

Deliberative, pre-decisional draft – for public comment

DECISION MEMORANDUM

SUBJECT: Program Waiver of Section 70914 of P.L. 117-58, Buy America, Build America Act, 2021 for State Revolving Fund Projects with Submitted Engineering Plans and Specifications

FROM: TBD, Title

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. 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 our 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 (IIJA) in November 2021). The BIL will provide an unprecedented level of federal investment in water infrastructure in 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 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 and WIFIA 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 we can leverage water investments on time and on budget.

EPA is seeking comment on this proposed waiver concerning the application of BABA requirements to SRF-funded projects that have submitted engineering plans and specifications prior to May 14, 2022, the effective date of BABA requirements.

Please submit comments to BABA-OW@epa.gov.

Program Waiver

The EPA hereby grants a program waiver for manufactured products and construction materials under Build America, Buy America (BABA) Act requirements pursuant to Section 70914(b)(1) (public interest waiver) of the Infrastructure Investment and Jobs Act (IIJA, Section 70914) for eligible State Revolving Fund projects that submitted engineering plans and specifications to an appropriate state agency prior to May 14, 2022, the statutory effective date of the BABA requirements.¹ This action permits the use of non-domestic manufactured products and construction materials in such projects funded by a Clean Water or Drinking Water State Revolving Fund (SRF) that may otherwise be prohibited under the BABA requirements of Section 70914. If a project does not require approved engineering plans and specifications, the bid advertisement date may count in lieu of the plans and specifications approval date for purposes of this waiver. This waiver does not waive the iron and steel requirements under BABA. Sections 70917(a) and (b) of IIJA provide a savings provision for existing statutory requirements that meet or exceed BABA requirements. The statutory American Iron and Steel (AIS) requirements of Clean Water Act (CWA) section 608 and Safe Drinking Water Act (SDWA) section 1452(a)(4) has previously applied to SRF projects and will continue to do so as part of BABA requirements.

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 items in such projects that may otherwise be prohibited under IIJA section 70914. The SRF programs have existing domestic preference requirements for SRF projects under CWA section 608 and SDWA section 1452(a)(4) (AIS requirements) to install iron and steel products that are produced in the U.S. This program waiver does not waive the iron and steel requirements under BABA. Sections 70917(a) and (b) of IIJA provide a savings provision for existing statutory requirements that meet or exceed BABA requirements. The statutory American Iron and Steel (AIS) requirements of Clean Water Act (CWA) section 608 and Safe Drinking Water Act (SDWA) section 1452(a)(4) have previously applied to SRF-funded projects and will continue to do as part of BABA requirements. Products covered under the AIS requirements are primarily iron and steel (i.e., greater than 50 percent iron or steel by 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

¹ Add EPA's Common Government-wide accounting classification code and the assistance listing name and code here.

- Reinforced precast concrete
- Construction materials

These listed products are identified by Congress within the AIS statute as commonly used iron and steel products in water infrastructure projects. Based on eight successful years of AIS implementation, EPA expects that projects subject to this waiver will obtain the majority of their iron and steel products from domestic sources.

Conditional and Target-Limited

This waiver covers eligible projects that submitted engineering plans and specifications to an appropriate state agency prior to May 14, 2022. For purposes of this waiver, “submitted engineering plans and specifications” also applies to situations where a project does not require engineering plans and specifications (such as simple pipe or equipment replacement projects funded by an SRF), whereby the bid advertisement date may count in lieu of the plans and specifications date for purposes of this waiver.

This waiver also applies, in limited circumstances, to projects receiving planning and/or design assistance agreements if the original assistance agreement was executed before May 14, 2022 and included a written commitment or documented expectation to utilize SRF funding for construction. Appearance on a project priority list in a state’s Intended Use Plan along with written reasonable assurance from the state that the assistance recipient will receive SRF funding for project construction (when funding becomes available) could provide sufficient evidence of “expectation of funding.”

Program-Wide Scope

The SRF program’s unique financial structure and funding procedures necessitates a program waiver to cover projects that receive SRF funding and meet the conditions of the waiver.

In the SRF funding process, EPA provides annually appropriated capitalization grants to state financial authorities, which then provide direct assistance to recipient projects. Projects may enter the SRF funding process at every level of design planning. Because the SRFs are state-implemented programs, the specific stages of project design are not known nationally by EPA. A high percentage of projects have completed design specifications by the time they receive an assistance agreement. At any time, as many as several thousand SRF projects may have finalized engineering plans and specifications, be ready to proceed to construction, or be under construction. In these cases, the projects are at a stage that makes it impractical to retroactively change and apply purchasing requirements. Because of the transition period from federal grant to state funding of projects, it is not possible for the SRF programs to predict the number of projects that, at the time of this waiver, have submitted engineering plans and specifications or have solicited bids but not yet signed assistance agreements. The table below provides a sample of projects from an existing funding pipeline for a DWSRF state program (one of 102 national DW and CWSRF programs) that are in various levels of design planning and are typical of the types of projects that would be subject to this waiver.

