



Clean Water
State Revolving Fund

DOMESTIC PREFERENCE OVERVIEW



United States
Environmental Protection
Agency

Office of Water

DOMESTIC PREFERENCE OVERVIEW

- Domestic Preference History
- American Iron and Steel (AIS)
 - Product coverage
 - Certifying compliance
 - AIS Waivers
- Bipartisan Infrastructure Law (BIL)
- Build America, Buy America Act (BABA)
 - BABA covered items
 - BABA waivers
 - Guidance
 - Request for Information
- Resources

DOMESTIC PREFERENCE OVERVIEW

Disclaimer

This presentation cannot substitute for official guidance, nor can it change or contradict existing guidance or statute. The purpose of this session is to provide an overview of the domestic preference requirements, including American Iron and Steel and the Build America, Buy America Act, as currently understood by the Environmental Protection Agency. We hope to provide you with a better understanding of the requirements, with the caveat that we are human and any potential incorrect statements or errors we may make during this presentation do not change official statute or guidance.

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EPA WATER – DOMESTIC PREFERENCE TIMELINE



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AIS BASICS: WHAT IS AIS?

"American Iron and Steel"(AIS) requires the use of iron and steel products that are produced in the United States for the construction, alteration, maintenance, or repair of a public water system or treatment works.

- Applies to projects for *public water systems* (DWSRF), *treatment works* (CWSRF), Community Grants, all WIFIA projects, and certain USDA projects.



AIS BASICS: WHAT IS AN IRON AND STEEL PRODUCT?

- ☒ ^{YES} Is the product “primarily” iron or steel?
- ☒ ^{YES} Is the product a “listed” product?
- ☒ ^{YES} Is the product “permanently incorporated” in the project?

If the product meets the criteria above, then it is an iron and steel product under the AIS requirement and must be “produced in the United States”.

AIS BASICS: WHAT IS AN IRON AND STEEL PRODUCT?



☒ Is the product “primarily” iron or steel?



AIS BASICS: PRIMARILY IRON OR STEEL

- Products greater than 50% iron or steel, measured by material costs only (not labor, overhead, shipping, etc.).
- Who determines if a product is primarily iron or steel?
 - Product manufacturers certify that their product is AIS compliant or does not need to meet AIS requirements.
- How do you calculate material cost?
 - Fire hydrant example:
 - Iron or steel components – bonnet, body and shoe
 - Other material costs – stem, coupling, valve, seals, and other non-iron or steel internal workings
 - Assembly of the internal workings into the hydrant body would not be included in cost calculation
 - Is the material cost of the iron and/or steel components > 50% of the total? If so, the hydrant is primarily iron or steel.



AIS BASICS: WHAT IS AN IRON AND STEEL PRODUCT?

YES
☒ Is the product a “listed” product?



AIS BASICS: LISTED PRODUCTS

- Lined or unlined pipes or fittings
- Manhole Covers
- Municipal Castings*
- Hydrants
- Tanks
- Flanges
- Pipe clamps and restraints
- Valves
- Structural steel
- Reinforced precast concrete*
- Construction materials*

AIS LISTED PRODUCTS:

Municipal Castings and Manhole Covers



AIS LISTED PRODUCTS:

Reinforced Precast Concrete

- Typically, not primarily iron and steel by material cost, but it is a listed product and is always an AIS product
- Reinforcing bar and wire must be domestic
- Casting of concrete must occur domestically
- Raw materials (e.g., cement, additives) do not need to be domestic



AIS LISTED PRODUCTS:

Construction Materials

- Iron or Steel articles, materials, or supplies, not including mechanical and/or electrical components, equipment and systems
- Examples:
 - Concrete reinforcing bar, rebar, wire rod
 - Fasteners
 - Framing, joists, trusses
 - Decking, grating, railings, stairs, ladders
 - Fencing, doors, door hardware

AIS BASICS: WHAT IS AN IRON AND STEEL PRODUCT?

☒ ^{YES} Is the product “permanently incorporated” in the project?



