



Clean Water
State Revolving Fund



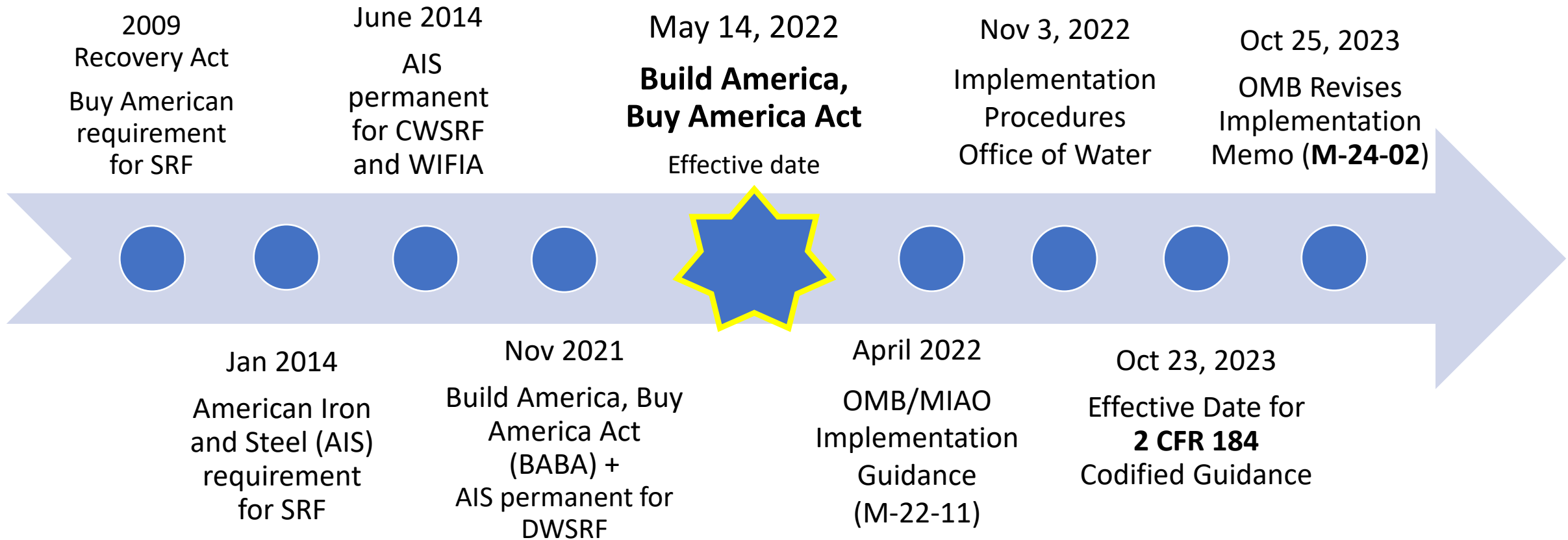
BUILD AMERICA, BUY AMERICA ACT AND WATER INFRASTRUCTURE – OMB GUIDANCE UPDATE AND DISCUSSION

COUNCIL OF INFRASTRUCTURE FINANCE AUTHORITIES NOVEMBER 2023

WHAT'S NEW WITH BABA?

- Domestic Preference Requirements - History Timeline
- OW Implementation Memo (documentation refresher)
- New: OMB Codified Guidance (2 CFR 184)
- Revised: OMB Implementation Memo (M-24-02)
- Amended SRF Design Planning Waiver
- Request for Information re: Water Products

EPA WATER – DOMESTIC PREFERENCE TIMELINE



EPA OW IMPLEMENTATION MEMO

- Released November 3, 2022
- “Build America, Buy America Act Implementation Procedures for EPA Office of Water Federal Financial Assistance Programs”
- Supplemental to OMB M-22-11 guidance
- <https://www.epa.gov/system/files/documents/2022-11/OW-BABA-Implementation-Procedures-Final-November-2022.pdf>



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF WATER

November 3, 2022

MEMORANDUM

SUBJECT: Build America, Buy America Act Implementation Procedures for EPA Office of Water Federal Financial Assistance Programs

FROM: Radhika Fox
Assistant Administrator

A handwritten signature in black ink, appearing to be "Radhika Fox".

