



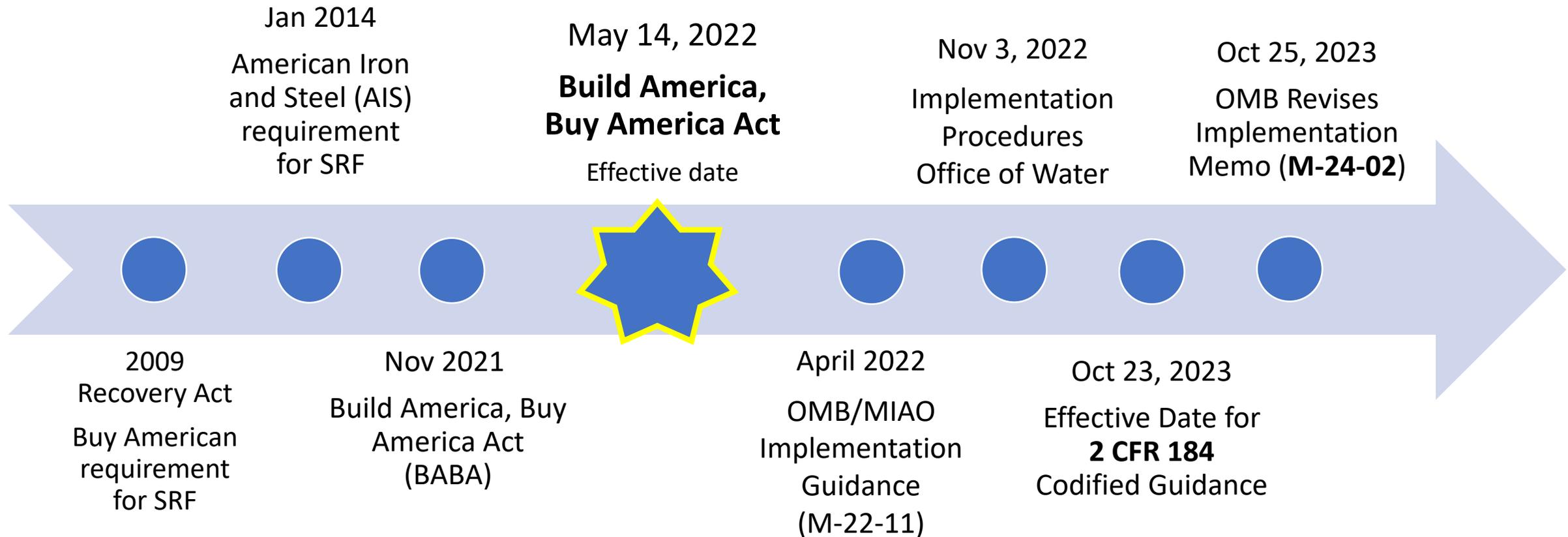
Clean Water  
State Revolving Fund

# BUILD AMERICA BUY AMERICA OVERVIEW

## SAN FRANCISCO BAY WATER QUALITY IMPROVEMENT FUND

APRIL 2024

# EPA WATER – DOMESTIC PREFERENCE TIMELINE



# BIPARTISAN INFRASTRUCTURE LAW (BIL) (IIJA)

- Included in the Bipartisan Infrastructure Law (BIL/IIJA)
- Public Law Number 117-58, Title IX, Subtitle A, Part I – Buy America Sourcing Requirements, Sections 70911-70917
- Signed November 15, 2021, became effective May 14, 2022
- Applies to more than 70 EPA infrastructure financial assistance programs
  - ~ 17 EPA water infrastructure federal financial assistance programs