AIS BASICS: PERMANENT PRODUCTS

- Products that are permanently incorporated into a project, meaning buried or left in place following construction, must comply with AIS, including:
 - Spare parts or backup equipment
 - Iron or Steel materials buried or left in place (intentional or not)
 - Examples: sheet piling, bypass valves, drains, etc.
- Temporary, non-permanent items are not covered under AIS. Examples include:
 - Trench boxes, forms, scaffolding, etc.



AIS BASICS: PRODUCTS THAT DO NOT HAVE TO BE PRODUCED IN THE U.S.

- Raw materials, such as iron ore, limestone, and iron and steel scrap
- Non-iron or non-steel components of a primarily iron and steel product
- Products that do not fall under any of the listed products
- Mechanical or electrical equipment
- Appurtenances of assemblies
 - Where the main component is not a covered product
 - Example: factory delivered pump skid with fittings, valves, controls

AIS BASICS: WHAT IS “PRODUCED IN THE UNITED STATES?”

- Manufacturing and processing of iron or steel must occur in the U.S, including:
 - Melting
 - Refining
 - Forming
 - Rolling
 - Drawing
 - Finishing
 - Fabricating
 - Assembly
- All processes must take place in the U.S., except:
 - Steel additives refining

HOW CAN PROJECTS COMPLY?

1. Certification Letter

- Letter asserting that all manufacturing processes for the purchased product occurred in the U.S.

2. Waiver

- EPA has authority to waive the AIS requirement and to issue waivers for a case or category of cases

HOW CAN PROJECTS COMPLY?

Certification Letter

AIS BASICS: CERTIFICATION LETTER – 5 KEY ELEMENTS

1. What is the product
 - List product(s) delivered to the project site
2. Where was it made
 - Location(s) of the foundry/mill/factory where the product was manufactured (City and State)
3. To whom was it delivered
 - Name of the project and/or jurisdiction delivered
4. Signature of company representative
 - Certifying official on company letterhead
5. Reference AIS requirements
 - OK if lists more, but AIS required

AIS BASICS: CERTIFICATION LETTER – 5 KEY ELEMENTS



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

<u>QUANTITY</u>	<u>DESCRIPTION</u>
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.

AIS elements:

- ✓ Project reference
- ✓ Specific list of products
- ✓ Location of manufacturing (city and state)
- ✓ Signature of a company representative
- ✓ AIS reference

HOW CAN PROJECTS COMPLY?

Waiver Coverage

AIS: GENERAL APPLICABILITY WAIVERS

- *De Minimis* public interest waiver
 - Allows SRF project a small percentage of incidental products of unknown or non-domestic origin
 - Thresholds to know:
 - Items on a project's de minimis list cannot exceed 5% of the total material cost
 - No single item can exceed 1% of the total material cost
 - Users of the de minimis waiver should maintain documentation of all the de minimis items in a project
- **Minor Components** public interest waiver
 - Allows the product manufacturer to include non-domestic, minor iron/steel components in AIS-compliant products (up to 5% of material cost of the product)
 - Example: a valve with stainless steel pins and springs could make use of the waiver.

AIS: PROJECT/PRODUCT-SPECIFIC WAIVERS

- **Availability Waiver**
 - Most common waiver type, but only needed in small percentage of AIS projects
 - Appropriate when the product(s) is not available or will not be available in sufficient and reasonably available quantities and of a satisfactory quality
- **Public Interest Waiver**
 - High Bar (Executive Order 14005, Jan 2021)
 - Applying the AIS requirement would be inconsistent with public interest
 - Evaluation can be complicated, longer decision time
- **Cost Waiver**
 - Appropriate when the application of AIS requirements increases the total project cost more than 25%
 - To date, only one AIS cost waiver has been approved

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BIPARTISAN INFRASTRUCTURE LAW (BIL) (IIJA)

- Signed by President Biden on November 15, 2021.
- Historic investment in key programs and initiatives implemented by the U.S. Environmental Protection Agency to build safer, healthier, cleaner communities.
- Includes \$50 billion to EPA to strengthen the nation's drinking water and wastewater systems – the single largest investment in water that the federal government has ever made.



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BUILD AMERICA, BUY AMERICA (BABA) ACT

- “[N]one 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.**”
- “Project” means any activity related to the construction, alteration, maintenance, or repair of infrastructure in the U.S.
- “Infrastructure” means anything fixed, permanent, and that serves a public function.

