



## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

OFFICE OF  
LAND AND EMERGENCY  
MANAGEMENT

### **DECISION MEMORANDUM**

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

**FROM:** Barry N. Breen  
Acting Assistant Administrator

### **Introduction**

In November 2021, Congress passed, and the President signed, the Infrastructure Investment and Jobs Act (IIJA) which included the Build America, Buy America (BABA) Act. 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.

Consistent with the OMB guidance M-22-11, EPA is issuing a brief, time-limited public interest adjustment period waiver applicable to CERCLA 104(d), 104(k), and 128(a) cooperative agreements to avoid undue increases in the time and cost of projects and to allow recipients and EPA to transition to new rules and processes. 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.

### **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 for 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 waiver time period 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 educational 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 EPA BABA 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 creates a challenge for 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 to demonstrate that further waivers may be needed for equity or other 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 affects 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 (RLF) 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 \$579.8 million, but the average cooperative agreement funding to states, tribes, and local governments is \$82 million. 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 be challenging for our most vulnerable communities, delaying cleanups and exacerbating environmental concerns. There are dozens of Brownfields 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 effective date of BABA and issuance of 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 section 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 effective date of BABA and issuance of 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 issuing this adjustment period waiver as an important tool to fill our knowledge gaps and implement the BABA 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-term strategy, 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 planning 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 planning to use the six-month period to work directly with our Superfund and Brownfields cooperative agreement recipients to fill knowledge gaps and to 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 BABA 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; to identify needs for project- or product-specific waivers; to increase staff capacity to handle the increased workload; to educate construction contractors about these requirements; and to 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 their 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 2022, EPA staff hosted 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 met with state representatives in August 2022 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 implementation 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.

### **Public Notice**

On July 14, 2022, EPA published a notice proposing to issue this adjustment period waiver, and the comment period was open until July 29, 2022. The Agency received 5 comments during the public comment period, three representing the interests of steel workers and steel manufacturers, one representing the wastewater industry, and another representing the information technology sector. Two were supportive of the waiver, appreciating the time needed for adjustment. Three commenters did not support issuing a waiver. The commenters raised concerns about the breadth of the proposed waiver and the length of time given for public comments. The commenter also indicated that proposed waiver and short comment period could be perceived as preventing U.S. manufacturing workers from the chance to fully benefit from Federal Buy America policy.

After reviewing these comments, EPA concludes that the information provided to the Agency generally supports the idea that additional time is needed for potential funding applicants and EPA to be prepared to order, produce, and fund equipment that meets the program's Buy America goals. This waiver will also allow EPA to work jointly with other land cleanup programs and EPA's contracting community to develop a common approach to applying Buy America provisions.

## **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 waiver 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).”

## **Finding**

Based on the above information and the stakeholders' comments received during public notice period, EPA hereby finds that this waiver is in the public interest and grants a program waiver of the requirements of section 70914(a) of the IIJA (Build America, Buy America), pursuant to Section 70914(b)(1), for the cooperative agreements issued under CERCLA 104(d), 104(k), and 128(a) for a six-month period starting on the date of signature of this memorandum. For those cooperative agreements awarded, or amended with additional funding, from May 14, 2022, until the date of signature of this waiver, if requested, EPA will review those projects on an individual basis to determine whether a waiver is appropriate.

If you have any questions concerning the contents of this memorandum, please contact Jennifer Wilbur ([wilbur.jennifer@epa.gov](mailto:wilbur.jennifer@epa.gov)).