TO: EPA Regional Water Division Directors, Regions I – X
EPA Office of Water Office Directors

OVERVIEW

The Biden-Harris Administration recognized the Nation's critical need for infrastructure investment, championing the Bipartisan Infrastructure Law (BIL), which Congress passed on November 15, 2021 (also known as the Infrastructure Investment and Jobs Act (IIJA)). The BIL will provide an unprecedented level of federal investment in water and wastewater infrastructure in communities across America.

In Title IX of the IIJA, Congress passed the Build America, Buy America (BABA) Act, which establishes strong and permanent domestic sourcing requirements across all Federal financial assistance programs for infrastructure. The U.S. Environmental Protection Agency (EPA) Office of Water is honored to help lead the implementation of these provisions and is proud of its near decade of successful implementation of the American Iron and Steel (AIS) provisions for its flagship water infrastructure programs.

This is a transformational opportunity to build a resilient supply chain and manufacturing base for critical products here in the United States that will spur 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 currently made domestically. This will take time, and flexibility will be important to ensure that EPA can leverage critical water investments on time and on budget to protect public health and improve water quality.

EPA OW BABA IMPLEMENTATION MEMO

- Section 1: General
- Section 2: Product Coverage
- Section 3: Co-funding
- Section 4: Waivers
- **Section 5: Documenting Compliance**
- Section 6: Programs with American Iron and Steel Requirements
- Section 7: Program-Specific Issues
- Appendix 1: Example BABA Construction Contract Language
- Appendix 2: Example BABA Assistance Agreement Language



HOW CAN PRODUCT COMPLIANCE BE DEMONSTRATED?

Manufacturer's documentation for the product(s) should include:

- Project identifier (name, location, contract number, or project number)
- The identity of the product(s) being supplied to the project (can be simple)
- A statement attesting that the products supplied are compliant with BABA requirements (the “certification”)
 - Certifying statement affirms knowledge of manufacturing processes and attests that the product meets BABA (noting product category)
- Location(s) of manufacturing being certified (city and state)
 - ✓ Minimum: documenting final point of manufacturing in the United States
- Signature of company representative making the certification (on company letterhead, signature can be electronic)

EXAMPLE CERT LETTER



MINAS MORGUL

Minas Morgul Steel, Inc.
1245 Barad Dur Ave.
Mordor, Middle Earth
+1 555 867 5309

Material Certification

August 29, 2017
Gondor Supply Co.
3477 One Ring Ln.
Fort Tirth, IA 50501

RE: Job Name: Saruman Contracting
Project#: Hobbiton Water Treatment Plant, The Shire, WY
Order Type: Submittal

<u>QUANTITY</u>	<u>DESCRIPTION</u>
30	8550350 66-S VLV BOX 26T 30B 1.5 WTR

Dear Valued Partner:

We hereby certify that the iron used to make the construction castings manufactured by MMS for the above referenced project is in full compliance with ASTM A48, Class 35B and AASHTO M105 for gray iron castings and ASTM A536, Grade 70-50-05 for ductile iron castings. Thank you for specifying and using products manufactured by Minas Morgul Steel, Inc.

The above listed castings are melted and manufactured 100% in the United States of America at our foundries in Moria, OK and Isengard, MI. These castings comply with the applicable provisions of the Code of Federal Regulations 23 CFR 635.410 BUY AMERICA Requirements.

We also certify that the above listed products supplied to the subject project are in full compliance with the American Iron and Steel (AIS) requirement as mandated in EPA's State Revolving Fund Programs.

Meriadoc Brandybuck
Product Quality Manager
Minas Morgul Steel, Inc.

Key Elements:

- Project reference
- Specific list of products
- Location of manufacturing (city and state)
- Signature of representative
- Dom Pref. requirement reference (+BABA Category Reference)

OMB CODIFIED GUIDANCE: 2 CFR 184

- Published August 23, 2023
- Effective October 23, 2023
- Final guidance for manufactured products component cost test, product categorization, and non-ferrous construction materials definitions
 - Definitions of manufactured products and guidance on determining the cost of components test
- <https://www.federalregister.gov/d/2023-17724/page-57788>