BUILD AMERICA, BUY AMERICA (BABA) ACT

Where does BABA apply?

- Applies to **all federally funded** infrastructure projects.
- Specific to CWSRF and DWSRF, the BABA requirement applies to SRF projects in an amount equivalent to the federal capitalization grant (aka **equivalency**) each year.
- To further understand this concept, let's investigate an example for SRF:
 - If a state received \$100M Cap Grant this year, they need to find \$100M in projects in the same year equivalent to the Cap Grant. The rest of their projects are "non-equivalency" or "revolving" moneys.
 - BABA would only apply to the projects using \$100M of fed funding, while AIS would apply to all SRF projects.

BUILD AMERICA, BUY AMERICA (BABA) ACT

Where does BABA apply? What about Community Grants projects?

- Non-equivalency SRF projects that later receive CDS funding, and are not covered under a waiver, implicate BABA.

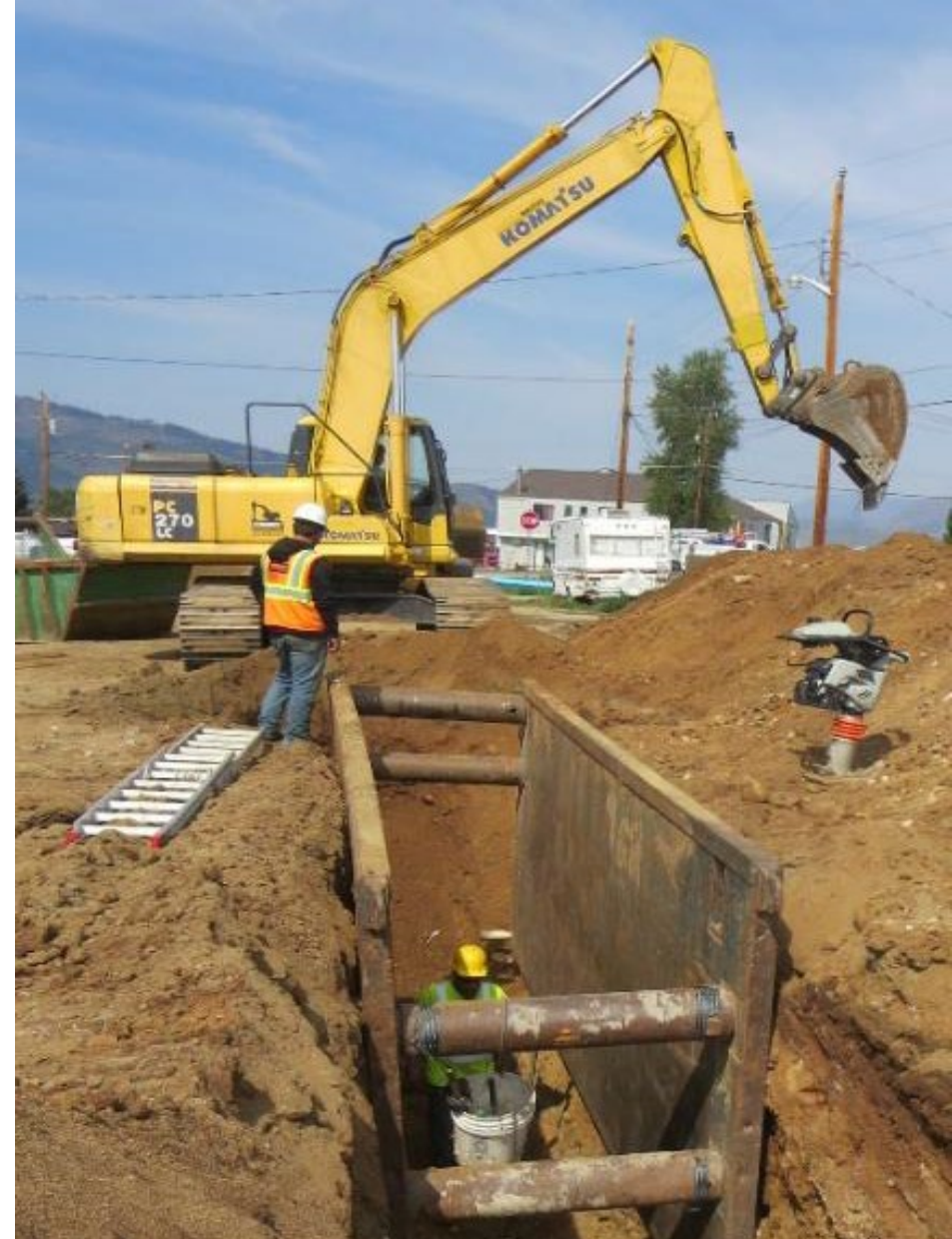
BUILD AMERICA, BUY AMERICA (BABA) ACT

Here's an example of projects where BABA does not apply:

- BABA does not apply for 319 Nonpoint Source projects using non-federal dollars for their required match (i.e., state funds or non-equivalency CWSRF funds)

BABA: COVERED ITEMS

- Iron and steel + manufactured products + (non-ferrous) construction materials
- Items are classified into ONE of the three categories
- Applies to items consumed in, incorporated into, or affixed to a project (aka permanently incorporated)
 - Similar to AIS
 - Scaffolding, Trench Boxes, Sheet Piling removed - Excluded



SO, NOW WHAT? AIS + BABA?

- Individual SRF and/or WIFIA projects will **not** be required to demonstrate compliance with AIS and BABA at same time
- AIS will continue to apply to Public Water and Treatment Works projects underway and many future SRF projects
- BABA applies to federally funded infrastructure projects and SRF equivalency projects
- Projects subject to BABA that demonstrate compliance with BABA do not also need to show compliance with AIS

BABA: IRON AND STEEL

- Similar to AIS
- BABA Iron and Steel \Leftrightarrow AIS products
- Covers products that are predominantly iron or steel, unless another standard applies under law or regulation
- All manufacturing processes, from the initial melting stage through the application of coatings, must occur in the U.S.
 - Functionally equivalent to AIS





BABA: MANUFACTURED PRODUCTS

- Many products will be categorized as manufactured products
- Final Manufacturing in the United States
