



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

APR 11 2023

THE ADMINISTRATOR

DECISION MEMORANDUM

SUBJECT: Public Interest: Minor (Ferrous) Components of Iron and Steel Products General Applicability 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".

ISSUE

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 all federally funded infrastructure projects funded 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, for only the iron and steel products covered by Build America, Buy America, the EPA would allow up to five percent of the total material cost of a product to include nondomestically produced miscellaneous minor iron or steel components without further need for a product-specific waiver.

This waiver for manufacturers differs from the EPA's *De Minimis* waiver.¹ The EPA's *De Minimis* waiver reduces administrative burden on assistance recipients by waiving entire products that in total are no more than five percent of a total project cost. This Minor (Ferrous) Components of Iron and Steel Products waiver will reduce administrative burden on manufacturers that seek to ensure that their iron and steel products comply with Build America, Buy America but may have small iron or steel components within their product that are nondomestic or of unknown origin.

¹ <https://www.epa.gov/system/files/documents/2022-10/EPA%20BABA%20De%20Minimis%20Waiver%20Final%20Oct%202022.pdf>

DISCUSSION

Build America, Buy America Minor Components 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," encourages agencies to consider whether it is in the public interest to waive application of a Buy America preference to minor components within iron and steel products.

This waiver advances Build America, Buy America objectives by focusing needs for domestic manufacturing on higher value items while minimizing the administrative burden on manufacturers that must account for the sourcing of minor components in an iron and steel product. The waiver expedites the process for manufacturers seeking to deem their products compliant with Build America, Buy America, which then benefits assistance recipients seeking Build America, Buy America-compliant products for their federally funded projects. This waiver supports those manufacturers making extensive efforts to produce domestic iron and steel products and signals to them to prioritize high-value domestic iron and steel products. In addition, this waiver is consistent with the EPA's existing American Iron and Steel Minor Components waiver.

The waiver applies only to iron and steel products subject to the Build America, Buy America Act requirements and concerns only the iron and steel (ferrous) components of an otherwise domestically manufactured iron and steel good. The Build America, Buy America Act requires that the iron and steel used in a product is melted and/or poured in the United States and all subsequent operations occur domestically. This waiver would allow manufacturers of iron and steel products to utilize a small portion (up to five percent by product material cost) of nondomestic or unknown origin iron and steel minor components within their otherwise domestically manufactured iron and steel products.

Anticipated Program Impacts Absent a Waiver

Build America, Buy America impacts 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. Absent this waiver, manufacturers will face considerable challenges determining that their iron and steel products, which may contain trivial components of foreign or unknown origin, are compliant with Build America, Buy America. Such uncertainty could lead to a significant increase in product nonavailability waiver requests for these iron and steel products from assistance recipients.

Failure to grant such a waiver creates significant administrative burden for the EPA and recipients as both sides must negotiate their iron and steel products on a project-by-project basis, which would increase the cost to the taxpayer, delay the award of assistance agreements and extend projects. More broadly, absent a waiver, recipients might inefficiently expend resources for critical public health protection and environmental infrastructure projects and fail to meet project goals.

Further, this waiver impacts a subset of iron and steel products where American-made product manufacturers would greatly benefit from this waiver. The cost of the minor components of iron and steel products tend to be very small. Without the waiver, small, miscellaneous iron and steel components could prevent a manufacturer from providing critical infrastructure products that otherwise could be made with majority domestic iron and steel. As a result, not having this waiver could prevent a manufacturer from creating a Build America, Buy America-compliant product and could force a recipient to request a waiver for an altogether nondomestically sourced product.

Assessment of Cost Advantage of a Foreign-Sourced Product

Under OMB's M-22-11 memorandum 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.

Public Notice

The EPA proposed to issue this waiver in January 18, 2023, and the comment period was open until February 3, 2023. The agency received 23 comments during the public comment period. Twenty-one commenters were generally supportive of the waiver with six requesting an increase in the proposed five percent of the total material cost of the minor components. Two commenters opposed the proposed waiver either because they believed that it would hinder their investments made to comply with American Iron and Steel requirements or because they believe it failed to align with the administration's priority for enhancing domestic manufacturing. Other commenters asked the EPA to clarify how nonferrous minor components of nondomestic or unknown origin would be treated.

After reviewing the comments received, the EPA concludes that the information provided to the agency generally supports a general applicability waiver of minor iron or steel components of Iron and Steel products without further need for product-specific waivers. This waiver aligns with the existing Minor Components waiver for the American Iron and Steel requirements, which also apply to only the ferrous minor components of an iron and steel product. The EPA determined that the comments generally supported maintaining five percent threshold of materials cost of the product in this waiver, which also aligns with the American Iron and Steel Minor Components waiver.

In response to comments received, the EPA clarifies that this waiver applies to only the ferrous minor components of a product made primarily of iron and steel. The nonferrous components of the otherwise primarily iron and steel product may be from unknown or nondomestic sources and are not included in this waiver (but may contribute to the total materials cost of the product in question). Like the American Iron and Steel Minor Components waiver, the EPA recommends that manufacturers acknowledge use of this Minor Components waiver when providing notice through their certification letters to document their product's compliance with the Build America, Buy America iron and steel and American Iron and Steel requirements.

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 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 determines that it is in the public interest to waive Build America, Buy America requirements for minor (ferrous) components of iron and steel products. The EPA will review this waiver every five years, or more often as necessary, from the date on which the waiver is issued.

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