



July 6, 2023

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

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

Re: Amended Public Interest Waiver of Section 70914(a) of P.L. 117-58, Build America, Buy America Act, 2021 for State Revolving Fund and Water Infrastructure Projects that have Initiated Design Planning

Dear Assistant Administrator Fox and Director Shmavonian,

The Council of Infrastructure Financing Authorities (CIFA), which represents the Clean Water and Drinking Water State Revolving Funds (SRFs), **supports** the intent, but **opposes** the proposed amended waiver of domestic preference requirements in the Build America, Buy America Act (BABAA) for State Revolving Fund and Water Infrastructure Projects.

The U.S. Environmental Protection Agency (EPA) has described the proposed waiver as simply extending the same relief from BABAA requirements for SRF projects to projects funded by the Community Grants Program (congressional earmarks). However, the proposed waiver actually establishes a two-tiered system of relief with one set of rules for projects funded by congressional earmarks and another set of more burdensome rules for projects funded by the SRFs.

CIFA believes there is a justifiable and urgent need to extend temporary relief from BABAA requirements to all water infrastructure projects that initiated design planning by the effective date of the law, May 14, 2022. Issuing a new waiver with the same rules for all water infrastructure projects funded through EPA, regardless of the program that provides the funding, will reduce confusion across the water sector. Establishing one set of clear and consistent rules supports successful, long-term implementation of BABAA by ensuring continued participation in EPA's funding programs for water infrastructure that protects public health and the environment. To support these efforts, CIFA offers an alternative amended waiver in Appendix A.

EPA's proposed waiver worsens confusion around implementation of BABAA.

EPA has caused significant confusion across the water sector by establishing different waivers with different rules for the same types of water infrastructure projects with the same pool of applicants. The proposed waiver exacerbates this confusion by establishing a "waiver within a waiver" which provides more relief from BABAA requirements for projects funded by congressional earmarks than for projects funded by SRFs or other programs implemented by the states.

- EPA's original waiver for congressional earmarks covered 16 Select EPA Funding Programs, including programs implemented by the states such as the Small, Underserved and Disadvantaged Community Grant Program and the Sewer Overflow and Stormwater Reuse Grant Program. However, EPA's proposed waiver omits these state-run programs and doesn't extend the same relief to these state projects.
- The excerpt below waives domestic preference procurement requirements for iron and steel for projects funded by congressional earmarks but not for state projects funded by the SRFs.

"For FY22 and FY23 previously planned water infrastructure projects subject to SRF requirements only, the iron and steel requirements of BABA are also waived for such projects not already subject to the American Iron and Steel requirements. For all other eligible projects, a reasonable expectation existed that the American Iron and Steel (AIS) requirements would apply to the SRF project, and no exceptions to those long-standing requirements are provided through this waiver."

- The entire section "Conditional and Target-Limited" applies to the SRFs and projects funded by SRFs but not to EPA or projects funded by congressional earmarks.
 - Like the BABAA waiver for projects funded by the Water Infrastructure Finance and Innovation Act Program (WIFIA), EPA provides themselves with 100% discretion to determine the eligibility of the waiver for a project funded by a congressional earmark, while limiting SRFs to "eight documentable efforts" to determine eligibility of an SRF project.
 - SRFs are required to report projects covered by the waiver; EPA doesn't apply any reporting requirements to themselves. Neither the expired waiver that covered congressional earmarks nor the current WIFIA waiver have reporting requirements.
 - Projects funded by the SRFs must provide a list of up to ten "significant" construction materials and manufactured products that could potentially be covered by the waiver; EPA doesn't apply this requirement to projects funded by congressional earmarks. Neither the expired waiver that covered congressional earmarks nor the current WIFIA waiver have a requirement to provide a list of materials.

Given the similarities between the relief for projects funded by congressional earmarks and projects funded by WIFIA, it would be less confusing to extend the BABAA waiver for WIFIA projects to projects funded by congressional earmarks. Establishing a separate waiver for projects funded by congressional earmarks would also be less confusing.

Congress clearly intended for projects funded with congressional earmarks to comply with American Iron and Steel (AIS).

Since 2022, Congress has used the SRF capitalization grants to pay for congressional earmarks. By using the SRF capitalization grant to pay for congressional earmarks, Congress clearly intended for all SRF requirements, including AIS requirements, to apply to all projects funded by a congressional earmark.

Under AIS, projects funded by the SRF capitalization grant, including congressional earmarks, must follow domestic procurement requirements for products that are primarily iron and steel, 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.

Waiving BABAA iron and steel requirements for projects funded by a congressional earmark sets the stage for EPA to also waive AIS requirements, which is patently unfair and inconsistent with congressional intent.

Amending the BABAA waiver is unnecessary for projects co-funded with the SRFs.

