



Clean Water
State Revolving Fund

BUILD AMERICA, BUY AMERICA ACT

PRESENTED BY:

DAN-TAM NGUYEN, US EPA, WIFIA PROGRAM



Office of Water

Build America, Buy America (BABA) Act

- New Domestic Preference Law included in BIL
 - Public Law Number 117-58, Title IX, Subtitle A, Part I – Buy America Sourcing Requirements, Sections 70911-70917
 - <https://www.congress.gov/117/plaws/publ58/PLAW-117publ58.pdf>
- Applies to **all** federal financial assistance programs, not just BIL funding.
- Effective date: May 14, 2022
- “[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.”

What about other Domestic Preference Laws?

- **Buy American (1933)**
 - Projects that involve direct federal procurement generally fall under Buy American requirements.
- **Buy America under American Recovery and Reinvestment Act (2009)**
 - Water infrastructure projects no longer have Buy America requirements under ARRA.
- **American Iron and Steel (2014)**
 - AIS replaced any of the Buy America requirements under ARRA

What about the American Iron and Steel (AIS) Requirements?

- A statutory requirement for several water infrastructure programs, including EPA's WIFIA, Clean Water State Revolving Fund, and Drinking Water State Revolving Fund Programs
- As BABA implementation is underway, there will be an intersection of AIS and BABA requirements for projects as new financial assistance awards are issued. AIS will not “go away.”

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

If the product is (1) *primarily iron and steel*, (2) *a listed product*, and (3) *permanently incorporated into the project*, then it is an iron and steel product under the AIS requirement and must be “produced in the United States”.