- Cost of components that are mined, produced, or manufactured in the U.S. is **greater than 55 percent of the total cost** of all components of the manufactured product

BABA: CONSTRUCTION MATERIALS (NON-FERROUS)

Includes

- **Non-ferrous** metals
- Plastic and polymer-based products (including PVC, composite building materials, and polymers)
- Glass
- Fiber optic cable
- Optical fiber
- Lumber
- Drywall
- Engineered wood

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)
- Non-permanent / temporary items

HOW CAN PROJECTS COMPLY?

1. Certification Letter

- Letter asserting that all manufacturing processes for the purchased product occurred in the U.S.

2. Waiver

- EPA has authority to waive the BABA requirement and to issue waivers for a case or category of cases

HOW CAN PROJECTS COMPLY?


Certification Letter

HOW CAN PRODUCT COMPLIANCE BE DEMONSTRATED?

Similar to the AIS requirements, manufacturer's documentation for the product(s) should include:

1. A project identifier (name, location, contract number, or project number)
2. The identity of the product(s) being supplied to the project (can be simple)
3. **A statement attesting that the products supplied are compliant with BABA requirements (the "certification")**
 - a. **Will list which category of product they are certifying (e.g., meets component cost test for manufactured products).**
4. Location(s) of manufacturing being certified (city and state)
 - a. Minimum: documenting final point of manufacturing in the United States
5. Signature of company representative making the certification (on company letterhead, signature can be electronic)

THE CERT LETTER HOLY GRAIL



MINAS MORGUL

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

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

Material Certification

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

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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 Build America Buy America Act requirements, as an iron and steel product, as mandated in EPA's State Revolving Fund Programs.

Meriadoc Brandybuck

Product Quality Manager
Minas Morgul Steel, Inc.

Key Elements:

- ✓ Project reference
- ✓ Specific list of products
- ✓ Location of manufacturing (city and state)
- ✓ Dom Pref. requirement reference **(+BABA Category Reference)**
- ✓ Signature of representative

HOW CAN PROJECTS COMPLY?

Waiver Coverage

BABA: APPROVED AGENCY-WIDE GENERAL APPLICABILITY WAIVERS

Note: These will all be covered in greater detail in later slides.

