



August 15, 2022

Radhika Fox
Assistant Administrator, Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Celeste Drake
Director, Made in America Office
Office of Management and Budget
725 17th Street, N.W.
Washington, D.C. 20503

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

Dear Assistant Administrator Fox and Director Drake:

The Council of Infrastructure Financing Authorities (CIFA), which represents the Clean Water and Drinking Water State Revolving Funds (SRFs), recommends revisions to the proposed de minimis waiver of domestic preference requirements in the Build America, Buy America Act (BABAA) to ensure fair and consistent implementation.

The de minimis waiver for BABAA should build upon the existing de minimis waiver for American Iron and Steel (AIS).

In 2014, the U.S. Environmental Protection Agency issued a de minimis waiver for domestic procurement mandates for American-made iron and steel in water infrastructure projects funded by the Clean Water and Drinking Water SRFs. The waiver “permits the use of products when they occur in de minimis incidental components of such projects funded by the act that may otherwise be prohibited . . . Funds used for such de minimis incidental components cumulatively may comprise no more than a total of 5 percent of the total cost of materials used in and incorporated into a project; the cost of an individual item may not exceed 1 percent of the total cost of the materials used in and incorporated into a project.”

To maintain the integrity of the existing AIS waiver, the de minimis waiver for BABAA should consider a separate threshold for each category.

The proposed de minimis waiver for BABAA severely dilutes the current relief provided by AIS waiver. The current 5% threshold in the AIS applies only to the cost of iron and steel, while the 5% threshold in the proposed BABAA waiver applies to all categories – iron and steel, construction materials and manufactured products. Combining the three categories actually

reduces the de minimis threshold for each category from 5% to 1.67%, cutting the long-established and accepted threshold in the AIS by two-thirds (67%).

CIFA recommends providing a separate de minimis threshold of 5% for each category – 5% for iron and steel, 5% for construction materials, and 5% for manufactured goods. To simplify the calculation, the waiver could also provide a flat 15% threshold for all de minimis components, regardless of the category.

To align with policy in the AIS waiver, the de minimis waiver for BABAA should consider adding a threshold for individual items under each category.

CIFA recommends adding a de minimis threshold for individual items under each category, just like the de minimis waiver for AIS. To be considered de minimis under the AIS waiver, “the cost of an individual item may not exceed 1 percent of the total cost of the materials used in and incorporated into a project.”

To ensure fair and consistent implementation, the de minimis waiver for BABAA should not require an evaluation of the nature or use of the components covered; the cost of materials should be the only consideration.

CIFA recommends eliminating the requirement that products be eligible for the de minimis waiver based “on the conditions or purpose of the project,” which is described under the section, “Anticipated Program Impacts Absent a Waiver.” Requiring subjective case-by-case determinations of products based “on the conditions or purpose of the project” will result in non-uniform interpretations across projects and SRF programs as well as other EPA programs. Establishing consistency for these determinations across all projects for all SRF and EPA programs will create a significant administrative burden that the waiver is intended to reduce.

To reduce administrative burden, the threshold for the de minimis waiver for BABAA should be based on a percentage of the project cost instead of the materials cost.

CIFA recommends that the threshold for the de minimis waiver be based on the total cost of the project, rather than to the total cost of materials. The cost of the project is documented in construction contracts. Conversely, the cost of materials is based on estimations provided by construction contractors, making it a less reliable source of data. Because of historic inflation and ongoing supply chain disruptions, many contractors are no longer able to provide estimations when materials are ordered and can only provide costs when materials are delivered, making estimations and determinations even more problematic.

Additionally, the statutory authority for EPA to provide “unreasonable cost waivers” for individual projects is based on the cost of the project, not the cost of materials. Using the same basis for the de minimis waiver will increase consistency with waivers for unreasonable costs.

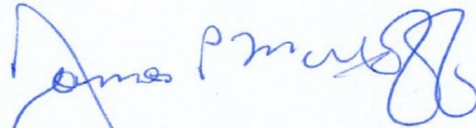
Comprehensive guidance is needed to ensure compliance with the BABAA mandate for manufactured products.

SRFs and SRF borrowers need comprehensive guidance to accurately calculate the cost of materials to determine whether a manufactured product, especially those with multiple components, is considered American-made. In the absence of detailed instructions for the "content test," borrowers may not apply for funding from the SRFs and SRFs may have to delay approval of financing for water infrastructure projects currently in the pipeline.

It is in the public interest to provide a temporary waiver of BABAA mandates for manufactured products until guidance is issued and operationalized. A temporary waiver for this category for all water infrastructure projects will maintain construction timelines for critical water and wastewater infrastructure projects, which are fundamental to protecting public health and environmental protection.

Thank you for your consideration.

Sincerely,



James P McGoff
COO and Director of Environmental Programs
Indiana Finance Authority
CIFA President

About CIFA

CIFA is a national not-for-profit organization that represents the Clean Water and Drinking Water State Revolving Funds (SRFs), the nation's premier programs for funding water infrastructure that protects public health and the environment.

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