

# Build America, Buy America (BABA) and Brownfields Grants

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

# BABA Basic Principles

## What is it?

- “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., Bipartisan Infrastructure Law (BIL)) funding
- Requirements became effective on May 14, 2022
- Waivers are permitted under certain circumstances

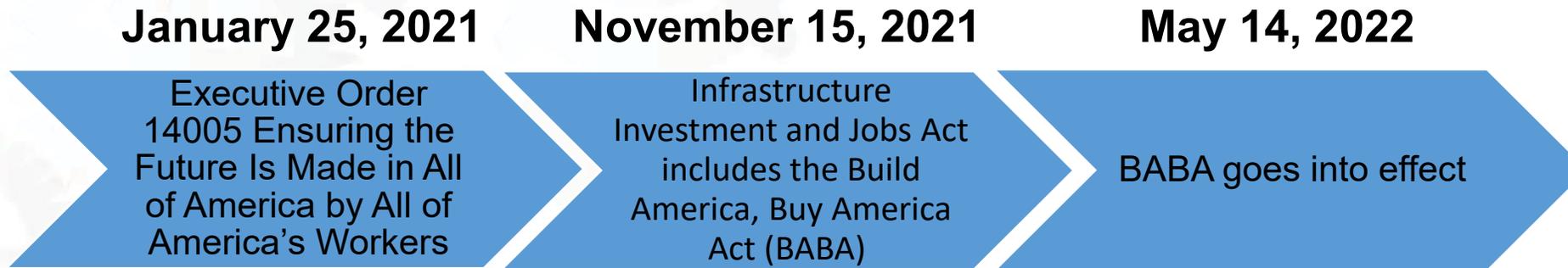
## BABA and Brownfields

- **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

# What Does BABA Mean for Grant Recipients?

- All Brownfields grant recipients whose grants have been awarded or amended to add additional funds after May 14, 2022, will have a term and condition in their grant award that requires compliance with BABA.
  - This requirement flows down to RLF loan recipients **and** RLF subgrantees.
- BABA compliance must be addressed in solicitation documents **and** resulting contracts as applicable.
- Grantees (including RLF loan recipients/RLF subgrantees) must maintain documentation of compliance, including:
  - Retaining certifications of materials; and/or
  - Retaining emails or other documentation from EPA that support applicability of waivers.
- For waivers, gather and provide EPA with information needed to make a determination or solicit input on a determination for product-specific waiver requests

# History: Made in America & BABA



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.

# Key Terms

- **“Project”** means: Any activity related to the construction, alteration, maintenance, or repair of infrastructure in the United States
- **“Infrastructure”** means: At a minimum, the structures, facilities, and equipment for, in the United States— (A) roads, highways, and bridges; (B) public transportation; (C) dams, ports, harbors, and other maritime facilities; (D) intercity passenger and freight railroads; (E) freight and intermodal facilities; (F) airports; (G) water systems, including drinking water and wastewater systems; (H) electrical transmission facilities and systems; (I) utilities; (J) broadband infrastructure; and (K) **buildings and real property**.
- The definition of “Project” when coupled with the inclusion of “buildings and real property” in the definition of “Infrastructure” brings certain types of Brownfield cleanup activities within the coverage of BABA.

# Defining “Infrastructure” Even Further...

## What it is:

- **Agencies are instructed to interpret the term “infrastructure” broadly** to include structures, facilities, and equipment that serve a public function.
- **For purposes of Brownfields cleanups, this might include those that use articles and materials for:**
  - ✓ Caps that use manufactured permanent items (e.g., geotextile/geomembrane)
  - ✓ Caps that use rebar in concrete
  - ✓ Pipes or pipe replacement (e.g., drainage line/water sewer pipes)
  - ✓ For asbestos/lead-based paint remediation projects, for example, installation of new windows or drywall (e.g., window/wood frames, nails, etc.)

## What it is **not**:

- × **Equipment or Materials for testing and monitoring** (e.g., at Brownfield sites) that are not used for long-term remediation
- × **Technical assistance**, site assessments, job training, or other programs that provide services
- × **Temporary Items**, such as scaffolding, trench boxes, shoring, sheet piling
- × **Fill Materials**, such as cement/cementitious materials and aggregates such as stone, gravel, or sand

# Overview of Covered Materials

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

# Purpose, Time, and Place Test

- EPA will apply a PTP test in determining the scope of a project.
- The PTP test 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



# 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 BABA for entire project where EPA contribution is under \$250K in direct cleanup grant funding or subawards including RLF loans and subgrants.
- 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>

# 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 (PO) and provide as much supporting information as possible to justify the waiver. The PO 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
  - 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](mailto: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 (subgrantees or borrowers) – 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.

# Primary Points and Recommendations

- 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 Office of Land and Emergency Management (OLEM) on all grants where BABA might apply.*
  - Questions may also be submitted to BABA-OLEM@epa.gov
- ***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.
- *(Relatively 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***

# BABA 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>.
- [Buy America Preferences for Infrastructure Projects](#) (2 CFR Part 184).
- [Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards](#) (2 CFR Part 200).

- **EPA Resources and Related Links**

- Your PO!
- Email: [BABA-OLEM@epa.gov](mailto:BABA-OLEM@epa.gov)
- 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).
- Brownfields BABA Website: <https://www.epa.gov/brownfields/build-america-buy-america-baba-act>.

# Questions?!

