



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

JUL 21 2023

THE ADMINISTRATOR

DECISION MEMORANDUM

SUBJECT: Public Interest: Electronic Vehicle Chargers Product Waiver of Section 70914(a) of P. L. 117-58, Build America, Buy America Act, 2021 for U.S. Environmental Protection Agency Financial Assistance Awards

FROM:

Michael S. Regan

A handwritten signature in black ink that reads "Michael S. Regan". The signature is written in a cursive style.

Introduction

Congress passed and the President signed in November 2021 the Infrastructure Investment and Jobs Act, which included the Build America, Buy America Act. This is a transformational opportunity to build a resilient supply chain and manufacturing base for critical products here in the United States that 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 Infrastructure Investment and Jobs Act establishes governmentwide Buy America conditions on public infrastructure projects funded by federal financial assistance awards obligated on or after May 14, 2022.

The U.S. Environmental Protection Agency remains committed to implementing Build America, Buy America to cultivate the domestic manufacturing base for a range of products. This waiver allows the EPA's assistance recipients to manage their federally funded activities more efficiently. For the purposes of this general applicability waiver, the EPA is issuing a time-limited, public-interest product waiver of Build America, Buy America requirements for electric-vehicle chargers funded through the EPA's financial assistance programs.

Electric-Vehicle Chargers Waiver

The Office of Management and Budget's April 18, 2022, M-22-11 memorandum, "Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure," provides guidance to agencies to consider whether it is in the public interest to waive application of a Buy America preference "where an agency determines that other important policy goals cannot be achieved consistent with the Buy America requirements established by the Build America, Buy America Act and the waiver would not meet the requirements for a nonavailability or unreasonable cost waiver." This waiver advances Build America, Buy America objectives based on market research conducted by both the EPA and the Federal Highway Administration, which indicates that the Alternating-Current Level 2 and Direct Current Fast Charging Electric Vehicle charger industry may not immediately be able to produce enough chargers to meet demand of infrastructure projects and satisfy full Build America, Buy America requirements.

Based on market research, the EPA is issuing a temporary, time-limited, public-interest product waiver for electric vehicle chargers. This is on the basis that applying section 70914 of the Build America, Buy

America Act requirements for steel, iron, manufactured products and construction materials to electric-vehicle chargers on EPA-assisted infrastructure projects would be inconsistent with the public interest. The EPA also believes that the phased approach in this waiver provides an incentive to manufacturers to ramp up production while, crucially, ensuring that there is a steady supply of electric-vehicle chargers available that are covered by this waiver and therefore are Buy America-compliant. The EPA determined that it is in the public interest to waive certain Buy America requirements for a temporary period on the following grounds:

- Immediately applying all applicable domestic content preferences for these products will delay the implementation of programs established by Infrastructure Investment and Jobs Act providing funding for electric vehicle chargers during an interim period as set forth in Phase One below; and
- Applying a single domestic content requirement to electric-vehicle chargers is consistent with the domestic content preference under section 70912(6)(B) of the Build America, Buy America Act.

The waiver provides a clear timetable to increase domestic manufacture and assembly of electric-vehicle chargers as quickly as possible while ensuring a steady supply of electric-vehicle chargers is covered by this waiver.

This waiver encourages manufacturers to adjust their production process to increase the amount of domestic content over time, consistent with the Congressional direction of Build America, Buy America Section 70935(a), while providing an incentive and advantage to those able to do so more quickly. The waiver is analogous to the FHWA's electric-vehicle charger waiver, published February 21, 2023, at 88 Federal Register 10619, and allows Buy America requirements for electric-vehicle chargers to be applied uniformly, regardless of whether the EPA or the FHWA is the source of federal funding. Consistency among federal agencies will further facilitate manufacturers meeting the Buy America requirements. As the EPA is funding similar chargers across the Infrastructure Investment and Jobs Act, Inflation Reduction Act and existing appropriated programs, an analogous approach to Buy America restrictions as laid out in the FHWA's recent waiver is justifiable. Consistency with the ongoing FHWA's program avoids confusion, reduces administrative burdens and advances the public interest.

Consistent with FHWA's electric vehicle charger waiver, the EPA will gradually phase out its waiver in two steps:

- (1) Phase One: Effective immediately upon the date of publication of the final waiver, the final assembly of electric-vehicle chargers must occur in the United States. This phase would apply to electric-vehicle chargers manufactured on or before June 30, 2024, for which recipients make expenditures on or after the effective date of the final waiver. This phase applies only to EV chargers that are manufactured during this period and for which recipients begin installation by October 1, 2024. As defined in the FHWA's public interest waiver, an "EV charger" is only the electric-vehicle charger unit itself and the equipment contained inside it (88 Federal Register 10619, III. F). Components are any article, material or supply that is directly incorporated into the end product, i.e., the electric vehicle charger.
- (2) Phase Two: Beginning with electric-vehicle chargers manufactured on or after July 1, 2024, the EPA will phase out coverage under this waiver for those previously covered electric-vehicle chargers where the cost of components manufactured in the United States does not exceed 55 percent of all the cost of components. This second phase would therefore apply to all electric-vehicle chargers that are manufactured on or after July 1, 2024, whose final assembly occurs in

the United States, and for which the cost of components manufactured in the United States is at least 55 percent of the cost of all components. For the purpose of this waiver, the cost of a component is based on whether it is purchased or manufactured when it is incorporated into the electric-vehicle chargers. The EPA will use the same methodology to calculate the cost of components as the FHWA's public interest waiver.¹

Consistent with the FHWA waiver, the electric-vehicle charger housing components that are predominantly iron and steel would not be covered by the EPA's waiver and must meet the iron and steel standard of "all manufacturing processes" for iron and steel for all phases. That is, electric-vehicle charger housing components that are predominantly iron and steel would be subject to the iron and steel standard required by the Build America, Buy America Act. For the purpose of this waiver, the electric-vehicle charger housing is defined as the component of the electric-vehicle charger that contains the electronics that converts electricity to direct current and is also known as its cabinet or enclosure. (88 Federal Register 10619, III). For Phase Two, consistent with the FHWA's waiver, the EPA will include the cost of any such housing – which must continue to meet the iron and steel standard required by the Build America, Buy America Act – as a cost of an EV charger's components when calculating whether the cost of components manufactured in the United States exceed 55 percent of the cost of all components (88 Federal Register 10619, IV).