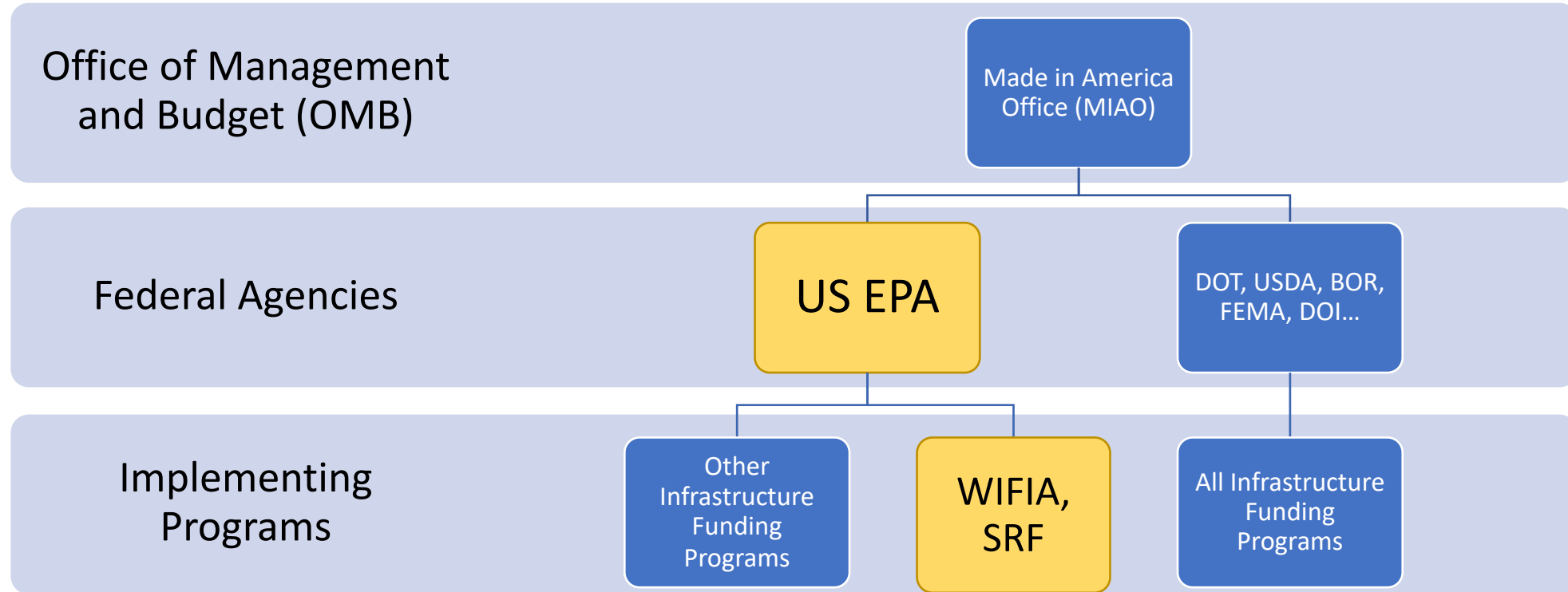


What is BABA?

- “[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 the public interest.

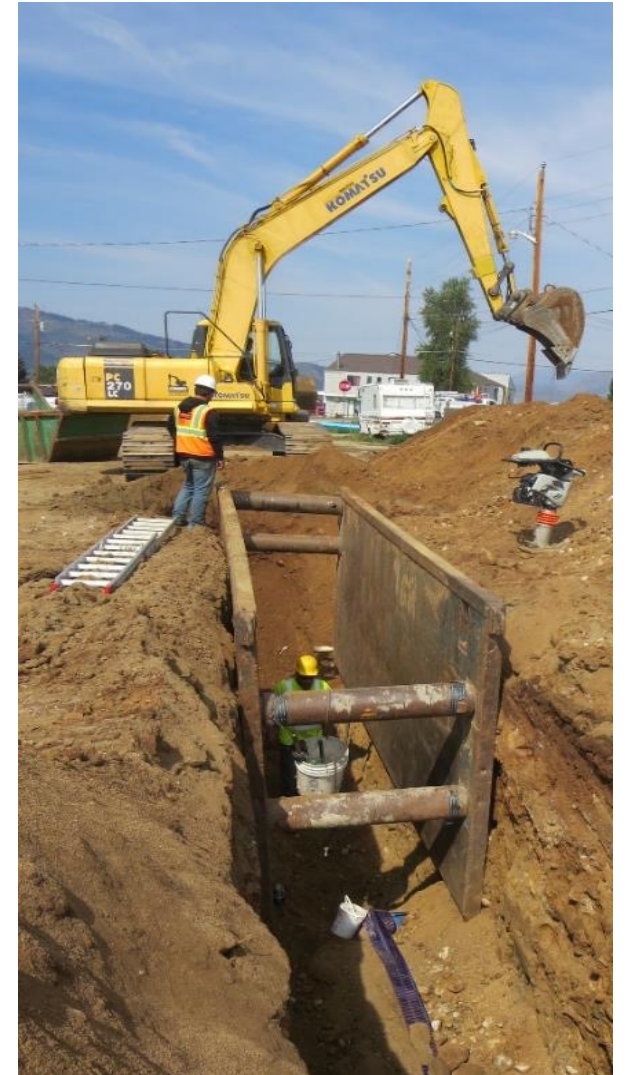
Government-wide applicability, across all federal agencies providing federal financial assistance

BABA Implementation Oversight (Federal)



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

- Same as AIS
- Items that are primarily / 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.



BABA: Construction Materials (Non-Ferrous)

- Includes:
 - **Non-ferrous** metals
 - Plastic and polymer-based products (including PVC, composite building materials, and polymers used in fiber optic cables)
 - Glass (including optic glass)
 - 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)

BABA: Construction Materials (Non-Ferrous)

- Materials must be produced in the U.S.
- Final guidance pending – OMB is reviewing comments received during public comment period (recently closed)
- PROPOSED in 2 CFR 184 –
 - Inclusion of materials under the construction materials product category, such as coatings, brick, engineered wood products (preamble)
 - Clarification of construction materials, particularly composite building materials, fiber optic cables, optical fibers, and optic glass (preamble)
 - Construction materials standards for “produced in the U.S.” (§ 184.6)

BABA: Manufactured Products

- 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
- Final guidance pending – OMB is reviewing comments received during public comment period (recently closed)
- PROPOSED in 2 CFR 184 –
 - Use the definition of “cost of components” in the Federal Acquisition Regulation (FAR) (48 CFR § 25.003) that is used for Federal procurement
 - Cost of components are determined based on whether they are purchased or manufactured (§ 184.5)
 - Determination of manufactured product as products not covered by iron and steel or construction materials product categories (§ 184.3)



BABA: How Do Projects Comply?

