

## **DECISION MEMORANDUM (DRAFT FOR PUBLIC COMMENT)**

**SUBJECT:** Adjustment Period Waiver of Section 70914(a) of P.L. 117-58, Buy America, Build America Act, 2021 for Brownfields and Superfund Cooperative Agreements

**FROM:** TBD

**TO:**

The Environmental Protection Agency (EPA) Office of Land and Emergency Management (OLEM) (Office of Superfund Remediation and Technology Innovation (OSRTI) and Office of Brownfields and Land Revitalization (OBLR)) is seeking comment on a six-month Adjustment Period Waiver from the Buy America, Build America Act (BABA) requirements, *i.e.*, iron and steel, manufactured products, and construction materials, in section 70914 of the Infrastructure Investment and Jobs Act (IIJA) Public Law 117-58. This adjustment period is critical to ensure that Superfund and Brownfields cleanup projects conducted by state, tribal, local, and non-profit cooperative agreements recipients sustain progress in communities across the country as we transition to best support the goals of BABA. Ensuring that EPA presents a smooth transition to BABA implementation, while initially delayed, will create dividends when delays are avoided, grantee questions are answered quickly, and support is provided that encourages future engagement. We are particularly interested in receiving comments on whether the waiver should apply retroactively to all funding obligated for Superfund and Brownfields financial assistance agreements on or after May 14, 2022.

Please submit comments to [BABA-OLEM@epa.gov](mailto:BABA-OLEM@epa.gov).

### **Introduction**

In November 2021, Congress passed, and the President signed, the IIJA which included BABA. This is a transformational opportunity to build a resilient supply chain and manufacturing base for critical products here in the United States and will catalyze new and long-term investment in good-paying American manufacturing jobs and businesses. Consistent with the policy direction of Executive Order 14005: Ensuring the Future is Made in All of America by All of America's Workers, section 70914 of IIJA establishes government-wide Buy America conditions on all federally funded infrastructure projects funded after May 14, 2022.

As required by section 70913 of the IIJA, EPA determined that BABA applies to certain Superfund cooperative agreements awarded under section 104(d) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and certain Brownfields cooperative agreements awarded under sections 104(k) and 128(a) of CERCLA (Superfund and Brownfields Cooperative Agreements). EPA efforts to implement BABA will help cultivate the domestic manufacturing base for a range of products. This will take time and flexibility to ensure that EPA programs, like Superfund and Brownfields, are appropriately and effectively implementing these new requirements, which includes educating and supporting the state, local, tribal, and non-profit recipients as they transition to supporting BABA in their federally funded activities.

## **BABA Adjustment Period Waiver**

The Office of Management and Budget's April 18, 2022, memorandum, "Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure" (M-22-11) describes several types of authorized public interest implementation waivers, ". . . time-limited waivers to allow recipients and agencies to transition to new rules and processes." With this memorandum, EPA issues a six-month adjustment period waiver to delay the implementation of the BABA requirements for Superfund and Brownfields Cooperative Agreements. While BABA applies to certain EPA funded Superfund and Brownfields cleanup activities, the scope of that applicability needs additional clarification, as does the degree to which Superfund and Brownfields cleanup activities create opportunities for domestic manufacturing.

To avoid delays in site cleanup that could occur if waivers were determined on a site-by-site or project by project basis, EPA will use this time to determine, among other things, the applicability of BABA to sites that are not publicly owned or do not clearly meet the definition of infrastructure and the applicability to equipment or materials brought to a site and removed before completion, e.g., a pump that will be removed prior to completion of the cleanup. Once clarification of applicability is obtained, EPA will then need to develop education materials, training, and other support materials for our recipients, as well as training and processes for EPA personnel. As part of this process, EPA will also need to consider the applicability of other waivers, e.g., de minimis, small grant, etc, to projects or cooperative agreements.