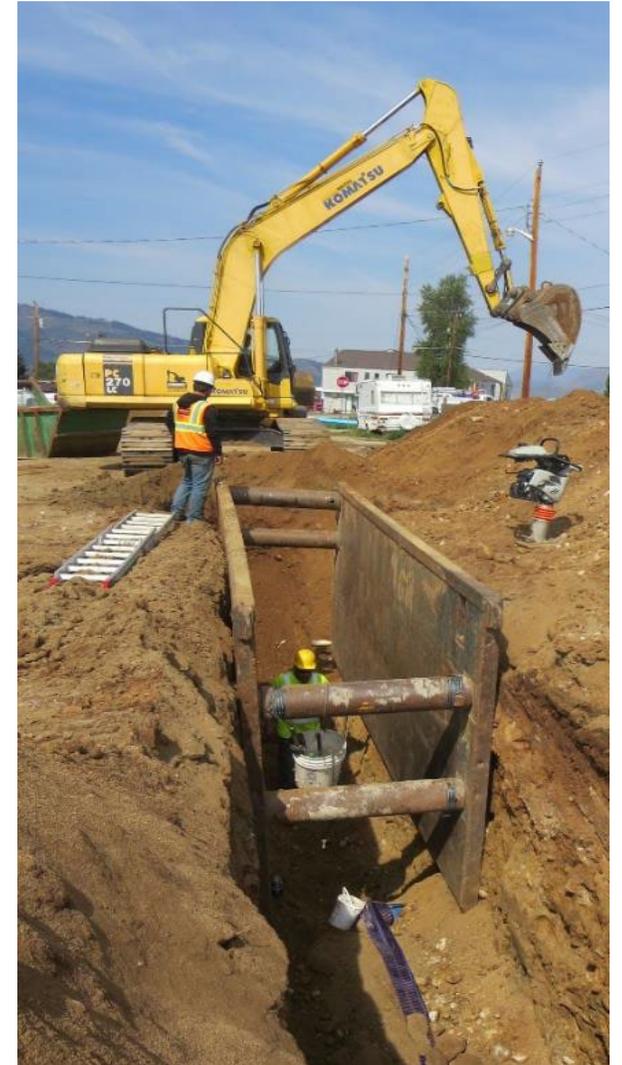


# BUILD AMERICA, BUY AMERICA (BABA) ACT

- “[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.**”
- Applies to **all federal** financial assistance programs for infrastructure.
- “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 the public interest.

# BABA: COVERED ITEMS

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



# BABA: IRON AND STEEL

- Items that are primarily / predominantly iron or steel, unless another standard applies under law or regulation
- Products greater than 50% iron or steel, measured by material costs only (not labor, overhead, shipping, etc.).
- All manufacturing processes, from the **initial melting stage** through the application of coatings, must occur in the U.S



# IRON AND STEEL PRODUCT EXAMPLES

- Lined or unlined pipes or fittings
- Manhole Covers
- Municipal Castings
- Hydrants
- Tanks
- Flanges
- Pipe clamps and restraints
- Valves
- Structural steel
- Reinforced precast concrete
- Site Steel (fencing, railings, reinforcement bar and wire, etc.)

# BABA: 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
- OMB recently published guidance (2 CFR 184) for manufactured products and will be addressed in later slides!



# BABA: MANUFACTURED PRODUCTS (CONTINUED)



# BABA: CONSTRUCTION MATERIALS (NON-FERROUS)

- Includes:
  - **Non-ferrous** metals
  - Plastic and polymer-based products (including PVC, composite building materials)
  - Glass
  - Optical fiber
  - Fiber Optic Cable
  - Engineered wood
  - Lumber
  - Drywall
- 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

# CONSTRUCTION MATERIALS

| Construction material              | “Produced in the U.S.” means all manufacturing processes occurred in the U.S.   |
|------------------------------------|---|
| Non-ferrous metals                 | From initial smelting or melting through final shaping, coating, and assembly   |
| Plastic and polymer-based products | From initial combination of constituent plastic or polymer-based inputs, or, where applicable, constituent composite materials, until the item is in its final form |
| Glass                              | From initial batching and melting of raw materials through annealing, cooling, and cutting  |
| Fiber optic cable                  | From the initial ribboning (if applicable), through buffering, fiber stranding and jacketing, occurred in the United States.  |
| Optical fiber                      | From the initial preform fabrication stage through the completion of the draw   |
| Lumber                             | From initial debarking through treatment and planing  |
| Drywall                            | From initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels  |
| Engineered wood                    | From the initial combination of constituent materials until the wood product is in its final form   |

# 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

## Compliance Roles

|  |  |
|--|--|
| <b>Manufacturers</b>                         | Provide signed certification letters for product   |
| <b>Contractors</b>                           | Verify products used on-site are compliant prior to installation                           |
| <b>Assistance Recipients/Representatives</b> | Collect compliance documentation for products received at the project site                 |
| <b>Projects</b>                              | Maintain documentation for products received at the project site (hard copy or electronic) |
| <b>Regions and States</b>                    | Support projects and oversee compliance  |

# HOW CAN PRODUCT COMPLIANCE BE DEMONSTRATED?

Manufacturer's documentation for the product(s) to 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. Location(s) of manufacturing being certified (city and state)
  - a. Minimum: documenting final point of manufacturing in the United States
4. Signature of company representative making the certification (on company letterhead, signature can be electronic)
5. 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).

