



June 27, 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: Proposed 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

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), **opposes** the proposed waiver of domestic preference procurement requirements for construction materials and manufactured goods in the Build America, Buy America Act (BABAA) for the Clean Water and Drinking Water SRFs.

Simply, the proposed waiver doesn't provide adequate "safe harbor" for borrowers in the SRF Project Pipeline to comply with BABAA.

The proposed waiver only exempts projects that meet narrowly defined parameters prior to the effective date of the law, Saturday, May 14, 2022, and offers no adjustment period for development and implementation of the new guidance for procurement of construction materials and manufactured products as suggested by the [Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure](#) issued by The White House Office of Management and Budget (OMB) on April 18, 2022.

Instead, CIFA urges the U.S. Environmental Protection Agency (EPA) and OMB to issue a temporary public interest waiver of domestic preference procurement requirements for construction materials and manufactured goods for SRF borrowers who "initiated design planning" for water infrastructure projects:

- prior to the effective date of the law,
- during the period of time between the effective date of the law until such a time as EPA issues comprehensive implementation guidance, and
- for at least six months after the EPA issues final comprehensive implementation guidance that clearly defines the rules of compliance.

Ensuring compliance with the law requires comprehensive implementation guidance to be issued *first*, followed by a temporary adjustment period that provides sufficient time for successful implementation. Clarity on the rules, consistency across programs, and continuity of policy through implementation will ensure critical water infrastructure projects remain on track, on time and on budget.

Unlike other federal programs, such as the Water Infrastructure Finance and Innovation Act (WIFIA) Program, SRFs are state-run programs which are responsible for compliance with federal mandates. After EPA issues its guidance, each SRF will need to develop the materials used to educate their borrowers on the new federal mandates and make programmatic changes to their state program to implement the national guidance and ensure compliance. Because of the unique nature of these state-federal partnerships, SRFs will need time, *at least six months from the date EPA issues their guidance*, to integrate the national guidance into their state programs, each of which has their own processes and procedures.

Additionally, "initiated design planning" should include efforts to procure services related to the water infrastructure project, such as the date of a bid or execution of a contract for rates studies, feasibility studies, design, planning, or engineering services, whether funded by SRFs or conducted independently. An executed assistance agreement with the SRF or inclusion on SRF Project Priority List or approved Capital Improvement Plan can also reflect "initiation" of design planning.

This temporary waiver for construction materials and manufactured products will provide a *minimal* adjustment period for SRFs to develop processes and procedures to implement these new mandates across the 102 state-run programs. Additional adjustment period waivers may be necessary, especially for manufactured products with a significant number of components.

(CIFA's comments don't address domestic preference procurement requirements, because as noted in the proposed waiver, borrowers of the SRFs must already comply with domestic preference procurements requirements for iron and steel under the Clean Water Act and Safe Drinking Water Act.)

The Need for Comprehensive Implementation Guidance Before Waivers

On November 15, 2021, President Joseph Biden signed BABAA into law as part of the Infrastructure Investment and Jobs Act (IIJA). OMB issued preliminary guidance on April 18, 2022, less than a month before the law took effect on Saturday, May 14, 2022. EPA has yet to issue comprehensive implementation guidance for borrowers of the SRFs, even though the law has been in effect for more than a month.

The current approach of issuing waivers *before* issuing comprehensive implementation guidance is creating confusion, uncertainty and inconsistency across the water sector. Additionally, the patchwork of waivers with different rules for different programs across the federal government

creates a question of equal treatment under the law, especially for water infrastructure projects that are eligible for funding under multiple federal programs in multiple federal agencies.

This haphazard implementation of BABAA has serious consequences, including:

- increased risk to public health from delays in construction of critical clean water and drinking water infrastructure, especially for disadvantaged, underserved and marginalized communities,
- increased threat to affordability of essential water and wastewater services from the increased cost of construction and compliance, which will disproportionately impact low-income households who can least afford it, and
- fundamental unfairness because of the significant disparity among recipients of federal financial assistance for infrastructure projects across EPA and other federal agencies.

The Increased Risk to Public Health

Protecting public health must remain the primary priority for all federal investment in water infrastructure.

The Clean Water and Drinking Water SRFs are the nation's premier programs for efficiently and effectively delivering federal funds for water infrastructure that protects public health and the environment to thousands of communities across the nation. Every year, these proven state-federal partnerships fund construction, rehabilitation and improvement of water infrastructure to prevent harmful water pollution, restore and protect water quality, and provide a safe, reliable drinking water to hundreds of millions of people across the nation.

The lack of comprehensive implementation guidance from EPA for BABAA is delaying decisions to pursue funding through the SRFs for these critical water infrastructure projects. These delays are increasing the risk of serious illness, especially for the most vulnerable among us including babies, children, elderly, infirmed and immunocompromised.

While the proposed waiver provides relief to the universe of borrowers who began construction or submitted engineering plans before the effective date of the law, the narrow scope of the waiver leaves too many communities with an uncertain future. Some borrowers missed the deadline by just a few days; had they known, those communities may have worked overtime to meet the deadline. Other borrowers who had initiated, but not completed, planning have put their projects on hold until EPA issues the comprehensive implementation guidance. Based on the final guidance, borrowers may have to return to the drawing board to redesign their projects, further increasing the cost of construction and delaying the health benefits of clean water to Americans.