A critical part of EPA's cleanup programs is to ensure that residents living in communities historically affected by economic disinvestment, health disparities, and environmental contamination have an opportunity to benefit from cleanup and redevelopment. EPA's cleanup programs are committed to helping communities revitalize contaminated properties, mitigate potential health risks, and restore economic vitality. EPA cooperative agreement funding plays a significant role in the cleanup and revitalization process. To ensure that we continue to support communities, EPA needs to consider whether application of BABA places a burden on rural or disadvantaged communities that may outweigh the potential benefits to domestic manufacturing. To do so, during this adjustment period, EPA will coordinate with our state, tribal, local, and non-profit cooperative agreement recipients and additional stakeholders, including the contracting community, to gather information on the types of products covered by BABA and the degree to which they are manufactured domestically. This will allow EPA to create tools that may support a streamlined process or demonstrate that further waivers may be needed for equity concerns.

In addition, information gathered will help determine whether there are opportunities to expand domestic manufacturing of materials used during the cleanup of Superfund and Brownfields sites. For example, in addition to iron and steel products commonly used in construction, both Superfund and Brownfields cleanup may use PVC piping, geo-textiles, vapor intrusion mitigation and other abatement systems,

## **Anticipated Program Impacts Absent a Waiver**

While BABA potentially impacts all Superfund and Brownfields cleanup cooperative agreements, including those awarded with Bipartisan Infrastructure Law (BIL) funds, annual appropriations, and, for Superfund, Special Account and tax resources, it is expected to be more applicable to those remedies that involve engineering controls or other more permanent placement of materials. For example, while the average annual appropriation for Brownfields is approximately \$158.0 Million, the average annual funding level for cleanup and revolving loan fund cooperative agreements is approximately \$28.0 Million or approximately 18% of the average annual appropriation]. The level of cooperative agreement funding that is likely to be covered by BABA is an even smaller subset of this funding. For Superfund, the annual average appropriation is \$579.8M, but the average cooperative agreement funding to states, tribes, and local governments is \$82M. The level of cooperative agreement funding that is likely to be covered by BABA would be an even smaller subset of this level.

For Brownfields cooperative agreements, it is our estimation that immediate implementation of the requirements would cause a burden on our most vulnerable communities, delaying cleanups and exacerbating environmental concerns. There are dozens of Brownfields Cleanup and Revolving Loan Fund (RLF) cooperative agreement recipients that submitted applications in October 2021, before the BABA law was passed. Cleanup applicants developed budget proposals and were evaluated on those proposals, prior to the issuance of BABA and OMB guidance, without contemplating the impact of future domestic sourcing requirements such as those included in BABA. Over 80 percent of applicants that receive Brownfields cleanup cooperative agreements meet the program's pilot definition of a Justice40 community. And a significant portion of the remaining cleanup projects are in rural communities. There is concern that communities would suffer from any implementation delays while the program waits for BABA-related clarifications. States and tribes have been using a portion of their CERCLA 128 response program funds to cleanup brownfield sites under long-term continuing environmental program grants and they will need to adjust their procurement procedures to take BABA into account. The potential for delays in project execution would prevent recipients from effectively carrying out the EPA funded activity in a timely manner and possibly exacerbate risks to human health and the environment.

For Superfund cooperative agreements, concerns are similar to Brownfields. There are several Superfund cooperative agreements in the review process now to award IJA funds to state, tribal and local governments to clean up sites on the Superfund National Priorities List (NPL). These cooperative agreements will fund ongoing remedial action projects and initiate new remedial action projects that cannot be delayed while the program waits for BABA-related clarification. Remedial designs for cleanup projects were started or completed prior to the issuance of BABA and OMB guidance without contemplating the impact of future domestic sourcing requirements such as those included in BABA. EPA and cooperative agreement recipients may have to reevaluate design alternatives and potentially investigate potential domestic products, redesign elements of projects, revise engineering drawings and bid specifications, and approve complete redesigns, thereby delaying the initiation or continuation of construction, increasing project costs, and impacting schedules. If EPA delays funding these cooperative agreements, EPA may be required to shut down site cleanups, secure sites, and demobilize personnel and equipment, incurring additional costs, slowing down important cleanup, and impacting communities. The potential for delays in project execution would prevent recipients from effectively carrying out

the EPA funded activity in a timely manner and possibly exacerbate risks to human health and the environment.