# THE CERT LETTER HOLY GRAIL



**MINAS MORGUL**  
August 29, 2017  
Gondor Supply Co.  
3477 One Ring Ln.  
Fort Tiriith, 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 |

Dear Valued Partner:

We hereby certify that the iron used to make the construction castings manufactured by MMS for above referenced project is in full compliance with ASTM A48, Class 35B and AASHTO M105 for 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 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 identifier
  - ✓ Specific list of products
  - ✓ Location of manufacturing (city and state)
  - ✓ Dom Pref. requirement reference (+BABA Category Reference)
  - ✓ Signature of representative

# BABA: AGENCY-WIDE GENERAL APPLICABILITY WAIVERS

- *De Minimis* public interest waiver
  - Agency-wide; Approved
    - All projects may use up to 5 percent (of project cost) non-domestic products

| BABA De Minimis List Example                                     |  |                 |                |                   |
|--|--|-----------------|----------------|-------------------|
| <b>Total Project Cost: \$1,000,000</b>                           |  |                 |                |                   |
| <b>5% Project Cost Limit (Max. De Minimis Allowed): \$50,000</b> |  |                 |                |                   |
| <u>Item #</u>  | <u>Description</u>                               | <u>Quantity</u> | <u>\$/Unit</u> | <u>Total Cost</u> |
| 1  | 4" PVC drain pipe                                | 50 LF           | \$10           | \$500             |
| 2  | Brass pressure relief valve                      | 3               | \$50           | \$150             |
| 3  | Electrical actuator/valve assembly               | 1               | \$3,000        | \$3,000           |
| 4  | 6-ft chain link fence w/gate framework and gates | 1               | \$7,500        | \$7,500           |
| 5  | 5 x 2 precast boxed culvert                      | 40 LF           | \$500          | \$20,000          |
| 6  | Filter fabric                                    | 900 SQ YD       | \$5            | \$4,500           |
|  |  |                 | <b>Total:</b>  | <b>\$35,650</b>   |

**\*Note: This list and the items on it are only examples. There is no required format for recipients to follow when documenting their de minimis products list.**

## BABA: AGENCY-WIDE GENERAL APPLICABILITY WAIVERS (CONTINUED)

- **Small Award Threshold Waiver**
  - Assistance agreements under \$250K threshold
  - Agency-wide; Approved
- **Minor Components Waiver for Iron and Steel Products**
  - Agency-wide; Approved; Same as AIS waiver (for Manufacturers)
  - Allows up to 5% non-domestic iron or steel components in BABA-compliant product
- **Pacific Islands Territories Waiver**
  - Agency-wide, Approved
  - Excludes the three remote Pacific territories

