

THE WIFIA PROGRAM'S BABA WAIVER PROCESS – HOW IT WORKS?

The Build America, Buy America Act (BABA) (Title IX of PL 117-58) became effective May 14, 2022. BABA establishes domestic preference requirements to maximize the purchase of goods produced in the U.S. BABA requirements apply to federal financial assistance awards and includes all expenditures by a Federal agency to a non-Federal entity for an infrastructure project (Section 70912(4) of IIJA). BABA does not apply to for-profit organizations, but otherwise includes loans issued through the WIFIA program.

BABA allows the WIFIA Program to grant **project-specific** waivers¹ in specific circumstances:

- 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 overall project by more than 25 percent (an "unreasonable cost waiver").

Under BABA, the WIFIA program anticipates product nonavailability waiver requests to be the most common request because many water infrastructure products are complex; and while they may meet specific technical performance standards for the project, they may not be able meet the manufacturing standards for BABA products.

Borrowers should notify the WIFIA program when product availability issues are identified and prior to product procurement and reimbursement by the WIFIA program to ensure that the project maintains compliance with the BABA requirement. Although not required, identifying products during project design can help the borrower assess market availability and initiate a timely waiver process, where needed.

Waivers should only be sought when all avenues of procuring BABA-compliant products have been exhausted or the de minimis waiver cannot be applied. National waivers, like the de minimis waiver, are valuable tools to facilitate compliance. In many cases, a borrower may find that an availability waiver is not needed.

If borrowers have submitted waiver requests under the AIS requirements, the process is similar, except for two additional steps involving the Office of Management and Budget's Made in America Office (bolded Steps 4a and 5a below). BABA waiver requests should follow these steps:

STEP 1. SUBMIT THE REQUEST. Follow the instructions on the [WIFIA BABA Waiver Request Form](#) and submit the request to your WIFIA point of contact. The WIFIA program reviews the request for adequacy and will process the request on the borrower's behalf.

STEP 2. INDEPENDENT PRODUCT RESEARCH. (APPROX. 10-14 DAYS) Before waiver requests are considered, the WIFIA program will conduct independent market review based on the borrower's technical specifications of the product, if there is a product component to the request. Due diligence completed by the borrower to find and procure BABA-compliant options for the product that is the subject of the waiver request should also be submitted to the program.

STEP 3. BORROWER ASSESSMENT. The timing of this step relies heavily on the WIFIA borrower to evaluate feasible options. The WIFIA program will notify the borrower of the results of the initial review and potential options for exploration by the borrower. If there was product market research, we will confirm unavailability of the products or identify additional domestically available options for the borrower to assess against their project requirements. If there are feasible options, no further steps are taken, and the program will request the borrower withdraw the waiver request.

STEP 4a. OMB Approval to Post for Public Comment. (NOT SPECIFIED. APPROX. 2-3 WEEKS, BASED ON CURRENT AGENCY EXPERIENCE). The WIFIA program will draft a solicitation for public comment document, which summarizes the contents of the waiver request as well as provides additional information (such as federal award information, project information, and product information). The document is routed through the Office of Water management team and EPA's Administration to OMB's Made in America Office for their review. The WIFIA program will receive clearance by the Made in America Office before the request can be posted to both the [EPA website](#) and [OMB's website](#) for public comment.

STEP 4B. INFORMAL PUBLIC COMMENT PERIOD (15 DAYS). Waiver requests are subject to a 15-day comment period once posted in both EPA and OMB's websites. Borrowers will be notified when their request is posted and if comments are received from the public.

STEP 5a. OMB Approval to Approve Waiver. (NOT SPECIFIED. APPROX. 2-4 WEEKS, BASED ON CURRENT AGENCY EXPERIENCE). If comments are received on the waiver request, the WIFIA program will follow up with the borrower and their technical staff, as needed, to respond to comments. Once all comments have been addressed, the WIFIA program will route a waiver recommendation package for review through the Office of Water management team, EPA's Administration, and OMB's Made in America Office to receive clearance for approval and signature.

STEP 5B. APPROVAL AND NOTIFICATION. (LESS THAN 5 DAYS). The WIFIA program will post the approved waiver on the EPA BABA webpage under [Approved Project Waivers](#) and notify the borrower. Note that the website is a centralized repository for all EPA program offices to post waivers. WIFIA borrowers may need to use search filters to locate program-specific waivers.

ⁱ This document focuses on typical timelines for project-specific waivers. The process for general applicability waivers (like agency-wide nonavailability product waivers) has similar steps, but the timeline is more comprehensive since it involves more stakeholder engagement, cross-agency and cross-program coordination, and a 30-day informal public comment period.