### **Additional Information Required Prior to BABA Implementation**

EPA is proposing this waiver as an important tool to fill our knowledge gaps and implement the Buy American provisions in the most efficient manner to promote investment in our domestic manufacturing base, strengthen critical supply chains, and position U.S. workers and businesses to compete and lead globally in the 21st century. EPA understands that advancing Made in America objectives is a long game and the Agency plans to move forward with sufficient information to implement the new requirements in a way that maximizes coordination and collaboration to support long-term investments in domestic production. The waiver period will provide EPA with sufficient time to work collaboratively with other federal agencies and learn from existing processes established for domestic preference for iron and steel. EPA is proposing to use the waiver time to leverage the lessons learned, templates, guidance, and policies and procedures developed by our Office of Water and other federal agencies that have long applied domestic preference to iron and steel. We are also looking to leverage the work OMB's Made in America Office is doing to identify domestic sources for these materials. Importantly, EPA is proposing to use the six-month period to work directly with our Superfund and Brownfields cooperative agreement recipients to fill knowledge gaps and understand the common needs for iron and steel products, construction materials and manufactured products.

EPA will work directly with recipients to identify and document the availability of required goods, including any specific supply chain challenges experienced. EPA will use the information gained from close engagement with other federal agencies, its cooperative agreement recipients, and OMB to determine the appropriate scope of additional waivers that may be necessary to ensure projects stay on time, on task and on budget. EPA will ensure that any waivers issued under the Act are balanced, practical, and an efficient tool to promote both American manufacturing and timely infrastructure investment. Furthermore, EPA is committed to building our internal capacity and the capacity of our external stakeholders, including providing training to subrecipients and contractors in these requirements. This adjustment period will give cooperative recipients and subrecipients, a large portion of which are small, local, or tribal governmental entities, time to put in place their own policies, procedures, and systems to collect and submit required information, identify needs for project- or product-specific waivers; increase staff capacity to handle the increased workload; educate construction contractors about these requirements; and participate in EPA-led working groups to guide BABA implementation.

More specifically, the Superfund and Brownfields programs intend to use the adjustment period to conduct a thorough analysis of BABA applicability to different types of projects, better understand the scope of covered projects, and develop more narrowly tailored waivers, as needed, to meet program requirements consistent with statute and OMB guidance.

For example, both programs need to obtain greater clarity on which projects constitute "infrastructure." According to the April 2022 guidance:

*When determining if a particular construction project . . . constitutes "infrastructure," agencies should consider whether the project will serve a public function, including whether*

*the project is publicly owned and operated, privately operated on behalf of the public, or is a place of public accommodation, as opposed to a project that is privately owned and not open to the public.*

While the Superfund and Brownfields programs may award funding for projects that meet the infrastructure definition, most Superfund cleanup projects and many Brownfields projects occur on private land or primarily impact a private residence or business, and it is unclear whether they serve a “public function” in the context of the BABA requirements. For example, there could be a Superfund project involving construction of a water line that connects to a private residence or a Brownfields project where the city owns a site for the purposes of remediating it with brownfields funding in order to prepare it for sale to a developer for development. This end use will lead to improvements to real property that is privately owned. In other instances, a state or tribal recipient may clean up a site owned by a private party in order to effectively respond to releases or threatened releases of hazardous substances and contaminants. Often, the ultimate end use of the site that is cleaned up is not known at the time of application or award and may not be reused for months or years after the federally funded cleanup occurs.

The Superfund and Brownfields programs need to understand which projects meet the BABA infrastructure and public purpose requirements and involve use of the materials covered under BABA. The programs need time to work with its regional counterparts to look at recent projects to determine whether BABA covered materials and projects are occurring. The national programs are in the process of awarding IIJA funding for response activities to states, tribes, local governments, and non-profits (Brownfields).. EPA needs time to analyze the work to have a more complete understanding of the projects and materials planned for use. EPA has convened a group of experts and has initiated work to analyze prior and pending cooperative agreements that will be awarded in the coming months.

