



June 29, 2022

The Honorable Radhika Fox
Assistant Administrator, Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460
Via: BABA-OW@epa.gov

Re: 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,

The Association of State Drinking Water Administrators (ASDWA) and its members would like to commend EPA on its recent proposed waiver for the requirements under Build America, Buy America (BABA) for State Revolving Fund (SRF) borrowers that submitted engineering plans and specifications to a state agency before May 14, 2022 – the day BABA went into effect. ASDWA supports this action and recommends that EPA continue to implement similar waivers across all EPA infrastructure funding programs in limited circumstances and when the waivers are in the public interest.

ASDWA also recommends that EPA consider a broader application of the waiver for those projects that had already begun project planning prior to May 14, 2022. Improvements at treatment plants typically require pilot testing for the selection of the appropriate treatment technology before the start of construction plans and specifications. As the waiver states, “It is common for planning and development of complex projects to begin years prior to construction.” For this reason, ASDWA recommends following the approach that was proposed in the waiver for the WIFIA program, which “covers projects that have initiated design planning prior to May 14, 2022, the effective date of BABAA requirements. For purposes of this waiver, ‘initiated project design planning’ means efforts made by the utility owner to evaluate and identify both technologically and financially viable options for capital improvement projects.” ASDWA agrees with EPA’s assertion that “SRF assistance recipients did not have the opportunity to reasonably plan for the domestic preference requirements for manufactured product and construction materials by the effective date.” Additionally, ASDWA concurs with the Agency that imposing BABA requirements on projects that submitted engineering plans and specifications prior to May 14, 2022, would conflict with the Bipartisan Infrastructure Law’s (BIL) goal of “investing in the nation’s water infrastructure and initiating construction in an expeditious and efficient manner.” The SRF waiver should offer the same flexibility for SRF projects as extended to WIFA projects.

Waiver differences are not in the public interest and could adversely affect public health and the environment by slowing down construction and/or increasing construction costs. The funding from the BIL represents a once-in-a-generation opportunity, and this critical funding will assist water systems in addressing much-needed infrastructure improvements, removing lead service lines, and tackling emerging contaminants such as PFAS. But the Federal and state partners must work to lessen the burden and simplify the process for those communities most in need to access these funds.

To achieve this, ASDWA has the following recommendations for the Agency.

- EPA should provide additional waivers for BABA requirements, in limited circumstances, for the BIL funds moving through the drinking water state revolving fund (DWSRF) programs beyond just those that submitted engineering plans and specifications to a state agency before May 14, 2022, to include all SRF projects within certain qualifiers. ASDWA recommends that EPA use a population cutoff for projects to qualify for these waivers and recommends that the Agency consider a 10,000-population threshold for these waivers.
- ASDWA has interpreted that the BABA requirements would only apply to projects that utilize the federal cap grant funds and not the additional leveraged DWSRF funds. ASDWA supports this application of BABA but recommends EPA give a more explicit explanation as to what funds must comply with the BABA requirements.
- ASDWA also recommends that EPA consider similar waivers for the Davis-Bacon (DB) Act requirements.

ASDWA continues to support the underlying principles of BABA and DB as America needs to increase its ability to manufacture construction materials and components. However, in many cases, these requirements make the DWSRF process insurmountable for many small systems that need the funding the most. Small systems with only a few hundred connections face higher costs for even their basic supplies. Requiring BABA and DB for the infrastructure projects these systems so desperately need only exacerbates the economic disadvantage imposed on these systems. Some states, such as California, have resorted to utilizing their own funding to aid small and disadvantaged communities to overcome these shortcomings of the federal DWSRF program.

Limited BABA waivers assist States in meeting the Agency's goal under the Justice40 initiative to work towards ensuring that at least forty percent of the overall benefits from federal investments go towards disadvantaged communities. Justice40 and the communities that will benefit should be prioritized over BABA and DB. The benefits for the country by implementing BABA will result from much larger community projects that will do the overwhelming amount of purchasing for their much more significant investments. Pitting small communities against large community purchasing power will likely continue the injustice these communities struggle with every day.

As EPA releases additional waivers, ASDWA recommends that the Agency ensure consistency across all of EPA's infrastructure programs. The principles for waivers should remain the same whether the

funding results from WIFIA, BIL, Congressionally directed spending, America's Water Infrastructure Act (AWIA) or other legislation. The same principles should apply to all. Additionally, the waivers should reflect continuity and clarity across any application of the waivers. As stated previously, navigating this process can be burdensome and confusing for local communities and water systems. EPA should take every action possible to ensure that obtaining infrastructure funds is as smooth and straightforward as possible.

ASDWA's members look forward to further engagement with EPA as the Agency works to implement similar waivers to ensure that state primacy and funding agencies make the most of the opportunities with BIL funding. If you have any questions regarding these comments, please contact me (aroberson@asdwa.org) or Stephanie Schlea (sschlea@asdwa.org).

Sincerely Yours,

A handwritten signature in blue ink that reads "J. Alan Roberson". The signature is written in a cursive, flowing style.

J. Alan Roberson, P.E.
ASDWA Executive Director

Cc: Bruno Piggott – EPA OW
Jennifer McLain – EPA OGWDW
Andrew Sawyers – EPA OWM
Jorianne Jernberg – EPA OWM