# BABA: OTHER WAIVERS

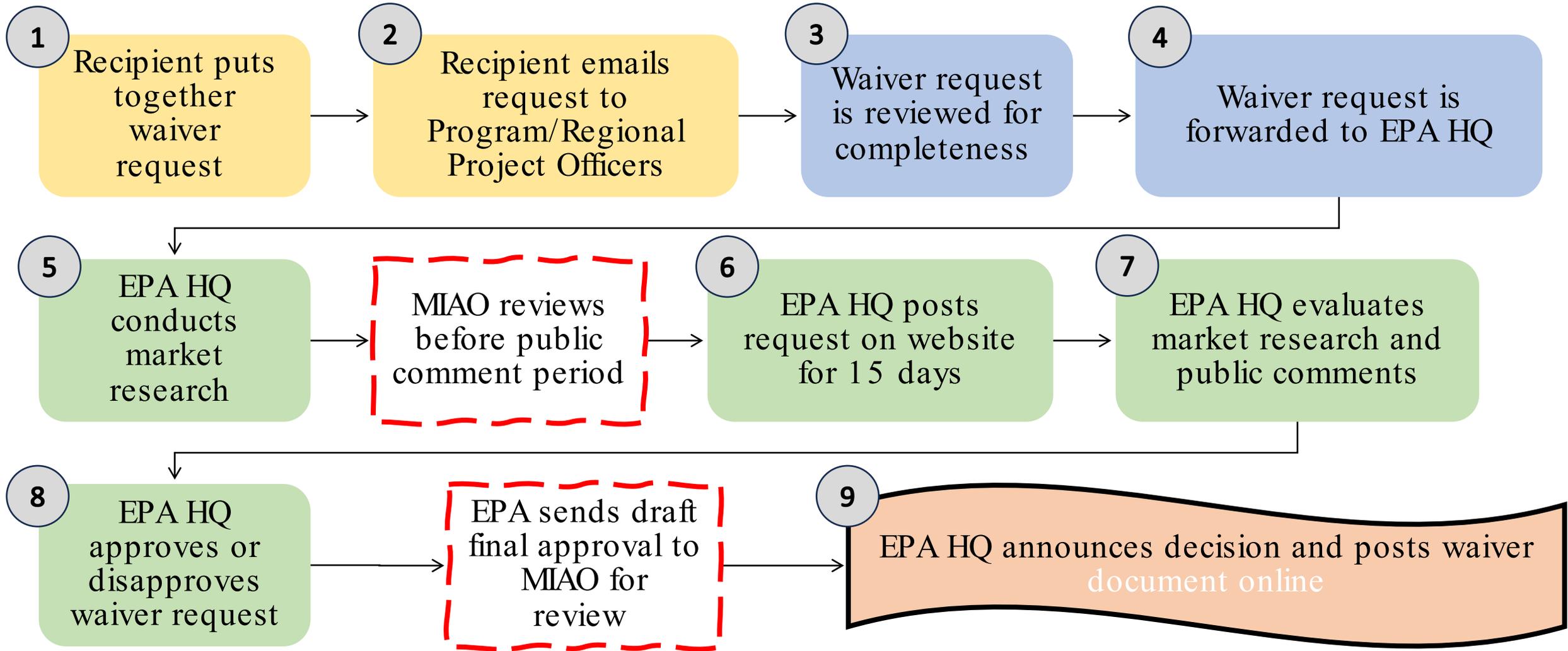
OMB BABA guidance lists other public interest waivers for agency consideration:

- **Program Priority Waivers**
  - other program waivers unlikely
- **Short-term product-specific waivers (Nonavailability)**
  - Short-term, targeted, conditional – required by guidance/OMB
- **General waivers for products not currently manufactured in U.S.**
  - EPA Initiating research for many complex manufactured products
  - EPA (and other federal water infrastructure agencies) issued a Request for Information to solicit manufacturer input (Nov 20<sup>th</sup>)

# BABA: PROJECT/PRODUCT-SPECIFIC WAIVERS

- **Nonavailability Waiver**
  - Product(s) is not available or will not be available in a reasonable time
- **Public Interest Waiver**
  - High Bar
  - Evaluation can be complicated, longer decision time
- **Unreasonable Cost Waiver**
  - Increases the total project cost more than 25%

# NEW STEPS IN WAIVER PROCESSING THROUGH MIAO



# WHO MAY APPLY FOR A WAIVER AND HOW?

- Assistance Recipients and their authorized representatives
  - EPA Regional programs (finance authority) will coordinate waiver requests to HQ
- 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
- 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

# 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 be "R. 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 MEMOS

- Initial memo April 18, 2022 (M-22-11)
- Revised October 25, 2023 (M-24-02)
- <https://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf>
- Updated to reflect guidance changes in codified guidance 2 CFR 184



THE DIRECTOR

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 preference<sup>1</sup> 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.<sup>2</sup> 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”).<sup>3</sup> 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 agency<sup>4</sup> 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.<sup>5</sup>

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

<sup>1</sup> 2 CFR 184.3.

<sup>2</sup> 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).

<sup>3</sup> 88 FR 57750 (Aug. 23, 2023).

<sup>4</sup> 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).

<sup>5</sup> 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

- EPA Websites:
  - [www.epa.gov/cwsrf/build-america-buy-america-baba](http://www.epa.gov/cwsrf/build-america-buy-america-baba)
- Email Inboxes:
  - [BABA-OW@epa.gov](mailto:BABA-OW@epa.gov) (hyphen!)
- OMB/MIAO Website:
  - [www.madeinamerica.gov](http://www.madeinamerica.gov)



# Questions and Discussion