

June 27, 2022

Radhika Fox, Assistant Administrator  
Office of Water  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

RE: BABA Public Interest Waiver for State Revolving Fund Projects with Submitted Engineering Plans and Specifications

Assistant Administrator Fox:

This letter is in response to the Environmental Protection Agency's (EPA) request for comments on the proposed BABA Public Interest Waiver for State Revolving Fund Projects with Submitted Engineering Plans and Specifications. The North Dakota Department of Environmental Quality (Department) offers the following comments:

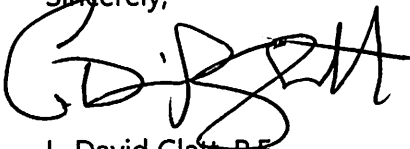
1. We urge the EPA to use the same deadline proposed for WIFIA's public interest waiver (the project must have been in planning and design prior to May 14, 2022) for the SRF's public interest waiver. As written, the SRF public interest waiver will impact WIFIA projects that are co-funded with the SRF program as those projects will have to comply with the more-restrictive SRF public interest waiver. In particular, the Fargo-Moorhead Metropolitan Area Stormwater Diversion Channel Project is expected to receive both WIFIA and CWSRF funds. While this project would be exempt from BABA under the WIFIA public interest waiver, it would not be exempt under the SRF public interest waiver.
2. The SRF public interest waiver, as written, doesn't consider the significant investment in both time and funds that many projects have already incurred through planning and design but haven't finalized plans and specifications. For example, the City of Fargo performed a 9-month long pilot study and produced several technical reports, dated as early as 2019, to identify a suitable filter media and underdrain system for their drinking water treatment plant. The final pilot study report and supporting technical documentation were submitted to the NDDEQ for review and approval in April but plans and specifications won't be ready until the fall of 2022. While it's expected that the filter media won't be a covered product under BABA, the underdrain system will be. If the chosen underdrain system doesn't comply with BABA, the city will have to decide whether to delay their project to evaluate other underdrains that do comply, or they will have to obtain funding from a non-federal source. Re-evaluating other filter underdrains

will cause an unexpected financial burden for the City of Fargo even though planning and design of this project began several years prior to BABA.

3. Memorandum M-22-11 issued on April 18, 2022 by the Office of Management and Budget states that "agencies should determine how this guidance is best applied to their infrastructure programs and processes" and that "the Federal agency must include appropriate terms and conditions in all awards, in accordance with applicable legal requirements and its established procedures, in order to effectuate the requirements of the Act and this guidance". The memorandum then provides sample language but states that "agencies should send their proposed terms and conditions to the Made in America Office (MIAO) for review prior to incorporating them into applicable awards". Neither EPA's determination about how to apply the guidance nor the terms and conditions for awards have been released to states yet. Borrowers that have not submitted plans and specs for a project before May 14, 2022 but have opened bids prior to the release of EPA guidance would have to issue a change order to add the BABA requirements into the construction contract when available to be eligible for SRF funding. This will likely result in cost increases that are greater than if the borrower had been able to obtain competitive bids. An SRF public interest waiver should be issued for all projects for at least six months after EPA issues final comprehensive implementation guidance that clearly defines the rules of compliance.
4. We urge EPA to also consider the ability for manufacturers and/or suppliers to provide documentation of compliance with BABA requirements for their products. Many of the covered products under BABA have not had to comply with any form of "Made in America" requirements before and will need time to prepare documentation that complies with EPA requirements once EPA releases its guidance.

If you have any questions, please contact Shannon Fisher, P.E., DWSRF Program Manager, at [smfisher@nd.gov](mailto:smfisher@nd.gov) or 701-328-5220.

Sincerely,

A handwritten signature in black ink, appearing to read 'L. David Glatt', written over a horizontal line.

L. David Glatt, P.E.

Director

North Dakota Department of Environmental Quality

LDG/smf