EPA has provided no timeline for issuing the implementation guidance, meaning these projects could be delayed for months and maybe longer.

The Increased Threat to Affordability of Essential Water Services

Supporting access to affordable water and wastewater services is also a stated priority for federal investment in water infrastructure, especially for the historic funding provided through the IIJA.

SRF subsidized loans have saved billions of dollars in infrastructure costs, allowing utilities to meet more stringent health standards, while maintaining more affordable access to life-sustaining water services, especially for disadvantaged communities and vulnerable populations.

While well-intentioned, every federal mandate on SRF borrowers increases the cost of construction of water infrastructure. Prescriptive procedures and excessive paperwork to demonstrate compliance with federal mandates also increases the cost of administration for federally financed water infrastructure projects. Those who lack the full-time professional capacity to manage compliance are disproportionately low-income, disadvantaged and underserved communities, those who can least afford the increased cost of construction and compliance.

Applying new federal mandates on water infrastructure projects at this time will compound the extraordinary economic conditions facing the nation. The cost of redesigning projects, sourcing American made products, and rebidding contracts will be compounded for utilities who are already facing historic inflation rates, unprecedented supply chain disruptions, and a once-in-a-generation worker shortage that will impact the cost of water infrastructure projects as well as day-to-day operations. Increased costs are likely to erase the savings of SRF subsidized loans, which can alleviate the pressure on utilities to raise rates to pay for the full cost of service.

With the growing threat of recession on the horizon, now is not the time to implement new federal mandates that could threaten the affordability of water and wastewater services, especially for working families who are struggling with the higher cost of food and energy and seniors who've experienced a significant loss of retirement income.

Fundamental Unfairness for SRF Borrowers

Maintaining equal treatment under the law is fundamental.

While BABAA expressly provides for waivers, it's hard to believe Congress contemplated a different set of rules for every infrastructure program across the federal government, especially for programs that fund the same types of water infrastructure projects. Additionally, unlike SRF and WIFIA borrowers who must repay the federal financial assistance they receive, these other programs provide grants, which don't have to be repaid.

EPA's proposed waivers:

- EPA's proposed waiver for the Clean School Bus Program exempts all projects funded with 2022 appropriations from all BABAA requirements.

- EPA's waiver for WIFIA exempts borrowers that "initiated" design planning before the effective date of the law from all BABAA requirements, including mandates for American iron and steel. WIFIA funds the same exact type of projects funded by the SRFs.
- While not yet published, EPA is expected to propose a waiver exempting all other projects funded with 2022 appropriations by programs under the EPA Office of Water, including Congressionally Directed Spending / Community Funded Projects (Earmarks). These programs fund the same type of water projects funded by the SRFs.

Other federal agencies have implemented universal waivers for adjustment periods across all infrastructure projects, although with varying effective dates:

- The U.S. Department of Transportation [adopted waiver](#) provides an adjustment period of 180 days from the effective date of the law (November 10, 2022) for construction materials for all projects.
- The U.S. Department of Education's [proposed waiver](#) provides an adjustment period until October 1, 2022 for iron, steel, construction materials and manufactured goods for all projects.
- The U.S. Department of Homeland Security's Federal Emergency Management Agency' (FEMA) [proposed waiver](#) provides an adjustment period of six months from the approval date of the waiver for iron, steel, construction materials and manufactured goods for all projects.
- The U.S. Department of Housing and Urban Development's [proposed waiver](#) provides an adjustment period of six months from the effective date of the law for iron, steel, construction materials and manufactured goods for all projects.
- The U.S. Department of Interior's [proposed waiver](#) provides an adjustment period of six months from the approval date of the waiver for iron, steel, construction materials and manufactured goods for all projects.
- The Gulf Coast Ecosystem Restoration Council's [proposed waiver](#) provides an adjustment period of six months from the effective date of the waiver for iron, steel, construction materials and manufactured goods for all projects.

Holding SRF borrowers to a higher standard of compliance than other recipients of federal assistance, many of whom are grant recipients, is fundamentally unfair. All federal programs under BABAA should be treated the same under the law.

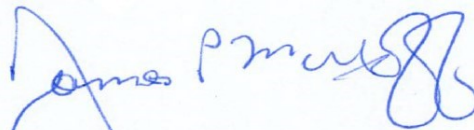
Systematic Implementation Will Lead to Success

Again, CIFA urges the EPA and OMB to issue a temporary public interest waiver of domestic preference procurement requirements for construction materials and manufactured goods for SRF borrowers who “initiated design planning” for water infrastructure projects:

- prior to the effective date of the law,
- during the period of time between the effective date of the law until such a time as EPA issues comprehensive implementation guidance, and
- for at least six months after the EPA issues final comprehensive implementation guidance that clearly defines the rules of compliance.

Thank you for the opportunity to comment on this proposed waiver and for your consideration of our comments. CIFA looks forward to working with the Biden-Harris Administration to implement BABAA to strengthen our nation’s commitment to clean water.

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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