Project Description	Level of Design
Rehabilitation of Water Treatment Plant	Under Construction, Loan agreement Pending
Water Main Construction Project	Design complete, Plans and Specs submitted
Consolidation of Water Systems	Design complete, Plans and Specs submitted
Water Storage Tank and Booster Pump Station Rehabilitation	Under construction, Loan agreement Pending
New Water Storage Tank Construction	Design complete, Plans and Specs submitted

It is not possible for EPA to nationally predict the number of, and the level of projects in the funding process. However, EPA expects similar project impacts for assistance recipients, which are further described below. This waiver only applies to those projects that are ready to proceed prior to the effective date of the BABA requirements. Projects that receive federal SRF funding from an obligation executed on or after May 14, 2022 and submit engineering plans and specifications (or advertise contract bids should their project not require plans and specifications) after the effective date will be subject to the full requirements. This waiver does not waive the iron and steel requirements under BABA. Sections 70917(a) and (b) of IIJA provide a savings provision for existing statutory requirements that meet or exceed BABA requirements. The statutory AIS requirements of Clean Water Act (CWA) section 608 and Safe Drinking Water Act (SDWA) section 1452(a)(4) have previously applied to SRF projects and will continue to do as part of BABA requirements.

EPA is proposing this waiver not as an alternative to increasing domestic production, but as an important tool to aid our implementation of the BABA requirements in the most efficient manner in order to promote investment in the country’s domestic manufacturing base, strengthen critical supply chains, and position U.S. workers and businesses to compete and lead globally in the 21st century. EPA understands that advancing Made in America objectives is a long game and EPA plans to move forward with sufficient information to implement the new requirements in a way that maximizes coordination and collaboration to support long-term investments in domestic production.

As EPA builds toward full implementation of the BABA requirements, EPA intends to focus on the intersection between these potential critical supply chain issues and product needs that it identifies through its robust and thorough domestic product research program. EPA has initially identified that some of the manufactured products and non-ferrous construction materials to be waived may, under the targeted conditions of this waiver, fall under water and wastewater infrastructure product categories, which may potentially intersect with the public health (such as water treatment technologies) and information and communications technology (such as computerized control technologies) industrial bases. EPA is working to address the gaps in its

knowledge base for these sectors, specifically the manufactured products and non-ferrous construction materials to be newly required under BABA. EPA solicits public comment through this proposed waiver on information regarding the domestic availability and potential market challenges for products used in water and wastewater infrastructure that may fall under these industrial base categories.

Anticipated Program and Project Impacts Absent a Waiver

After publication of the government-wide BABA guidance issued by the Office of Management and Budget's Made in America Office (MIAO), EPA held listening sessions targeting all known potential BABA stakeholders for the SRF programs. EPA hosted three widely-advertised webinars, with sessions soliciting input from the following: (1) potentially affected manufacturers, suppliers, distributors, and representative organizations; (2) water sector and water infrastructure organizations, associations, and professional trade groups; and (3) states, state associations, EPA Regions, and potential assistance recipients. More than two thousand entities participated in these webinars and submitted hundreds of questions and comments to EPA regarding the implementation of BABA for the SRF programs. One of the most common and popular topics was the perceived need for this proposed waiver for the SRF programs. EPA received dozens of requests in favor of a waiver for projects with submitted engineering plans and specifications (similar to what EPA approved at the initiation of the AIS requirements in 2014). EPA did not receive any concerns in opposition to a potential plans and specifications waiver during these outreach sessions.

The basis for the public interest program waiver is that due to the uncertainty about the application of BABA requirements prior to publication of guidance by MIAO, the potential SRF assistance recipients did not have the opportunity to reasonably plan for the domestic preference requirements for manufactured product and construction materials by the effective date. This waiver does not waive the iron and steel requirements under BABA. Sections 70917(a) and (b) of IIJA provide a savings provision for existing statutory requirements that meet or exceed BABA requirements. The statutory AIS requirements of Clean Water Act (CWA) section 608 and Safe Drinking Water Act (SDWA) section 1452(a)(4) have previously applied to SRF projects and will continue to do as part of BABA requirements. Until detailed guidance was issued on April 18, 2022, potential SRF assistance recipients were unable to solicit bids from construction firms with appropriate definitions of key terms and concepts that were elucidated in the guidance. Additionally, projects that submitted engineering plans and specifications without knowledge of the BABA requirements, and with the anticipation that such plans would be quickly approved, but where such approval did not occur until on or after May 14, 2022, would be required to redesign elements of the project, investigate potential domestic products, revise engineering drawings and bid specifications, and resubmit such plans and specifications for approval, thereby substantially delaying the initiation of construction and adding to the cost of the project. Those projects which do not require approved plans and specifications, but advertised contract bids prior to the guidance being issued, also could be required to rebid the project or submit change orders to comply with the new requirements, which would likely delay initiation of construction and unduly burden the SRF projects and assistance recipients. These

potential delays associated with rebidding of construction contracts could significantly affect the cost and schedule of projects. In all cases where this waiver applies, the other requirements for SRF funding still apply, which includes the AIS requirements.