The screenshot displays the Federal Register page for a rule titled "Guidance for Grants and Agreements". The page header includes the National Archives logo, the text "FEDERAL REGISTER The Daily Journal of the United States Government", and the Presidential Seal. A blue bar at the top right indicates it is a "Rule". Below the title, it states "A Rule by the Management and Budget Office on 08/23/2023". The main content area is divided into sections: "AGENCY:" (Office of Federal Financial Management, Office of Management and Budget), "ACTION:" (Final rule; notification of final guidance), "SUMMARY:" (The Office of Management and Budget is revising the OMB Guidance for Grants and Agreements...), and "DATES:" (The effective date for the revised guidance is October 23, 2023). A right-hand sidebar titled "DOCUMENT DETAILS" provides additional information: "Printed version: PDF", "Publication Date: 08/23/2023", "Agency: Office of Management and Budget", "Dates: The effective date for the revised guidance is October 23, 2023.", "Effective Date: 10/23/2023", "Document Type: Rule", "Document Citation: 88 FR 57750", "Page: 57750-57790 (41 pages)", "CFR: 2 CFR 184, 2 CFR 200", and "Document Number:".

OMB MADE IN AMERICA – 2 CFR 184 HIGHLIGHTS

- Key text of guidance begins at end of page 57787
- Section 184.3 - definitions of key terms, including:
 - Manufactured Product means –
"(1) Articles, materials, or supplies that have been:
 - (i) Processed into a specific form and shape; or
 - (ii) Combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies."

OMB MIAO – 2 CFR 184 HIGHLIGHTS, CONT.

- Component –
"an article, material, or supply, whether manufactured or unmanufactured, incorporated directly into: (i) a manufactured product; or, where applicable, (ii) an iron or steel product."
- Manufacturer –
"the entity that performs the final manufacturing process that produces a manufactured product."
- Produced in the United States (Manufactured Product) –
"(i) The product was manufactured in the United States; and
(ii) The cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product."

OMB MIAO – 2 CFR 184 HIGHLIGHTS, CONT.

- Construction Material Clarifications:
 - Engineered wood – construction material
 - Drop cable = fiber optic cable – construction material
 - Paint, coatings, brick, etc. added to project on site – manufactured products
 - Minor Additions – agency decides amount allowed in "construction materials"
 - For (non-ferrous) Construction Materials only
 - Minor additions of articles, materials, supplies, or binding agents (coatings, paint, etc.)
- Kit = a manufactured product
 - Kits are from a manufacturer or supplier that have a unified function and are assembled on site
 - Manufacturing product component test applies (55%)

OMB MIAO – FINAL 2 CFR 18, CONT. - CONSTRUCTION MATERIALS

Construction material	“Produced in the U.S.” means all manufacturing processes occurred in the U.S.
Non-ferrous metals	From initial smelting or melting through final shaping, coating, and assembly
Plastic and polymer-based products	From initial combination of constituent plastic or polymer-based inputs, or, where applicable, constituent composite materials, until the item is in its final form
Glass	From initial batching and melting of raw materials through annealing, cooling, and cutting
Fiber optic cable	From the initial ribboning (if applicable), through buffering, fiber stranding and jacketing, occurred in the United States.
Optical fiber	From the initial preform fabrication stage through the completion of the draw
Lumber	From initial debarking through treatment and planing
Drywall	From initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels
Engineered wood	From the initial combination of constituent materials until the wood product is in its final form

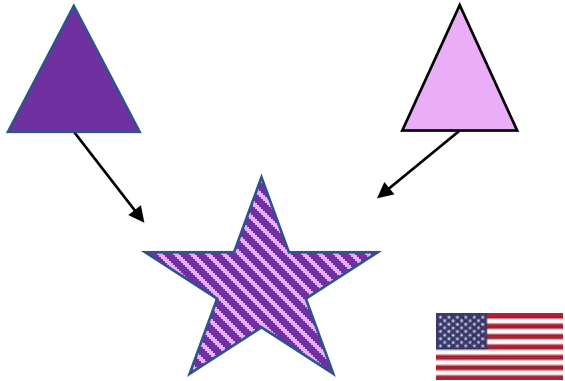
OMB MIAO – 2 CFR 184 HIGHLIGHTS, CONT.

