

Welcome!

The live event will start shortly.

- **Audio** is available online with your device or by telephone.
 - Optional dial in 646 828 7666
 - Meeting ID 160 619 7853
- **Slides** are on our website: <https://www.epa.gov/brownfields/build-america-buy-america-baba-act>
- Use **Q&A** to type **written** questions. (The **Chat** has been disabled for participants.)
- There will also be an opportunity at the end for asking **verbal** questions, but **we will answer written questions first**.
 - Participants should raise their hand to confirm they wish to ask a question verbally.
 - Please unmute when your name is called.
- This meeting will be recorded, but the recording will not be posted on an EPA internet page.





Build America, Buy America Act (BABA)

Brownfields Grant Recipient Training*
January 10, 2024

*Information presented in this presentation reflects understanding as of the date delivered. BABA is a relatively new law with evolving interpretations.



Meet the Presenters

Jennifer Wilbur

*EPA Office of Land and
Emergency Management (OLEM)*

Jim Drummond

*EPA Office of
General Counsel (OGC)*

Primary Points & Recommendations

- BABA applies to **all** federal financial assistance
 - All new grants (and certain amended awards) have a BABA Term & Condition included
 - “New” is any grant awarded or amended to add additional funds after May 14, 2022
 - Awards made after May 14, 2022, through February 28, 2023, may comply with BABA by applying the “adjustment period waiver”
- Likelihood of BABA applicability to Brownfields Grant Awards:
 - CERCLA 104(k) Competitive Awards:
 - Cleanup, Revolving Loan Fund (RLF), and Multipurpose grants that involve construction activities are most likely to trigger BABA
 - Assessment and Job Training grants are not anticipated to trigger BABA (although cannot rule out completely)
 - CERCLA 128(a) State and Tribal Grants:
 - 128(a) grants used for cleanup/construction related activities (either direct cleanup or through an RLF) are likely to trigger BABA
- Pacific Island Territories currently have an Agency-wide BABA waiver and compliance is applying that waiver, *i.e.*, you do not have to follow BABA requirements but would advise keeping a copy of the waiver in your grant files (*note, this waiver expires, if not renewed, January 5, 2025*).

Primary Points & Recommendations (continued)

- BABA is relatively new and while some issues are being solidified, a number of questions on applicability remain. *Please make sure that you work with the regional project officer, who will work with the Office of Brownfields and Land Revitalization (OBLR) and OLEM on all grants where BABA might apply.*
- ***Grantees ultimately bear the responsibility of compliance, but we are here to help.***
- Easiest way to comply is to simply require that all covered materials in a project meet the BABA requirements and ***retain documentation.***
- Suppliers/contractors should provide verification of product compliance.
- If compliance becomes a problem that is when we consider applicability and potential waivers.
- (NEW) 2 CFR Parts 184 and 200
- We NEED your data and anything you hear from manufacturers or suppliers that may need to be BABA compliant and they are having difficulty obtaining.

DO NOT TRY TO INTERPRET THIS ON YOUR OWN

History: Made in America & BABA

January 25, 2021

Executive Order 14005
Ensuring the Future Is
Made in All of America
by All of America's
Workers

November 15, 2021

Infrastructure
Investment and Jobs Act
includes the Build
America, Buy America
Act (BABA)

May 14, 2022

BABA goes into effect

Note: Made in America (MIA) & BABA are related but not the same. MIA is applicable to federal contracting. BABA applies to federal financial assistance recipients.

What is BABA?

