

## DECISION MEMORANDUM (FOR PUBLIC COMMENT)

**SUBJECT:** Public Interest: Small Project General Applicability Waiver of Section 70914(a) of P.L. 117-58, Build America, Buy America Act, 2021 for EPA Financial Assistance Awards

**FROM:** Environmental Protection Agency

**TO:**

The Environmental Protection Agency (EPA) is seeking comment on a proposed public interest waiver for small projects under a specified size threshold from the Build America, Buy America (BABA) Act requirements in section 70914 of the Infrastructure Investment and Jobs Act (IIJA) Public Law 117-58. The waiver will cover EPA projects with total federal funding (direct EPA funding and any other federal agency) in amounts equal to or less than the 2 CFR 200.1 *Simplified acquisition threshold*, which is currently \$250,000. For projects with funding from multiple federal agencies, the waiver applies when EPA is the cognizant agency for the Made in America requirement. This waiver is critical to ensure that agency infrastructure projects conducted by EPA financial assistance recipients sustain progress in communities across the country. The impact of the waiver varies by year and EPA program but the agency estimates that it will affect approximately 5% of assistance provided within a given infrastructure program.

### **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 currently applies to 63 agency programs.<sup>1</sup> EPA remains committed to implementing BABA to cultivate the domestic manufacturing base for a range of products. This waiver allows EPA's state, local, tribal, and non-profit recipients to manage their federally funded activities more efficiently. For the purposes of this general applicability waiver, EPA will include small projects, where assistance agreements and subawards are less than \$250,000.

### **BABA Small Projects 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) encourages agencies to consider whether it is in the public interest to waive application of a Buy America preference to awards below the Simplified Acquisition Threshold. EPA has identified a need for such a waiver in the initial years after enactment of IIJA,

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<sup>1</sup> See <https://www.epa.gov/system/files/documents/2022-01/report-epa-identification-of-federal-financial-assistance-infrastructure-programs.pdf>

but the agency anticipates that the waiver may be phased out as EPA develops more efficient waiver review capabilities.

This waiver advances BABA by reducing the administrative burden to potential assistance recipients, including predominantly small and disadvantaged communities, where the costs of compliance with BABA could significantly negate the benefits of the smallest grants and projects. Failure to provide assistance recipients such flexibilities could perpetuate systemic barriers to opportunities and benefits and limit the agency's ability to deliver resources and benefits equitably to all.

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

BABA currently impacts more than 60 EPA programs that provide financial assistance to communities with limited implementation capacity. This waiver is critical to reduce the administrative burden to potential assistance recipients, including predominantly small and disadvantaged communities, where the costs of compliance with BABA could significantly negate the benefits of the smallest grants and projects. For example, recipients that manage projects often do not have experience in complying with domestic preference requirements as robust and technically complex as those established in BABA. Failure to provide recipients such flexibilities could perpetuate systemic barriers to opportunities and benefits and limit the agency's ability to deliver resources and benefits equitably to all.

Additionally, EPA will need to dedicate significant staff and contractor time to processing project-specific waivers. A small projects waiver ensures that EPA does not devote significant public resources towards compliance activities where there is limited public benefit and ensures that requests for project-specific waivers for larger projects can be responded to in a timely fashion.

### **Assessment of Cost Advantage of a Foreign-Sourced Product**

Under OMB Memorandum M-22-11, agencies are expected to assess "whether a significant portion of any cost advantage of a foreign-sourced product is the result of the use of dumped steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products" as appropriate before granting a public interest waiver. EPA's analysis has concluded that this assessment is not applicable to this waiver, as this waiver is not based on the cost of foreign-sourced products. EPA will perform additional market research as it implements the BABA requirements to better understand the market and to limit the use of waivers caused by dumping of foreign-sourced products.

### **Public Comment**

The Agency is particularly interested in public comments on whether \$250,000 is the appropriate threshold for a small project waiver or whether a different threshold would be more appropriate.

### **Waiver Decision**

Section 70914(b)(1) of the IJA authorizes the Administrator to waive the requirements of BABA if implementation would be inconsistent with the public interest. Due to the critical need to reduce the administrative burden for recipients and agencies to ensure recipients can effectively carry out the EPA funded activity in a timely manner thus, reducing risks to human health and the

environment, it is in the public interest to waive BABA requirements for small projects. EPA will review this waiver every 5 years after the date on which the waiver is issued.

If you have any questions concerning the contents of this memorandum or wish to submit a comment, please contact Dan Coogan at [EPA\\_BABA\\_Waiver@epa.gov](mailto:EPA_BABA_Waiver@epa.gov).