§184.5 Determining the cost of components for manufactured products

- (a) For components purchased by the manufacturer, the acquisition cost, including transportation costs to the place of incorporation into the manufactured product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or
- (b) For components manufactured by the manufacturer, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (a) of this section, plus allocable overhead costs, but excluding profit. **Cost of components does not include any costs associated with the manufacture of the manufactured product.**

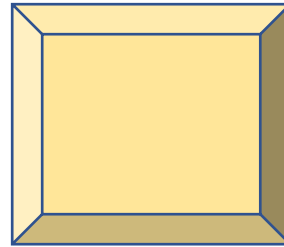
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Manufacturer A (MA)
US Location



Fully "Processed"
(manufactured) in the US =
Component 100% Made in US

Final Manufacturer C (MC)
US Location



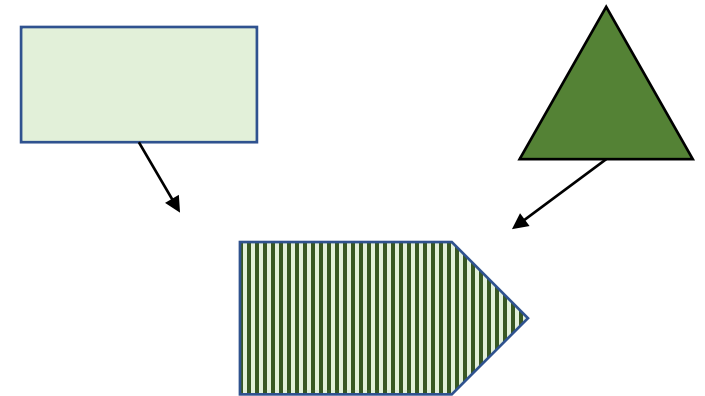
Component Made in US Factory

MC buys from MA and MB

Component Test Guide

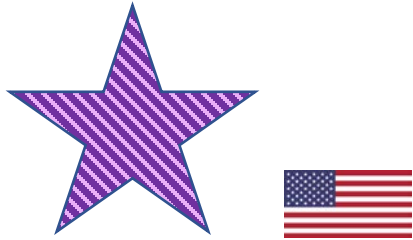
1. Components of the final product are either **100% Made in US** or **100% Foreign origin**.
2. Each component cost includes ALL costs to obtain it (tariffs, shipping, etc.)
3. Include components made by **final manufacturer** in content test (w/o profit)

Manufacturer B (MB)
Non-US Location



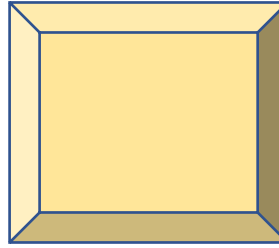
Manufactured outside the US =
Component 100% Not Made in US

Manufacturer A
– US Location



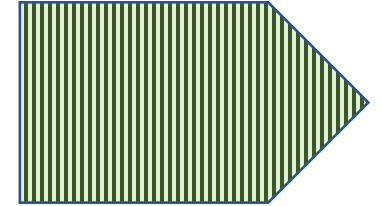
Fully “Processed”
(manufactured) in the US =
Component Made in US

Final Manufacturer C – US Location



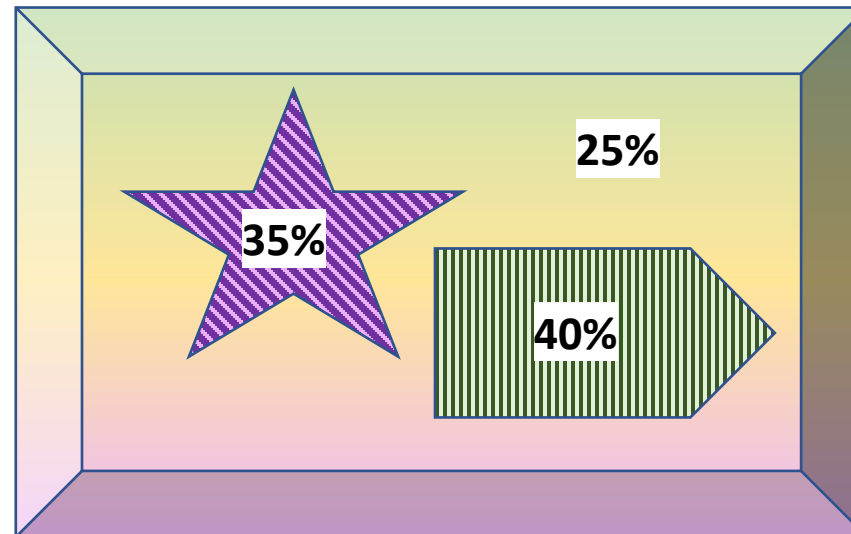
Component Made in US Factory

Manufacturer B
– Non-US Location



Manufactured outside the US =
Component 100% Not Made in US

Manufacturer C
Product Content Percentages:



Product Content Test

25% + 35% = 60% Made in US

40% Not Made in US

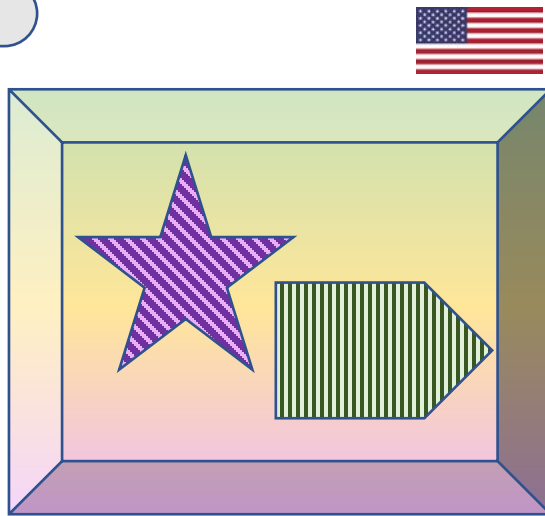
Manufactured Product is BABA Compliant

because cost of components > 55 %

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Manufacturer C Certification

This product
meets the 55%
component test
= BABA
compliant
~ *Manufacturer C*



Five Key Elements of a Manufacturer Certification

1. Letter on a company letterhead and signed by a company representative
2. Reference to the project
3. List of products
4. City and State of manufacturer
5. Reference to BABA
 - a) Should include “meets 55% component test” for manufactured products

DRAFT

UPDATED OMB IMPLEMENTATION MEMO: M-24-02

- Published October 25, 2023
- <https://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf>
- Replaces M-22-11 (April 18, 2022)
- Includes several revisions of note to M-22-11, including these key changes:
 - Significant changes to the “Cognizant Agency” policy from M-22-11
 - New policy regarding waivers and expenditures (“retroactivity”)
 - Additional information on MIAO’s expectations and role in waiver process