- *De Minimis* public interest waiver
 - Allows projects to use a small percentage of products of unknown or nondomestic origin
 - Threshold to know :
 - Items on a project's de minimis list cannot exceed 5% of the total project cost
- **Small Award Threshold**
 - Projects receiving less than \$250k of EPA funding are eligible
- **Minor Components Waiver for Iron and Steel Products**
 - Same as the AIS Minor Components waiver
- **Pacific Islands Territories Waiver**
 - Waives requirements for three remote pacific territories

BABA: APPROVED PROGRAM GENERAL APPLICABILITY WAIVERS

For SRF: Amended Design Planning Waiver

- EPA amended this waiver to extend coverage to water infrastructure projects subject to SRF requirements funded outside SRF appropriations (i.e., Community Grants projects). More on the next slide!

For WIFIA: Design Planning Waiver

For Selected OW programs: 6-month Adjustment-Period Waiver; Approved (now expired – Mar 2, 2023)

AMENDED SRF BABA DESIGN PLANNING WAIVER

Projects funded with FY22 or FY23 funds that completed one of the following eight milestones prior to May 14, 2022, are eligible for coverage under this waiver.

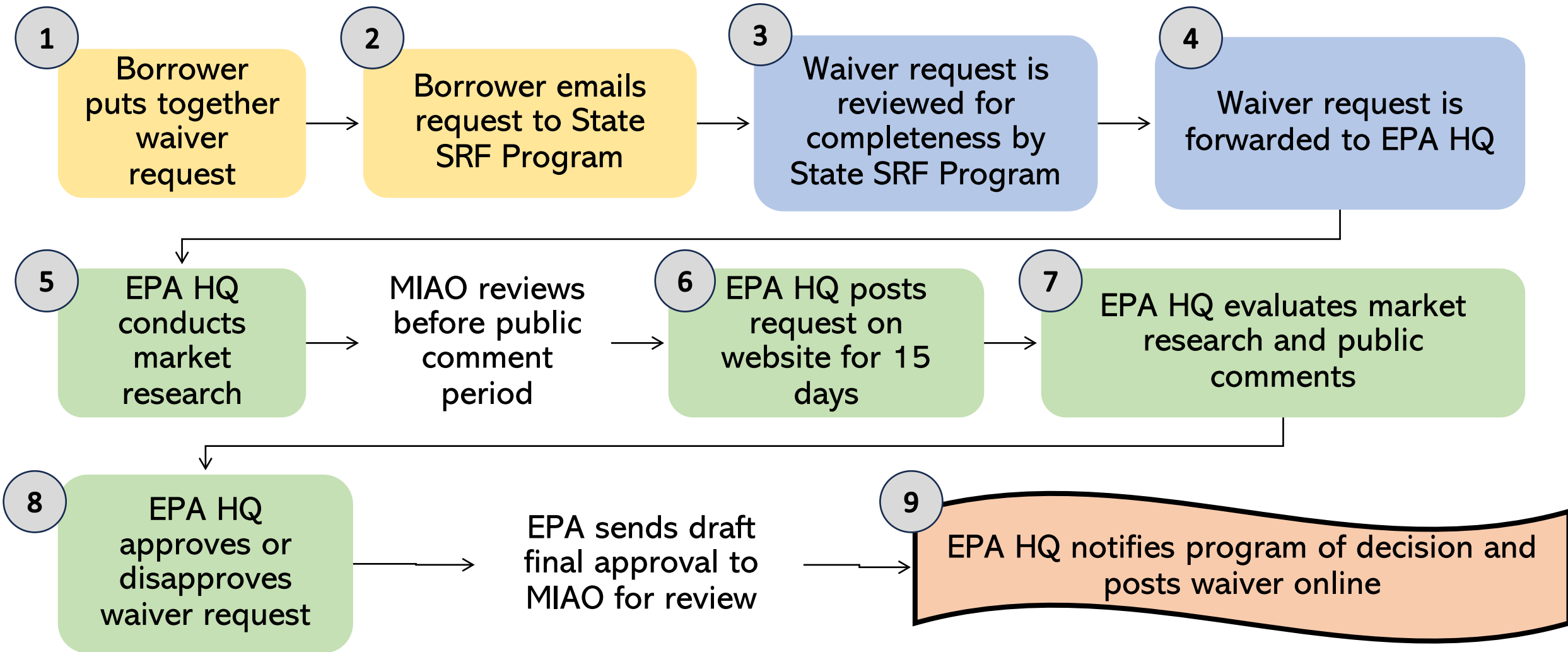
1. Submitted PER or equivalent (to state or to recipient);
2. Issued RFP or executed contract for design or engineering services;
3. Executed SRF assistance agreement that includes design;
4. For projects designed by recipient: documented initiating design (such as PER);
5. Solicitation of construction contract bids;
6. Submitted plans and specifications to state (do not need to be complete);
7. Held public referendum or public meeting on proposed project; or
8. Evidence of new bonds passed or other new funding backing secured.