As defined in the FHWA's public interest waiver, for all phases, the "date of manufacture" is the date on which the electric-vehicle charger has its final assembly occur and is in an operational state (88 Federal Register 10619, III.C, IV). For purpose of this waiver, the EPA will consider an electric-vehicle charger to fall under the phase of the waiver that exists on the date when that electric-vehicle charger was manufactured.

This waiver will expire when the program reaches full Build America, Buy America compliance July 1, 2024. The EPA, however, reserves the right to modify or shorten the duration of this waiver or any of its phases if it obtains information indicating that this waiver or any of its phases are no longer in the public interest.

For any areas, products or materials excluded from its waiver, the EPA's existing Buy America requirements and policies under the Build America, Buy America Act will continue to apply to all steel, iron, manufactured products and construction materials.

Anticipated Program Impacts Absent a Waiver

Build America, Buy America covers more than 60 EPA programs. The agency is committed to robust implementation of the Act's Buy America Preference in an efficient and effective manner. The EPA has reviewed the FHWA's market research, proposal, comments and final determination and agrees with

¹ "For the purpose of this waiver, the FHWA considers the cost of a component to be based on whether it is purchased or manufactured when it is incorporated into the EV charger. The FHWA will use the standards in FAR 25.003 to determine the allowable costs included in purchased or manufactured components and will use the standards in FAR 31.201-4 to determine overhead costs that are generally allocable. In other words, FHWA will include acquisition costs (including transportation costs to the place of incorporation into the end product) and any applicable duty (regardless of whether a duty-free certificate of entry is issued) for purchased components. For manufactured components, the FHWA will include all costs associated with the manufacture of the component, including transportation costs and quality testing, and allocable overhead costs; the FHWA will not include profits and any labor costs associated with the manufacture of the end product. The FHWA will consider allocable overhead costs to be (a) costs incurred specifically for the contract; (b) benefit both the contract and other work and can be distributed to each in reasonable proportion to the benefits received; or (c) are necessary to the overall operation of the business, even if a direct relationship to any particular cost objective cannot be shown."

their conclusions and adopted waiver schedule and thus determined that applying the Infrastructure Investment and Jobs Act Section 70914 requirements for steel, iron and manufactured products to electric-vehicle chargers would be inconsistent with the public interest. Failure to issue such a waiver would create considerable confusion and administrative burden for recipients that must negotiate different electric-vehicle charger requirements across federal funding programs.

This waiver addresses only infrastructure related to charging investments allowed under program guides, which includes electric-vehicle chargers and all components of electric-vehicle chargers, which are the same electric-vehicle chargers funded by the FHWA's program. To enable consistency among federal agencies, the EPA's waiver is structured analogously and tracks the FHWA's March 23, 2023, public-interest waiver.

Assessment of Cost Advantage of a Foreign-Sourced Product

Under section 70921(b)(2) of the IJIA and 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. The 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. The EPA will perform additional market research as it implements the Build America, Buy America requirements to better understand the market and to limit the use of waivers caused by dumping of foreign-sourced products.

Stakeholder Engagement

The EPA will continue to meet with stakeholders and partner with the Department of Transportation, Department of Energy, the Joint Office of Energy and Transportation and the Made in America Office to adapt to the evolving domestic electric-vehicle charger manufacturing industry. The EPA is also working closely with the National Institute of Standards and Technology's Manufacturing Extension Partnership, relying on continuous market research through their national network of domestic manufacturers and suppliers. Further, the EPA will review any new Requests for Information published by the FHWA every six months from this waiver's effective date to July 1, 2024, to receive information on the state of the electric-vehicle charger industry.

Public Notice

The EPA proposed to issue this waiver May 11, 2023, and the comment period was open until May 26, 2023. The agency did not receive comments during the public comment period. The EPA concludes that it is in the public interest to issue a product waiver for electric-vehicle chargers.

Waiver Approval

Section 70914(b)(1) of the Infrastructure Investment and Jobs Act authorizes the Administrator to waive the requirements of Build America, Buy America if implementation would be inconsistent with the public interest. Due to the critical need to maintain consistency across federal financial assistance programs and 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, the EPA determined that it is in the public interest to the time-limited electric-vehicle charger product waiver. This waiver will remain in place until the program reaches full Build America, Buy America compliance July 1, 2024.

The EPA reserves the right to modify, shorten the duration of, or discontinue the final waiver if it obtains information indicating that the waiver is found to no longer be in the public interest. The EPA will coordinate every six months with the Department of Transportation and the Joint Office for Energy and Transportation to discuss the state of the EV charger industry and any pertinent information gained via FHWA's Requests for Information. This information may lead the EPA to amend this waiver, terminate the waiver or take action to develop a new waiver in consultation with the Made in America Office.

Questions about this memorandum should be directed to EPA_BABA_Waiver@epa.gov.