- “None of the funds made available for a Federal financial assistance program for infrastructure...may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.”
- BABA applies to all Federal financial assistance for infrastructure projects, not just Infrastructure Investment and Jobs Act [IIJA, a.k.a., BIL] funding
- Waivers are permitted under certain circumstances
- “Project” means:
 - Any activity related to the construction, alteration, maintenance, or repair of infrastructure in the United States
- Requirements became effective on May 14, 2022



BABA Applicability

Defining Infrastructure

What it is

- **Agencies are instructed to interpret the term “infrastructure” broadly** to include structures, facilities, and equipment that are permanent, fixed, and serve a public function.
- Examples include the articles, materials, and supplies that constitute:
 - **Water systems, including drinking water and wastewater systems** *Relevant to EPA*
 - **Buildings and real property**
 - **Structures, facilities, and equipment that generate, transport, and distribute energy (including EV charging)**
 - Roads, highways, and bridges
 - Public transportation
 - Dams, **ports**, harbors, and other maritime facilities
 - Intercity passenger and freight railroads
 - Broadband infrastructure

What it is not

- **Rolling stock** (e.g., electric school buses are not covered under the statute)
- **Equipment or Materials for testing and monitoring** (e.g., at Brownfield and Superfund sites) that is not a permanent fixture
- **Technical assistance**, site assessments, job training, or other programs that provide services
- **Temporary Items**, such as scaffolding, trench boxes, shoring, sheet piling

Overview of Covered Products

Category	Definition	Implications for EPA
Iron and steel	<ul style="list-style-type: none">All manufacturing processes from the initial melting stage through the application of coatings occur in the United States.	<ul style="list-style-type: none">Two of EPA's major infrastructure programs (SRF, WIFIA) already comply with comparable American Iron and Steel (AIS) requirements.Expands iron and steel requirements to additional programs for the first time.
Manufactured products	<ul style="list-style-type: none">55% or greater of the total cost of components must be produced domestically.	<ul style="list-style-type: none">Expected to more than double the scope of covered products (relative to AIS) including products that have historically been a challenge to source domestically such as pumps and electronic controls.Includes Administration priorities such as EV batteries and charging equipment.
Construction materials	<ul style="list-style-type: none">All manufacturing processes for non-ferrous metals, plastics and polymers, glass, lumber, and drywall are produced domestically.	<ul style="list-style-type: none">Will further contribute to increase in scope of covered products (relative to AIS). Extent of increase is still being analyzed.Excludes primarily iron/steel items, manufactured products, cement & cementitious materials, aggregates (e.g., stone, sand, or gravel, aggregate binding agents/additives)

BABA Applicability: Construction Materials (Non-Ferrous)

Includes:

- **Non-ferrous** metals
- Plastic and polymer-based products (including PVC, composite building materials, and polymers used in fiber optic cables)
- Glass (including optic glass)
- Lumber (including engineered wood)
- Drywall
- Pre-cast concrete

Excludes:

- Items made primarily of iron or steel
- Manufactured products
- Cement and cementitious materials
- Aggregates such as stone, sand, or gravel
- Aggregate binding agents/additives
- Flora (plantings, landscaping)



How to Determine Whether BABA Applies

BABA Implementation Framework

1. Does the project involve the construction, alteration, or repair of, e.g., water infrastructure, buildings, or real property?
2. Does the project serve a public function (e.g., publicly owned/operated, serve a public function, place of public accommodation)?
3. Does the project involve leaving iron, steel, manufactured goods, or construction materials permanently affixed?
4. If the answer to all 3 are yes, BABA is likely applicable.
5. Consideration of a waiver, if needed.

Does BABA apply?

Scenario 1

A city receives an assessment cooperative agreement from EPA for \$500,000. City will use the funding to develop a robust plan to conduct phase 1 site assessments and focus some money on phase 2 site assessments. They will use the funding to hire contractors to conduct the site assessment, develop tracking systems, and report data to EPA.

Q. Does the project involve construction, alteration, or repair of a building or real property?

A: **No** (funding is for site assessments, writing, reporting, gathering information, but no construction will leave materials permanently affixed).

Conclusion: BABA does not apply.

Does BABA apply?

Scenario 2

A territory receives a cleanup grant for \$500,000 and will use the funding to remove contaminated soil from a public playground and backfill with clean topsoil at a depth of three feet. To prevent future digging into potentially contaminated soil, they will have the contractor place a barrier prior to backfilling.

