

CIFA's Proposed Amended Waiver for Water Infrastructure Projects

Introduction

The U.S. Environmental Protection Agency, state partners, water utilities, manufacturers and other stakeholders are committed to successful implementation of the Build America, Buy America Act (BABAA), which requires domestic preference procurement for iron, steel, construction materials and manufactured products for federally funded infrastructure projects, including infrastructure that delivers safe drinking water, treats wastewater to make it safe to return to the environment and manages stormwater to protect water quality.

Providing one set of rules for water infrastructure projects across all EPA funding programs is critical to successful implementation of BABAA. One set of rules will provide consistency, clarity and equal application under the law to recipients of federal funding and will establish a level playing field across multiple funding programs.

To ensure protection of public health and the environment during the early years of BABAA implementation, this waiver only applies to a limited universe of water infrastructure projects that initiated design planning or construction prior to the effective date of the law, May 14, 2022. Because eligibility is based on the status of projects at the effective date of the law, this waiver will naturally expire as fewer and fewer projects meet eligibility requirements by the statutory deadline in the law.

This waiver provides much needed certainty to water utilities that started planning or building water infrastructure before federal procurement requirements became effective, which is critical to keeping these public health projects on track, on time and on budget. The uncertainty of securing a waiver for water infrastructure projects could derail these public health projects, resulting in increased costs, delays in construction and exploration of alternative and more costly financing. All these factors will also impact the affordability and efficacy of the project.

Public Interest Waiver for Select Projects

The EPA hereby issues a public interest waiver of the requirements of section 70914(a) of the Infrastructure Investment and Jobs Act (BIL), pursuant to Section 70914(b)(1) for all water infrastructure projects that initiated design planning prior to May 14, 2022, the effective date of the Build America, Buy America Act (BABAA).

This waiver supersedes the following waivers:

- Program Waiver of Section 70914(a) of P.L. 117-58, Buy America, Build America Act, 2021 for Projects in Design Planning, issued June 22, 2022
- Adjustment Period Waiver of Section 70914(a) of P.L. 117-58, Build America, Buy America Act, 2021 for SRF Projects that have Initiated Design Planning, issued September 2, 2022

Definition of a Water Infrastructure Project

A "water infrastructure project" consists of all planning and construction necessary to complete the proposed work regardless of the number of contracts or assistance agreements involved as

long as all contracts and assistance agreements for the project are closely related in purpose, time, and place.

Covered Programs

All water infrastructure projects funded by EPA programs will be covered by this waiver, including, but not limited to, projects funded by the:

- Clean Water and Drinking Water State Revolving Fund (SRFs)
- Water Infrastructure Finance and Innovation Act (WIFIA)
- Community Grants Program (congressional earmarks)
- Sewer Overflow and Stormwater Reuse Municipal Grants (OSG)
- Small and Disadvantaged Communities Grant Program, including Emerging Contaminants and Drinking Water Infrastructure Resilience & Sustainability (SDWA §1459A)
- Reducing Lead in Drinking Water Grant Program
- Voluntary School and Child Care Program Lead Testing and Remediation Grant Program
- 319 Nonpoint Source Management Program Implementation
- National Estuaries Program (CWA Section 320)
- Geographic Programs
- Clean Water and Drinking Water Grants to U.S. Territories and District of Columbia
- Clean Water Indian Set-aside (and any associated Interagency Agreements with the Indian Health Service)
- Drinking Water Infrastructure Grant – Tribal Set-Aside (and any associated Interagency Agreements with the Indian Health Service)
- Gulf Hypoxia Program
- U.S.-Mexico Border Water Infrastructure Program
- USMCA Implementing Legislation (Section 821 and Title IX, USMCA Supplemental Appropriations, 2020)
- Alaska Native Villages and Rural Communities Water Grant Program (ANV) (and any associated Interagency Agreements with the Indian Health Service)
- Coastal Wetlands Planning, Protection and Restoration Act, (CWPPRA) Programs

Covered Products

All projects that initiated design planning by the effective date of the law, May 14, 2022, will be permitted to use non-domestic iron, steel, construction materials and manufactured products.

American Iron and Steel (AIS)

This waiver doesn't apply to requirements for AIS in Clean Water Act (CWA) section 608 and Safe Drinking Water Act (SDWA) section 1452(a)(4). AIS requires the following products to be made primarily of iron and steel made in America, including lines or unlined pipes and fittings, manhole covers and other municipal castings, hydrants, tanks, flanges, pipe clamps and restraints, valves, structural steel, reinforced precast concrete and construction materials.

Projects that are statutorily required to comply with AIS, including projects funded by the SRFs, WIFIA and congressional earmarks, must continue to comply with AIS. However, based on Sections 70917(a) and (b) of the BIL, which provides a savings provision for existing statutory

requirements that meet or exceed BABAA requirements, compliance with AIS constitutes compliance with BABAA.

Eligibility Criteria

For purposes of this waiver, “initiated project design planning” means that an assistance recipient or funding program can provide documentation that the project met one of the ten eligibility criteria below by the effective date of the law, May 14, 2022.

1. Assistance recipient had begun or completed construction.
2. Funding program had approved or executed an assistance agreement for construction.
3. Assistance recipient solicited bids or executed a contract for construction.
4. Assistance recipient or funding program received plans and specifications (partial or completed) from an outside firm.
5. Assistance recipient or funding program received preliminary engineering report, or equivalent, from an outside firm.
6. Assistance recipient can provide documentation that design planning was initiated by in-house staff.
7. Funding program had approved or executed an assistance agreement for design and/or engineering, which may or may not include construction.
8. Assistance recipient had solicited bids or executed a contract for design and/or engineering, including contracts not funded by the funding program.
9. Assistance recipient submitted a sealed project proposal or letter of interest that includes a description of activities with a detailed construction budget by a professional engineer to the funding program.
10. Assistance recipient initiated the process of securing other financing, such as issuing bonds.
11. Assistance recipient scheduled or held a public hearing or referendum on the project.

If a project doesn’t meet one of these eligibility criteria, the assistance recipient may still request an individual project waiver from EPA.

Reporting

All funding programs must publicly report:

1. recipients of the waiver, including the name of the assistance recipient, the name of the project, and the number of the assistance agreement,
2. the qualifying criteria used to determine eligibility, including the date that design planning was initiated and which of the 11 eligible efforts was documented, and
3. a list of up to ten (10) of the most significant construction materials or manufactured products most likely to be subject to the waiver.
 - a. For example, a construction project to replace, repair or improve a force main could list “three lift station pumps, five valve actuators, three flow meters, and two pressure gauges.”

- b. For projects with more than ten (10) significant construction materials or manufactured products, assistance recipients should rely on the best professional judgment of their engineer(s) to determine the most significant items.

SRFs must enter this information in EPA's Office of Water SRF Data System by the end of each quarter. EPA shall determine the appropriate database and reporting frequency for all other EPA funding programs.