BABA: PRODUCT/PROJECT-SPECIFIC WAIVERS

Just like in AIS:

- **Nonavailability Waiver**
 - Appropriate when a product(s) is not available or will not be available in sufficient and reasonably available quantities and of a satisfactory quality
- **Public Interest Waiver**
 - High Bar
 - BABA implementation is not in the public interest
 - Evaluation can be complicated, longer decision time
- **Unreasonable Cost Waiver**
 - Appropriate when application of BABA requirements increases the total project cost more than 25%

NEW STEPS IN WAIVER PROCESSING THROUGH MADE IN AMERICA OFFICE (MIAO)



WHO MAY APPLY FOR A WAIVER AND HOW?

- Assistance Recipients and their authorized representatives
- EPA does not process waiver requests from suppliers, distributors, or manufacturers (we do consider manufacturer's product information)
 - Exception: the assistance recipient endorses it and submits the request on its behalf to the funding authority
- If co-funded project, "cognizant" program coordinates the waiver request
- Approved general-applicability and Agency-wide waivers do not require a separate waiver request
 - De Minimis Waiver – executed by the Assistance Recipient (representatives)
 - Minor Components Waiver – for Iron and Steel product manufacturers

COMPLIANCE ROLES

Manufacturers

Provide signed certification letters for the product

Contractors

Verify products received are compliant prior to installation

Assistance Recipients and Representatives

Collect compliance documentation for products received at the project site

Projects

Maintain documentation for products received at the project site

Regions or States

Support projects and oversee compliance

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EPA OW IMPLEMENTATION MEMO

- Released November 3, 2022
- “Build America, Buy America Act Implementation Procedures for EPA Office of Water Federal Financial Assistance Programs”
- Additive to OMB M-22-11 guidance
- <https://www.epa.gov/system/files/documents/2022-11/OW-BABA-Implementation-Procedures-Final-November-2022.pdf>
- Supplemental Q&As (Section 8) – May 2023



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF WATER

November 3, 2022

MEMORANDUM

SUBJECT: Build America, Buy America Act Implementation Procedures for EPA Office of Water Federal Financial Assistance Programs

FROM: Radhika Fox
Assistant Administrator

A handwritten signature in black ink, appearing to read "Radhika Fox".

TO: EPA Regional Water Division Directors, Regions I – X
EPA Office of Water Office Directors

OVERVIEW

The Biden-Harris Administration recognized the Nation's critical need for infrastructure investment, championing the Bipartisan Infrastructure Law (BIL), which Congress passed on November 15, 2021 (also known as the Infrastructure Investment and Jobs Act (IIJA)). The BIL will provide an unprecedented level of federal investment in water and wastewater infrastructure in communities across America.

In Title IX of the IIJA, Congress passed the Build America, Buy America (BABA) Act, which establishes strong and permanent domestic sourcing requirements across all Federal financial assistance programs for infrastructure. The U.S. Environmental Protection Agency (EPA) Office of Water is honored to help lead the implementation of these provisions and is proud of its near decade of successful implementation of the American Iron and Steel (AIS) provisions for its flagship water infrastructure programs.

This is a transformational opportunity to build a resilient supply chain and manufacturing base for critical products here in the United States that will spur investment in good-paying American manufacturing jobs and businesses. EPA's efforts to implement BABA will help cultivate the domestic manufacturing base for a wide range of products commonly used across the water sector but not currently made domestically. This will take time, and flexibility will be important to ensure that EPA can leverage critical water investments on time and on budget to protect public health and improve water quality.