Q. Does the project involve construction, alteration, or repair of a building or real property?

A. **Yes**, the land is real property and there is construction with soil removal, barrier installation, and backfill.

Q. Does the project involve leaving iron, steel, manufactured goods or construction materials permanently affixed to the property?

A. **Yes**, the barrier. The soil (and gravel if there was some added) is not included within BABA.

Q. Is the project publicly owned or serve a public function?

A. **Yes**, this is the territory's land (land subject to cleanup grant must be owned by the recipient) and the playground is a public facility.

Conclusion: BABA applies.

Waiver?:

- **If this territory is a Pacific Island territory (e.g., Guam), the territory would be able to apply the Pacific Island waiver, so long as the award and activities are within the timeline of applicability. The grantee should be encouraged to maintain a copy of the waiver in their grant files, and it is recommended that they seek confirmation from EPA regarding applicability of the waiver.**
- **If the territory is NOT a Pacific Island territory, BABA would most likely apply and if compliance was problematic, we would then consider whether other waivers might be applicable.**

Does BABA apply?

Scenario 3

An RLF recipient receives a \$2 million award. The recipient will subgrant \$250,000 to a nonprofit who will abate lead and asbestos in their non-profit owned senior citizen community center. The non-profit owned senior center is open to any senior citizen in the area. The contractor will remove and replace windows, drywall, and install new insulation. The contractor will have to tent the building during abatement.

Q. Does the project involve construction, alteration, or repair of a building or real property?

A. **Yes.**

Q. Does the project involve leaving iron, steel, manufactured goods or construction materials permanently affixed to the property?

A. **Yes**, windows, drywall, and insulation will be permanently affixed. This would include the nails, caulk, etc. for the installation.

The tenting is not and will be removed.

Q. Is the project publicly owned or serve a public function?

A. While this is a non-profit run center, it does offer the center to the public.

Conclusion: BABA would most likely apply.

Recommendation: Encourage subrecipient to comply but if there are difficulties, the subrecipient should work through the grantee, who will work with EPA to determine answers, including whether any waivers may be applicable.

***New:** In this example, the subrecipient is receiving \$250k – if this were a stand-alone award, the recipient could apply the small project waiver, but new interpretation does not allow for parsing of initial awards to apply this waiver. However, the subrecipient would use the Purpose, Time, & Place (PTP) that will be discussed in later slides to evaluate the applicability of other waivers, e.g., de minimus.

Purpose, Time, and Place Test

- EPA will apply a “Purpose, Time, and Place” (PTP) test in determining the scope of a project.
- The PTP will mainly be used to determine, e.g., whether a de minimis waiver would apply or whether an unreasonable cost waiver would apply. It may also be used to determine whether a manufactured item is considered temporary equipment or something that is permanently affixed.
- **Purpose:** Is the project for which the funding is being used distinguishable from other uses of the overall financial assistance?
- **Time:** Is the time for which the funds being used distinct?
- **Place:** Is the place at which the funds are being used distinct?

Example: Using Scenario 3 (slide 16)

- **Purpose:** The subrecipient is distinct from the larger RLF grant. While other loans or subgrants may be issues, this is for this unique project. As structured, this project would be done concurrently, so the project would be the “lead and asbestos abatement.”
- **Time:** The lead and asbestos abatement appear to be one project, but it’s possible they may not be under certain circumstances.
- **Place:** The senior center is one place.

Using Scenario 3, the abatement of the center appears to be one “project” using PTP.

The cost of the “project” would be those costs that make up the abatement, including the tenting, salaries, etc. If certain materials, e.g., nails, are less than 5% of the cost of the project, a de minimis waiver could apply – if the subrecipient wished to apply it.



