from unknown or nondomestic sources and are not included in this waiver (but may contribute to the total materials cost of the product in question). Like the American Iron and Steel Minor Components waiver, the EPA recommends that manufacturers acknowledge use of this Minor Components waiver when providing notice through their certification letters to document their product's compliance with the Build America, Buy America iron and steel and American Iron and Steel requirements.

WAIVER APPROVAL

Section 70914(b)(1) of the Infrastructure Investment and Jobs Act authorizes the Administrator to waive the requirements of Build America, Buy America if implementation would be inconsistent with the public interest. Due to the critical need to reduce the administrative burden for recipients and agencies to ensure recipients can effectively carry out the EPA-funded activity in a timely manner thus, reducing risks to human health and the environment, the EPA determines that it is in the public interest to waive Build America, Buy America requirements for minor (ferrous) components of iron and steel products. The EPA will review this waiver every five years, or more often as necessary, from the date on which the waiver is issued.

Questions about this memorandum should be directed to EPA_BABA_Waiver@epa.gov.