The imposition of the BABA requirements on projects eligible for SRF assistance whose assistance recipients submitted complete engineering plans and specifications prior to May 14, 2022, the date on which those requirements were effective, could require the time-consuming and expensive redesign of those projects. Specifically, those projects that can show a reasonable basis for the submission of plans and specification prior to this date could be harmed by the imposition of these requirements post submission. This imposition could conflict with both EPA's, as well as the states', interest in providing funding to eligible assistance recipients in an expeditious and efficient manner, as required by the CWA and the SDWA. Project delays could increase the time necessary to comply with CWA and SDWA requirements, therefore adversely impact protection of public health and the environment. A targeted waiver for projects with submitted engineering plans and specifications will provide a bridge for EPA and its stakeholders' long-term ability to adjust from the AIS requirements to the BABA requirements, including manufactured products and non-ferrous construction materials.

Re-evaluation of Design Decisions

SRF assistance recipients apply a tremendous amount of effort and expenditure in planning, design, and even early construction and mobilization activities for projects prior to submitting their engineering designs and specifications to state authorities.

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, local funding processes, 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, local budget approvals, and even siting options. Design and construction of these projects are carefully choreographed and interdependent processes and imposing new conditions on the tail end of the process may require re-evaluating earlier decisions on which the whole project is established, which may have included referenda and/or public approval processes.

Years of work are informed by early design considerations for water and wastewater treatment technologies, many times in response to federal requirements, compliance objectives, and/or enforcement agreements. With a project already designed around (in many cases) complex treatment equipment, subsequently applying new purchasing requirements, significant costs and effort would be needed to re-evaluate BABA-compliant technology alternatives and assess the implications of design alterations on the overall feasibility of the project. Many SRF projects, absent this waiver, would potentially need to stop work, delay critical-path construction activities, forego portions of planned projects, potentially fail compliance actions, and/or seek alternative funding as re-designing and finding domestic alternatives may not be feasible.

Increased Project and Construction Costs

EPA has received a consistent message from assistance recipients of its water infrastructure programs: projects requiring re-evaluation of their project plans to comply with BABA 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 engineering plans and specifications for State approval. Required adjustments could delay the initiation of construction and increase project costs and schedule by months. This could substantially derail the infrastructure investment efforts already made by many assistance recipients.

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

The country faces unprecedented challenges with aging drinking water distribution systems and wastewater conveyance and treatment plants that have far exceeded their useful life. Many facilities need to make improvements to their system to return their community to compliance with the CWA or SDWA. 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 assistance recipients', 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 IJJA. This further prevents the assistance recipients' ability to timely address compliance issues under the CWA and SDWA 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 SRF projects are necessary to meet regulatory requirements or resolve public health or environmental violations or enforcement actions.

A Decline in the Use of SRF Funds

Assistance recipients 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 SRF programs 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 BABA implementation will be missed. This program waiver seeks to provide a reasonable transition period for BABA implementation while minimizing impacts to projects.

Program Implementation Considerations

EPA's implementation of AIS requirements for the SRF and WIFIA programs has assured almost all iron and steel products in water, wastewater, and stormwater infrastructure projects are domestically sourced. However, 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 project bid tabulation for

a large wastewater infrastructure 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 SRF program will aim to collect information from projects covered by this waiver to help evaluate the domestic market availability of commonly used infrastructure products.

Through these efforts, EPA will support government-wide efforts to catalyze domestic manufacturing, resilient supply chains, and good jobs – while successfully delivering a wide range of public health protection and water quality improvement infrastructure projects. EPA intends to build on its near decade of success implementing the American Iron and Steel requirements for thousands of SRF-funded projects, bridging that success to the BABA requirements for manufactured products and non-ferrous construction materials. EPA intends to support the creation of resilient supply chains and manufacturing base for critical products here in the United States that will bring about investment in good-paying American manufacturing jobs and businesses. The creation of jobs in communities will also alleviate supply chain disruptions through cultivation of the domestic manufacturing base for a wide range of products commonly used across the water sector but not yet made domestically.

Assessment of Cost Advantage of a Foreign-Sourced Product

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

Waiver Decision

Section 70914(b)(1) of the IJA authorizes the Administrator to waive the requirements of section 70914 in any case or category of cases in which they find 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 for the foregoing reasons, imposing the BABA requirements on projects that submitted engineering plans and specifications to an appropriate state agency for approval, or the bid advertisement date for a project that does not require approved engineering plans and specifications, prior to May 14, 2022, is not in the public interest.

If you have any questions concerning the contents of this memorandum, please contact Timothy Connor, Chemical Engineer, State Revolving Fund Branch, Water Infrastructure Division, at connor.timothy@epa.gov or (202) 566-1059 or Kiri Anderer, Senior Environmental Engineer,

Infrastructure Branch, Drinking Water Protection Division, at anderer.kirsten@epa.gov or (202) 564-3134.

Issued on: _____

Approved by: _____