

deliberative predecisional draft – for public comment

The Environmental Protection Agency (EPA) is seeking comment on a proposed waiver concerning the application of Buy America, Build America Act (BABAA) to WIFIA-funded projects that have initiated project design planning prior to May 14, 2022, the effective date of BABAA requirements.

Please submit comments to WIFIA@epa.gov

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

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 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. This will take time, and flexibility will be important to ensure that we can leverage water investments on time and on budget. The 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.

Program Waiver

The 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.

Applicability of Existing Domestic Preference Requirements

This waiver does not depend upon the cost or non-availability of U.S. products. This waiver action permits the use of non-domestic iron, steel, manufactured products, and construction materials in such projects that may otherwise be prohibited under section 70914(a), while prospective

borrowers incorporate the new BABAA requirements. The WIFIA program has existing domestic preference requirements for WIFIA loan recipients under 33 U.S.C. §3914 (American Iron and Steel (AIS) requirement) to install iron and steel products that are produced in the U.S. This program waiver does not waive WIFIA’s AIS requirements. WIFIA loan recipients will continue to follow the existing AIS requirements for their projects. Products covered under the AIS requirements are primarily iron and steel (i.e., greater than 50% iron or steel in material costs), permanently incorporated into the project, and are limited to:

- Lined or unlined pipes and fittings
- Manhole covers and other municipal castings
- Hydrants
- Tanks
- Flanges
- Pipe clamps and restraints
- Valves
- Structural steel
- Reinforced precast concrete
- Construction materials

These listed products are identified by Congress within the WIFIA statute as commonly used iron and steel products in water infrastructure projects. Based on eight successful years of AIS implementation for the State Revolving Fund (SRF) and WIFIA programs, EPA expects that projects subject to this waiver will obtain almost all their iron and steel products from domestic sources. EPA also expects that most items that aren’t iron or steel products will fall under manufactured products or construction materials.

Conditional and Target-Limited

This waiver covers projects that have initiated design planning prior to May 14, 2022, the effective date of BABAA requirements. For purposes of this waiver, “initiated project design planning” means efforts made by the utility owner to evaluate and identify both technologically and financially viable options for capital improvement projects. These efforts can be in various forms of technical documents describing design concepts, alternatives analyses, and long-term facility or system plans. Examples include preliminary engineering reports, master plans, basis of design reports, and technical design memorandum.

Program-Wide Scope

The WIFIA program’s federal loan structure and funding procedures necessitates a program waiver to cover projects that receive WIFIA funding and meet the conditions of the waiver.

In WIFIA’s funding process, the amount of federal loans made available for WIFIA lending is dictated by annual appropriations of risk subsidy to the program. Following an appropriation, the WIFIA program issues a Notice of Funding Availability (NOFA) that initiates a competitive project selection process to invite prospective borrowers, followed by a loan application review

process. Projects may enter WIFIA’s funding process at every level of design planning. The level of design is not known by the WIFIA program until after the NOFA is issued and detailed project information is submitted, but in most of the cases the projects are at a planning design stage that makes it impractical to retroactively apply purchasing requirements. The table below provides a sample of projects from our existing funding pipeline that are in various levels of design planning and are typical of the types of projects that would be subject to this waiver.

Project Name	Level of Design
Wastewater Project Delivery Program	Design builder procured, 50% design
Sewer Lift Station and Force Main Project	Design builder procured, 50% design
Dam Replacement Project	Design complete
Drinking Water Reliability Project	Near Construction
Plant Effluent Outfall Tunnel	Under Construction

It is not possible for the WIFIA program to predict the number of, and the level of design and planning from, prospective projects that will enter the funding process. However, the program expects similar project impacts for both current and prospective borrowers, which are further described below. By end of year, the WIFIA program will have over 100 loans in various stages of WIFIA’s funding process.

Anticipated Program and Project Impacts Absent a Waiver

Utilities that began planning prior to the issuance of OMB’s final guidance did so with no knowledge that a future domestic sourcing requirement would apply to WIFIA loans. Without such knowledge, they did not have the opportunity to plan for such requirements and may have to reevaluate design alternatives and potentially redesign elements of their projects, investigate potential domestic products, revise engineering drawings and bid specifications, and resubmit plans and specifications for State or local approval, thereby delaying the initiation of construction, and increasing project costs and schedule substantially. Absent a waiver, EPA believes that utilities may decline cheaper federal funds in favor of more expensive sources of financing to minimize such impacts.

Re-evaluation of Design Decisions

Utilities expend a tremendous amount of effort prior to submitting detailed letters of interest to the WIFIA program. The costs for this planning in both local funds and staff hours can approach \$100 million for the largest of WIFIA’s projects and oftentimes involve projects in planning, design, and even early construction and mobilization activities.

It is common for planning and development of complex projects to begin years prior to construction. This process often includes estimation of project benefits and costs to evaluate design alternatives and in many cases, involves complex environmental assessments, site reviews, and prioritization efforts. Although these early stages of project planning and design may be performed years in advance of construction, they incorporate, and are influenced by, the expected availability of supplies, materials, manufactured products, equipment, packaged technological solutions, and even siting options. Design and construction of these projects are carefully choreographed and

interdependent processes. Imposing new conditions on the tail end of the process may require costly re-evaluation of earlier decisions on which the whole project is based.