Waivers

Waiver Overview

Two Categories

- **General applicability waivers**
 - Applies to multiple projects and products within a program
 - Subject to OMB consultation and 15 days of public comment
 - Authority delegated to AAs for OW, OLEM, OAR, OCSP, OP
- **Project/product specific waivers**
 - Applies to specific project/product
 - Subject to informal OMB consultation and 15 days of public comment
 - Authority may be redelegated to HQ Office Directors

Waiver development

- **OMB has instructed agencies to develop waivers that are:**
 - Time-limited. Waivers are encouraged for 1-2 years until domestic supply becomes available.
 - Targeted. Project/product waivers are favored over general applicability waivers.
 - Conditional. Additional program-specific constraints on scope.
- **OMB & our team at EPA will set a high standard for waivers.** They are a tool to effectively transition to domestic supply wherever possible.
- **EPA Waivers timeline averages 3-5 months from initial submission to OMB to final waiver signature.**

Agency-wide National BABA Waivers

- Small Projects

- Waives entire project where EPA contribution is under \$250K.
- Expires in September 2027

- De Minimis

- Projects may use non-domestic up to 5% of project cost
- Expires in October 2027

- Minor Components

- Allows an otherwise iron or steel product to contain up to 5% non-domestic content
- Expires in April 2028

- Pacific Island Territories General Applicability Waiver

- Waives BABA requirements for Pacific Island Territories
- Expires January 2025

- All of EPA's approved waivers: <https://www.epa.gov/cwsrf/build-america-buy-america-baba-approved-waivers>

BABA Waiver Authority

EPA may waive BABA requirements where:

- Applying the domestic content procurement preference would be inconsistent with the public interest (a “*public interest waiver*”);
- Types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality (a “*nonavailability waiver*”); or
- Inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the project by more than 25 percent (an “*unreasonable cost waiver*”)

Types of waivers

Types of waiver		Description
Nonavailability		<ul style="list-style-type: none"> Market research on items, products, and materials and qualifying alternate items will be needed on the availability of sources
Unreasonable cost		<ul style="list-style-type: none"> If the inclusion of iron, steel, manufactured products, or construction materials will increase the cost of the overall project by more than 25% - documentation and cost comparison would be needed
Public Interest	Adjustment Period	<ul style="list-style-type: none"> Additional time for Agency and / or industry to ramp-up to BABA requirements
	De Minimis	<ul style="list-style-type: none"> If the cost of processing the individualized waivers would risk exceeding the value of the items waive (e.g., could set a de minimis threshold such as 5% of project costs up to a max of \$1M)
	Other considerations	<ul style="list-style-type: none"> Includes considerations for policy (equity, sustainability, accessibility, performance standards)
Other examples: Small grants, Minor Components, International Trade Obligations		



Compliance Roles and Responsibilities

Compliance Roles and Responsibilities

Manufacturers play a vital role in the compliance of projects for domestic preference requirements.



Manufacturer Certification Letter Example



MINAS MORGUL

Minas Morgul Steel, Inc.
1245 Barad Dur Ave.
Mordor, Middle Earth
+1 555 867 5309

Material Certification

August 29, 2017
Gondor Supply Co.
3477 One Ring Ln.
Fort Tirth, IA 50501

**RE: Job Name: Saruman Contracting
Project#: Hobbiton Water Treatment Plant, The Shire, WY
Order Type: Submittal**

QUANTITY	DESCRIPTION
30	8550350 66-S VLV BOX 26T 36B 1.5 WTR

Dear Valued Partner:

We hereby certify that the iron used to make the construction castings manufactured by MMS for the above referenced project is in full compliance with ASTM A48, Class 35B and AASHTO M105 for gray iron castings and ASTM A536, Grade 70-50-05 for ductile iron castings. Thank you for specifying and using products manufactured by Minas Morgul Steel, Inc.

The above listed castings are melted and manufactured 100% in the United States of America at our foundries in Moria, OK and Isengard, MI. These castings comply with the applicable provisions of the Code of Federal Regulations 23 CFR 635.410 BUY AMERICA Requirements.