EPA OW BABA IMPLEMENTATION MEMO

- Section 1: General
- Section 2: Product Coverage
- Section 3: Co-funding
- Section 4: Waivers
- Section 5: Documenting Compliance
- Section 6: Programs with AIS Requirements
- Section 7: Program-Specific Issues
- Appendix 1: Example BABA Construction Contract Language
- Appendix 2: Example BABA Assistance Agreement Language



OMB BABA GUIDANCE: M-24-02

- Released October 25, 2023
- “Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure”
- Supersedes their initial implementation M-22-11
- <https://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf>



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

October 25, 2023

M-24-02

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Shalanda D. Young *Shalanda D. Young*

SUBJECT: Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure

This memorandum provides supplemental implementation guidance to Federal agencies on: (1) the application of a Buy America preference¹ to Federal financial assistance programs for infrastructure; and (2) the process for waiving such a Buy America preference — including the circumstances under which waivers may be justified as consistent with applicable law and policy.² This memorandum rescinds and replaces Office of Management and Budget (OMB) Memorandum M-22-11. In addition, this memorandum removes direct conflicts between the earlier Memorandum M-22-11 and subsequent guidance issued by OMB in part 184 of Title 2 of the Code of Federal Regulations (“CFR”).³ This memorandum also provides updated guidance on a limited number of topics — including the waiver process — which modifies earlier guidance provided by OMB in Memorandum M-22-11. To the extent that any guidance provided in this memorandum conflicts with guidance in 2 CFR part 184, the guidance in part 184 prevails.

On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act (“IIJA”), Pub. L. No. 117-58, which includes the Build America, Buy America Act (“BABA”). Pub. L. No. 117-58, §§ 70901-27. BABA strengthens Buy America preferences associated with Federal financial assistance for infrastructure and will bolster America’s industrial base, protect national security, and support high-paying jobs. BABA requires that the head of each covered Federal agency⁴ must ensure that none of the funds made available for a Federal financial assistance program for infrastructure are 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.⁵

BABA affirms, consistent with Executive Order 14005, *Ensuring the Future Is Made in All of America by All of America’s Workers* (“the Executive Order”), this Administration’s priority to

¹ 2 CFR 184.3.

² 2 CFR 184.7; Executive Order 14005, “Ensuring the Future Is Made in All of America by All of America’s Workers,” 86 FR 7475 (Jan. 28, 2021).

³ 88 FR 57750 (Aug. 23, 2023).

⁴ For the purposes of this guidance, the terms “Federal agency” and “agency” mean any authority of the United States that is an “agency” (as defined in section 3502 of title 44, United States Code), other than an independent regulatory agency (as defined in that section). IIJA, § 70912(3).

⁵ IIJA, § 70914(a).

OMB – FINAL GUIDANCE – 2 CFR 184

- Published Aug 23, 2023: [federalregister.gov/d/2023-17724](https://www.federalregister.gov/d/2023-17724)
- Final guidance for manufactured products cost test, product categorization, and non-ferrous construction materials
- Effective for BABA projects October 23, 2023
- OMB requested comments addressing 11 topics
 - Preamble includes OMB response to comments received (~2000 comments)
 - Guidance text = last 10 pages (skip to page 126)

OMB MADE IN AMERICA – FINAL GUIDANCE HIGHLIGHTS

- Section 184.3 - definitions of key terms, including:
 - Manufactured Product
 - Component
 - Manufacturer
 - Produced in the United States
- Discusses determining the cost of components for manufactured products
 - Definition of “cost of components” mirrors Federal Acquisition Regulation (FAR) with some key changes/differences
- Additional construction materials added

RESOURCES

- Email Inboxes:
 - SRF_AIS@epa.gov (underscore!)
 - BABA-OW@epa.gov (hyphen!)
- EPA Websites:
 - www.epa.gov/cwsrf/state-revolving-fund-american-iron-and-steel-ais-requirement
 - www.epa.gov/cwsrf/build-america-buy-america-baba



Questions and Discussion