In an email announcing the comment period for the proposed amended waiver, EPA said “Clarification of the applicability of the waiver for all projects subject to the SRF requirements should also provide certainty for many co-funded projects and will greatly reduce the burden on communities, states, and our programs at this critical stage in implementation.” This reasoning is confusing and potentially misleading.

Under federal law, SRFs that provide cost-share for congressional earmarks are legally required to use state funds. BABAA only applies to projects that receive federal funding, not to projects that receive state funding, so the BABAA SRF waiver can never apply to a project co-funded by a congressional earmark and an SRF subsidized loan. No further clarification is required.

The public deserves transparency on the need and intent for amending the SRF waiver. The proposed waiver doesn't *clarify* the applicability of the SRF waiver for co-funded projects; it *changes* the projects that are eligible for the SRF waiver. When EPA first issued BABAA waivers, it clearly and decisively chose to exclude projects funded by congressional earmarks from the SRF waiver. Since this decision, the only circumstance that has changed is expiration of EPA's waiver that provided relief from BABAA requirements to projects funded by congressional earmarks.

The current BABAA waiver for SRF projects is a purely conditional waiver.

CIFA disagrees with EPA that the current SRF waiver is an “adjustment period” waiver.

According to the Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure issued by the Made in America Office (MIAO Guidance), the purpose of an adjustment period waiver is “to allow recipients and agencies to transition to new rules and processes.”

The current BABAA waiver for SRFs doesn’t meet this criterium. Unlike EPA’s other BABAA waivers, the current waiver for SRF projects doesn’t apply to the program, to all projects funded by the program, or to all recipients of assistance from the program. Conversely, the current SRF waiver only applies to limited subset of water infrastructure projects that meet the very specific and narrow conditions of the waiver. Water infrastructure projects that don’t meet these clearly defined conditions are not eligible.

The sunset deadline in the proposed waiver is arbitrary and unnecessary; the current waiver for SRF projects already has a deadline based on the effective date of law.

The deadline for eligibility under the current wavier for SRF projects is the effective date of the law, May 14, 2022, more than a year ago. With every passing day, the window for eligibility narrows because fewer and fewer projects will be able to meet the conditions of the waiver by that clear cutoff date. The current waiver for SRF projects will self-expire when no projects can demonstrate documentable efforts that design planning was initiated before the deadline established by BABAA.

The current waiver was issued on September 2, 2022, six months after the effective date of the law. Because the criteria for eligibility was established after the effective date of the law and imposed retroactively, it is impossible for a recipient to do anything to “make” their project eligible for the waiver. Eligibility is clear cut; either the project meets the documentable requirements to be eligible or it doesn’t.

The conditions and deadline in the current BABAA waiver for SRF projects are consistent with congressional intent.

CIFA believes Congress intended BABAA to spur sustained investment in the manufacturing sector of the American economy. By establishing the effective date of the law six months after enactment and providing federal agencies with the ability to provide waivers that are in the public interest, Congress also recognized the need for time and flexibility to successfully achieve this enduring goal.

EPA’s insistence on sunseting relief for projects that are underway seems inconsistent with congressional intent. CIFA doesn’t believe that Congress wants utilities to halt construction, design or planning of water infrastructure projects that began before the new requirements became effective.

The proposed waiver undermines public health and affordability of safe drinking water, wastewater services and stormwater management.

The current BABAA waiver for SRF projects is designed to keep construction of pre-existing water infrastructure projects on track, on time and on budget. Withdrawing relief for projects

that are currently eligible ignores the purpose and intent of the current waiver, which is to prevent disruption of water infrastructure projects that were underway before the law became effective.

The wholesale reversal of relief for SRF projects also undermines the credibility of the process for obtaining a project-specific waiver. This action sends a clear message that EPA plans to use their sole discretion to deny waivers for projects that are currently eligible under the SRF waiver.

Simply, if EPA was going to approve all project specific waivers that meet the current eligibility requirements, why sunset the waiver in the first place? Doing so only creates more process and paperwork, which will undoubtedly delay and increase the cost of design and construction of water infrastructure projects.

Moreover, sunsetting the waiver creates an unprecedented level of uncertainty surrounding implementation of BABAA. Many utilities made decisions about accessing low cost, federally subsidized financing from the SRFs based on their eligibility under the current waiver, which ensures their projects wouldn't have to be redesigned to meet new requirements. Abruptly reversing course sends the message that the rules for domestic preference procurement requirements under BABAA may be withdrawn or changed at any time for any reason, regardless of the impact on public health and environmental protection.

Utilities that lose relief provided by the current BABAA waiver for SRF projects will need to consider the uncertainty, increased cost and construction delays of obtaining a project specific waiver. These factors may lead many utilities to abandon federal funding for their water infrastructure projects, which increases the risk to public health and the environment and exacerbates affordability of critical water services to low-income communities and households.