EPA will also be working with OMB as refinements are made to definitions related to manufactured goods and construction materials. Use of this information will help inform the impact both the Superfund and Brownfields programs have on domestic manufacturing. For example, with approximately 100 Brownfields cleanups a year, we do not anticipate the funding will have a significant impact on any supply chains of manufactured products that may be permanently incorporated into the final clean up, but data collected will help inform our information and potentially highlight opportunities.

Lastly, both programs require time to develop guidance and training materials for BABA implementation for both cooperative agreement recipients and EPA project officers, as well as waiver processes that will expeditiously support situations where a waiver may be needed. We need to develop protocols for recipients to document, where appropriate, that domestic materials were purchased or that the project did not fit within the BABA requirements. With recipients having a wide range of experience in managing federal funding, proper support is critical to ensuring success of funded projects. Ensuring that EPA presents a smooth transition to BABA implementation, while initially delayed, will create dividends when delays are avoided, grantee questions are answered quickly, and support is provided that encourages future engagement.

In addition, our cooperative agreement recipients may also need time to alter their own procurement processes to be able to comply with the BABA requirements. They will need to work with our regional offices to understand the new requirements and then develop their own strategies for how they will comply.

EPA has and will continue to engage with our cooperative agreement recipients, the contracting community, and other stakeholders during the adjustment time period. For example, during the Brownfields Conference in August, EPA staff will be hosting two sessions with cooperative recipients and vendors to discuss BABA implementation and gather information on potential products that may present a challenge to meeting the BABA requirements. EPA staff are meeting with state representatives in August at the Association of State and Territorial Solid Waste Management Officials CERCLA and Brownfields Subcommittee Symposium and have established ongoing discussions with volunteer groups of recipients, e.g., existing Brownfields Revolving Loan Fund recipients. EPA is also engaging with our Office of Acquisition Solutions, the lead for Made in America as it relates to contracting efforts. For Superfund, the vast majority of federal funding will be expended through contracts and Interagency Agreements. Because cleanups and the materials used will be very similar regardless of whether or not the funds are expended by a cooperative agreement recipient or a contractor, it will be critical that EPA develop a process that best aligns the waiver processes. EPA has initiated a review of the contracting waiver process and will continue this review to help refine the full suite of materials that may benefit from domestic manufacturing.

Finally, as directed in the April 2022 OMB guidance EPA needs to consider whether international obligations impact BABA applicability and additional time is needed to assess this factor.

The Agency does not expect the conclusion of this waiver to have any impact on industry and there is no cost advantage of a foreign-sourced product that is the result of the use of dumped items.

### **Waiver Decision**

Section 70914(b)(1) of the IIJA authorizes the Administrator to waive the requirements of BABA if implementation would be inconsistent with the public interest. Due to the critical need to award Superfund and Brownfields cooperative agreements in a timely and cost-effective manner, delaying BABA requirements for eligible projects until EPA is prepared for implementation is in the public's interest. This request encompasses all funding obligated for Superfund and Brownfields cooperative agreements during the waiver period even if the funds are expended by recipients after the waiver period expires. As OMB's April 2022 guidance advises ". . . public interest waivers may be needed for awards and amendments made on or after May 14, 2022, where budgets for purchase of covered materials have already been agreed upon (including if materials have been ordered and construction has begun)."

This waiver will apply to Superfund and Brownfields cooperative agreements and funded amendments awarded six months from the date of signature of the final waiver.

### **Public Comment**

The Agency is particularly interested in public comments on whether retroactive application of the adjustment period waiver is needed for those Superfund and Brownfields cooperative agreements awarded or amended to add funds on or after May 14, 2022, up until the effective date of the waiver. Absent retroactive application of the adjustment period waiver, recipients of funding that was obligated prior to the effective date of the waiver (new awards and funded amendments) will need to apply to EPA for case-by-case waivers if they were unable to procure BABA compliant products for infrastructure projects funded all or in part with EPA funds subject to BABA requirements.

If you have any questions concerning the contents of this memorandum, please contact Jennifer Wilbur in EPA's Office of Land and Emergency Management at [wilbur.jennifer@epa.gov](mailto:wilbur.jennifer@epa.gov).

Please submit comments on this draft waiver to [BABA-OLEM@epa.gov](mailto:BABA-OLEM@epa.gov).