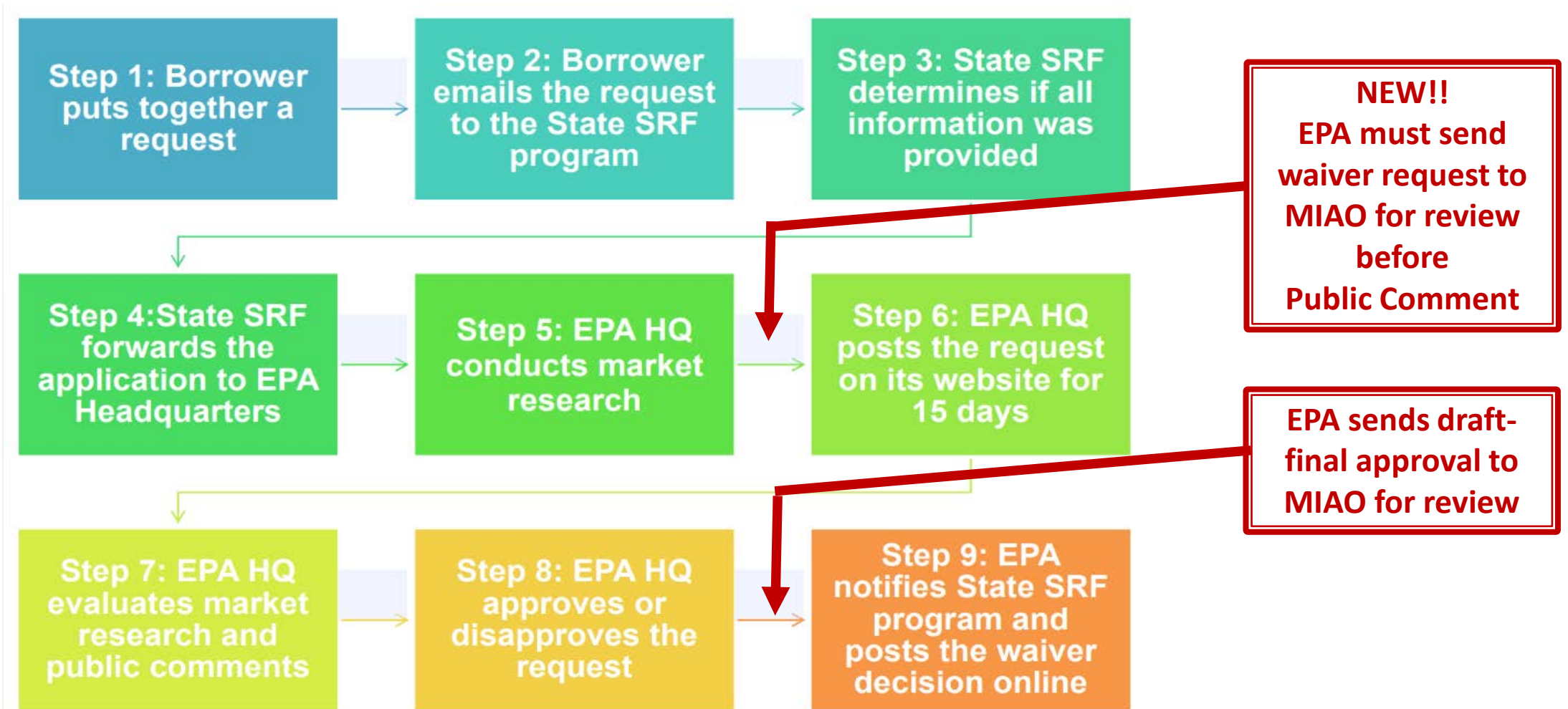
COGNIZANT AGENCY POLICY CHANGES IN M-24-02

- In M-22-11, the Cognizant Agency policy stated federal agencies could cooperate to minimize waiver duplication
- M-24-02 now states, “a Cognizant Agency cannot independently issue a waiver that applies to other agencies.”
- Further: “Any Federal agency that did not jointly issue the proposed and final waivers will need an individual waiver.”
- Projects funded by more than one federal agency will be required to propose and approve “individual” waivers or do so jointly.

PROHIBITION ON “RETROACTIVE” WAIVERS IN M-24-02

- Page 10 of M-24-02 includes new language regarding the timing of waivers
- MIAO acknowledges that waivers are necessary after an “award.”
- MIAO states, “the waiver cannot apply to expenditures already incurred under the Federal award for items subject to a Buy America preference before the effective date of the waiver.”
- Long-standing EPA policy: consider public interest waivers if circumstances outside assistance recipient’s control led to non-compliant product (e.g., misled).
- Cognizant agency policy changes could also cause further complications.

NEW STEPS IN WAIVER PROCESSING THROUGH MIAO



AMENDED SRF DESIGN PLANNING WAIVER

- Final amended SRF Design Planning Waiver
 - Allows for use by Community Grants (with SRF requirements)
 - Limits applicability to FY22 and FY23 appropriations
 - For SRF, this means projects funded by FY22/23 capitalization grant
 - Waiver replaces original SRF waiver only for projects "funded" after amended waiver approval date
 - Community Grants projects "awarded" before amended date, may use waiver if no "expenditures" incurred before date

WATER INFRASTRUCTURE PROJECTS RFI

- EPA and other Federal agencies are publishing a Request for Information (RFI) on water infrastructure products
 - Includes product list from initial research and outreach identified as potentially in short supply or not available
 - Comment period: 30 days
 - Primarily seeking comments from Manufacturers / Suppliers
 - If product waivers examined, EPA will follow precedent for Targeted, Time-Limited, Conditional (i.e, AIS stainless nuts&bolts)

RESOURCES

- Websites:
 - www.epa.gov/cwsrf/build-america-buy-america-baba
 - <https://www.madeinamerica.gov/>
- Email Inboxes:
 - BABA-OW@epa.gov (hyphen!)
 - SRF_AIS@epa.gov (underscore!)



Questions and Discussion