For example, one WIFIA borrower invested four years conducting studies, alternatives evaluation, site selection, environmental permitting, and technology assessments that resulted in the chosen project approach and the Basis for Design, that then took one year to progress to Final Design before construction could begin. All these years of work were informed by an early decision to use a particular Ballasted Flocculation technology half a decade before construction began and with the project designed and the site selected around this major equipment. Had a BABAA requirement subsequently applied, significant costs and effort would be needed to re-evaluate BABAA-compliant technology alternatives and assess the implications of design alterations on the overall constructability of the project. Another WIFIA project currently in the funding pipeline raised concerns on the lack of known domestic alternatives that could substitute for the main components in the project, and should BABA requirements apply, EPA anticipates utilities would forgo federal funding as re-designing and finding domestic alternatives may not be possible.

Increased Project and Construction Costs

For some projects, redesign of the project would result in dramatic increases in planning, design, and construction costs. A project in California needed to extend the operating life of existing facilities and continue to reliably meet environmental and regulatory requirements. The engineer of record for the project reviewed the design documents to identify what may be needed to have the project comply with BABAA, and their conclusion is that it is uncertain if compliance would even be possible for this already-designed project without a major redesign that could increase construction cost by approximately \$40 million (11 percent) and delay the project by 22 months. Another project in Missouri estimates that complying with BABA requirements would add about \$100 million (17 percent) to their project and that achieving compliance with the increase in costs is uncertain.

Requiring projects in design planning to undergo a re-evaluation of their plans to comply with BABAA may lead to significant cost and schedule increases for much needed infrastructure. Furthermore, changes in design, treatment plant equipment, and materials would require communities with approved permits to resubmit plans and specifications for State or local approval. Required adjustments will delay the initiation of construction and increase project costs and schedule by months. Based on WIFIA's conversations with impacted borrowers, EPA believes this would substantially derail the infrastructure investment efforts already made by utilities.

Delay in Compliance with Clean Water Act and Safe Drinking Water Act Requirements

The country faces unprecedented challenges with aging drinking water and wastewater treatment plants and distribution systems that have far exceeded their useful life. Many facilities need to make improvements to their system to return their community to compliance with the Clean Water Act or Safe Drinking Water Act. Communities that are required to redesign systems will not only face increased planning, design, and construction costs, but may ultimately delay and perhaps even prevent some improvements necessary to meet requirements.

Such delays conflict with EPA's, as well as prospective borrowers', interest in investing in the nation's water infrastructure and initiating construction in an expeditious and efficient manner, results antithetical to the goals of the IJA. This further prevents the utilities' ability to timely address compliance issues under the Clean Water Act and Safe Drinking Water Act and adversely impacts the protection of public health and the environment. For many of these projects, planning and design activities will have already begun to meet stringent federal and state regulations with court-enforced deadlines. A majority of WIFIA projects are being implemented to meet regulatory requirements or resolve public health or environmental violations or enforcement actions.

A Decline in the Use of Federal WIFIA Funds

Utilities faced with a need to re-design and re-permit projects may decline cheaper federal funds in favor of more expensive sources of financing to minimize such impacts. By declining to use WIFIA as a funding source, no domestic preference for American iron and steel will be required, potentially leading to a reduction in the use of domestic iron and steel. Similarly, the intended long-term benefits of BABAA implementation will be missed. This program waiver seeks to provide a reasonable transition period for BABAA implementation while minimizing impacts to projects.

Program Implementation Considerations

As the transition period advances, the WIFIA program anticipates fewer projects to fall under the scope of this program waiver. To encourage the use of domestic products, the WIFIA program will provide incentives to utilities in future funding rounds through its selection criteria. Projects that voluntarily implement BABAA requirements regardless of the waiver will increase their likelihood of selection.

EPA's implementation of AIS requirements for the SRF and WIFIA programs has assured almost all iron and steel products in water, wastewater, and stormwater infrastructure projects are domestically sourced. However, the domestic availability of other non-ferrous construction materials and manufactured products incorporated in projects is largely unknown at this time. The list of items included on these projects can be vast. For example, a WIFIA project bid tabulation for a typical project listed approximately 9,000 unique items, with most of those listing construction materials, equipment, or manufactured goods.

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

Waiver Decision

Section 70914(b)(1) of the IJA authorizes the Administrator to waive the requirements of section 70914(a) in any case or category of cases in which he finds that applying subsection (a) would be inconsistent with the public interest. Due to the critical need to repair and upgrade our nation's water infrastructure in a timely and cost-effective manner, and the foregoing reasons, imposing

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BABAA requirements on eligible projects of prospective borrowers that initiated project design plans prior to May 14, 2022, is not in the public's interest.

If you have any questions concerning the contents of this memorandum, please contact Alejandro Escobar, Chief, Technical Support Branch, at escobar.alejandro@epa.gov or (202) 564-9047.