The public deserves more transparency on how EPA will implement the new sunset clause.

EPA's proposed waiver fails to provide any detail on how the new sunset clause will be applied to projects funded by congressional earmarks and SRFs. Without this critical information, the public and assistance recipients cannot provide constructive comments on the potential impact of proposed changes to the current waiver.

For example, the proposed waiver provides sweeping relief for iron and steel requirements for projects funded by appropriations in fiscal years 2022 and 2023. Will the sunset clause be based on the year of appropriations as well? Or will the sunset clause be applied to projects that applied for the grant? Or will the sunset clause only apply to projects that have been awarded an EPA grant?

Each of these approaches poses challenges.

- Applying the new sunset deadline to projects funded by appropriations bills for fiscal years 2022, 2023 and 2024 provides applicants with clarity on whether their project is eligible but

may jeopardize eligibility for large, complex projects that are built and financed over multiple years beyond the arbitrary sunset deadline.

- Applying the new sunset deadline to projects based on the date a recipient submits an application also provides clarity but may jeopardize eligibility for small, rural and disadvantaged communities who require technical assistance to prepare a complete application.
- Applying the new sunset deadline to projects that were awarded a grant by EPA creates the greatest uncertainty because EPA's ability to process grant applications will determine whether a project qualifies under the waiver. EPA needs to guarantee that applications submitted by a specific date will be eligible for the waiver. If EPA needs 90 days to process a grant application, the practical sunset date is actually June 30, 2022, and that date should be made clear to all recipients covered by the waiver.

Because of the magnitude of these different approaches on congressional earmarks and the SRFs, EPA should provide another 30-day comment period for a revised waiver that includes the fundamental details of implementation.

CIFA recommends establishing one set of rules for all water infrastructure projects, regardless of the EPA funding program.

In Appendix A, CIFA proposes an amended general applicability public interest waiver that provides conditional relief for BABAA requirements for all EPA funded water infrastructure projects that initiated design planning by the effective date of the law, May 14, 2022. CIFA's proposed waiver also establishes one set of rules for eligibility, data collection and reporting.

Elements of CIFA's proposed waiver:

- Rescinds current BABAA waivers for SRF and WIFIA projects.
- Defines a water infrastructure project based on EPA's definition in the Supplemental Questions & Answers for BABAA.
- Lists all EPA water infrastructure funding programs covered by the new waiver.
- Clearly states that the waiver doesn't apply to domestic preference procurement requirements for America Iron and Steel (AIS).
- Clarifies the language for "documentable efforts" to provide more specificity to the conditions of eligibility.
- Applies the requirement for a materials list to all projects.
- Applies reporting requirements to all programs.

To provide clarity for the water sector and EPA funding programs, CIFA's proposed waiver includes a definition of a water infrastructure project based on the definition in [EPA's Supplemental Questions & Answers \(Q8.8\)](#). As EPA knows, WIFIA and the SRFs finance large, complex projects over multiple years, sometimes referred to as programmatic financing. Applying new rules mid-way through design and construction of these projects will have

significant detrimental effects on a utility's ability to provide safe drinking water, maintain reliable wastewater services, and manage stormwater to protect the environment.

To provide consistency across EPA funding programs, CIFA's proposed waiver clarifies the current documentable efforts. To ensure projects, especially congressional earmarks, are covered as intended, CIFA's proposed waiver adds three new documentable efforts – one is a slight variation on other current efforts and two explicitly state that a project that has started the construction phase is eligible for the waiver.

The new documentable efforts are:

- Assistance recipient had begun or completed construction.
- Funding program had approved or executed an assistance agreement for construction.
- 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.

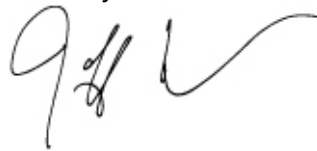
CIFA supports successful implementation of BABAA.

Establishing one waiver for all EPA funded water infrastructure projects will reduce confusion, foster consistency and ensure a fair and equal application of the law. Providing an additional 30-day comment period for the revised waiver, which includes the details of implementation, is in the public interest.

Ultimately, successful implementation of BABAA will depend on the workability of the regulations and rules that will be used to determine and certify compliance with the domestic preference procurement requirements in the law. CIFA and the SRFs are available to assist with the development of these rules by Made in America Office and EPA.

Thanks so much for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'J Walker', with a long horizontal flourish extending to the right.

Jeff Walker

Executive Administrator, Texas Water Development Board
President, Council of Infrastructure Financing Authorities

CC: Jennifer McLain, Director, EPA Office of Groundwater and Drinking Water
Andrew Sawyers, Director, EPA Office of Wastewater Management
Zach Schafer, Senior Advisor, EPA Office of Water

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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APPENDIX A: CIFA's Proposed Amended Waiver

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 (IIJA), 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.