We also certify that the above listed products supplied to the subject project are in full compliance with the American Iron and Steel (AIS) requirement as mandated in EPA's State Revolving Fund Programs.

Meriadoc Brandybuck
Product Quality Manager
Minas Morgul Steel, Inc.

- 5 Key Elements:
- Project reference
 - Specific list of products
 - Location of manufacturing (city and state)
 - Signature of representative
 - AIS/BABA reference

Market Research

- EPA Headquarters will lead this effort, but we will need information from the Project Officers and grantees.
- Market research helps refine the Government's need; determines whether that need can be met by the existing market; determines whether the product exists as a domestically manufactured resource. The documented results of market research can be used by a program or an agency to learn about products for subsequent needs and to form broader strategies for obtainment of those products.
- The market research must describe the market research activities and methods used to identify domestically manufactured items capable of satisfying the requirement, including the timing of the research and conclusions reached on the availability of domestic sources with supporting data.

EPA's Role in BABA

- Work within EPA and with OMB and other federal agencies, to maximize efficiencies and consistency
- Develop program-specific implementation procedures
- Draft program-wide waivers, as needed
- Identify strategic products for market research
- Conduct program-specific stakeholder engagement on BABA
- Answer questions from recipients and manufacturers
- Process waiver requests from recipients
- Conduct BABA oversight (e.g., site visits, project file reviews, etc.)
- Partner with other EPA programs or other agencies to streamline BABA compliance

Grant Recipients' Role in BABA

- Grant recipients are required to comply with BABA, like all other federal cross-cutters provided in the grant terms & conditions
- Maintain documentation of compliance
 - Retain certifications for materials
 - Retain emails or other documentation from EPA that support applicability of waivers
- Issue RFPs or contract solicitations that include BABA compliance as a requirement
- For waivers, gather and provide EPA with information needed to make a determination or solicit input on a determination for product-specific waiver requests
- If subgrant or loan, responsible for ensuring subgrant or loan recipient compliance with BABA and submit waiver questions, requests, etc., on their behalf

Waiver Requests

- If a grantee believes they are eligible for programmatic waivers (e.g., Pacific Island Territory, adjustment period, or de minimis), they should speak with their project officer and provide as much supporting information as possible to justify the waiver. The project officer will then work with OBLR and OLEM to determine applicability. EPA will provide the grantee with a specific response.
- Project or Product-Specific Waivers
 - These are not self-executing and will require approval by EPA
 - These will take time and need to be publicly noticed
 - If you need one, please initiate the discussion with the PO
 - PO will call OBLR and OBLR will bring in the OLEM lead (*i.e.*, me)
 - We will work collectively to evaluate the situation and explain what is needed to review the waiver request
 - Grantees will submit their requests through OLEM_BABA@epa.gov
 - We will **not** work with your consultants, suppliers, or contractors – we work with the grantee!
 - We will **not** work with your subrecipients – only the grantee!
 - Please make sure you have done some due diligence prior to submitting, although we realize this may be challenging
- While some waivers may be self-executing, e.g., Pacific Island Territories may apply this waiver (within the time allowed), highly recommend that grantees speak with their PO before and get documentation from EPA that supports the waiver application.

Resources

- OMB Website and Related Links
 - <https://www.madeinamerica.gov/>
 - New BABA Grant Guidance: <https://www.federalregister.gov/documents/2023/08/23/2023-17724/guidance-for-grants-and-agreements>
 - Updated Implementation Guidance: <https://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf>
- EPA Resources and Related Links
 - EPA BABA Website: <https://www.epa.gov/cwsrf/build-america-buy-america-baba>
 - OLEM FAQs: [https://www.epa.gov/system/files/documents/2023-02/OLEM BABA FAQs Final-Feb 15 2023.pdf](https://www.epa.gov/system/files/documents/2023-02/OLEM_BABA_FAQs_Final-Feb_15_2023.pdf)
- OLEM BABA Lead: Jennifer Wilbur (Wilbur.Jennifer@epa.gov)

Questions?