1. Certification Letter

- Letter asserting that the purchased product complies with BABA requirements (according to the criteria for compliance for each product category)

2. Waiver

- EPA has authority to waive the BABA requirement and to issue waivers for a project

Certification Letter = 5 key elements

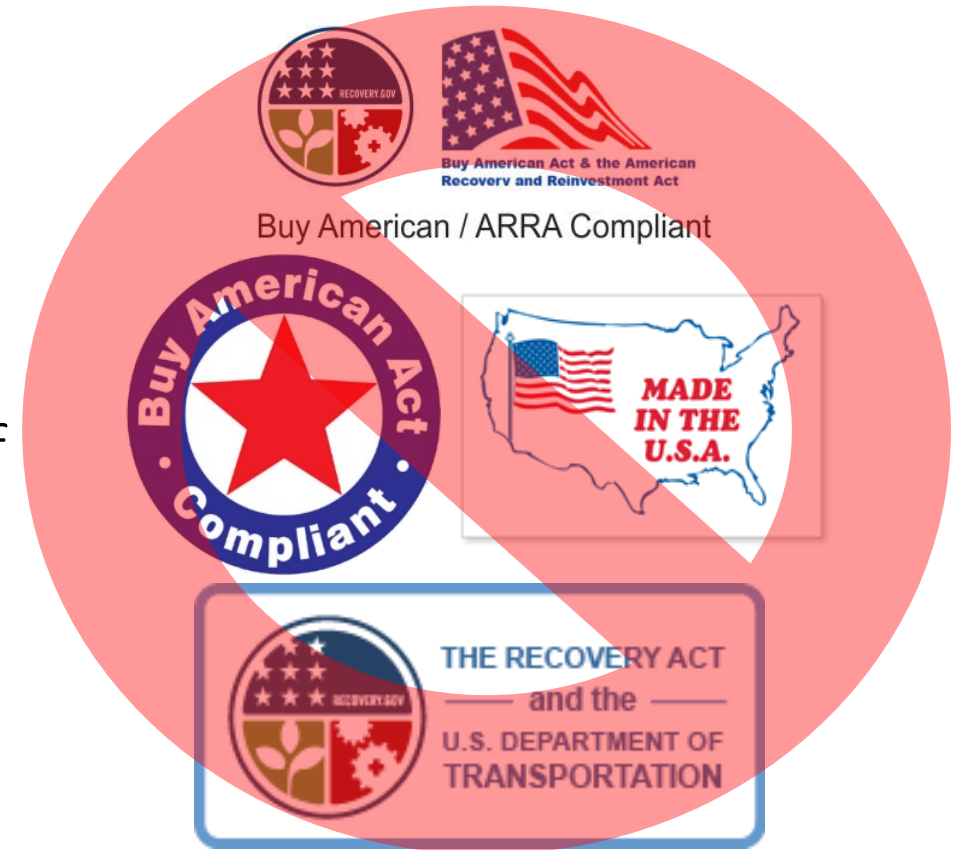
1. What is the product
 - List product(s) delivered to the project site
2. Where was it made
 - Location(s) of the foundry/mill/factory where the product was manufactured (City and State)
3. To whom was it delivered
 - Name of the project and/or jurisdiction delivered
4. Signature of company representative
 - Certifying official on company letterhead
5. References compliance with AIS and/or BABA requirements (not Buy American, Buy American Act, or other domestic preference laws)

BABA: Certification Letter

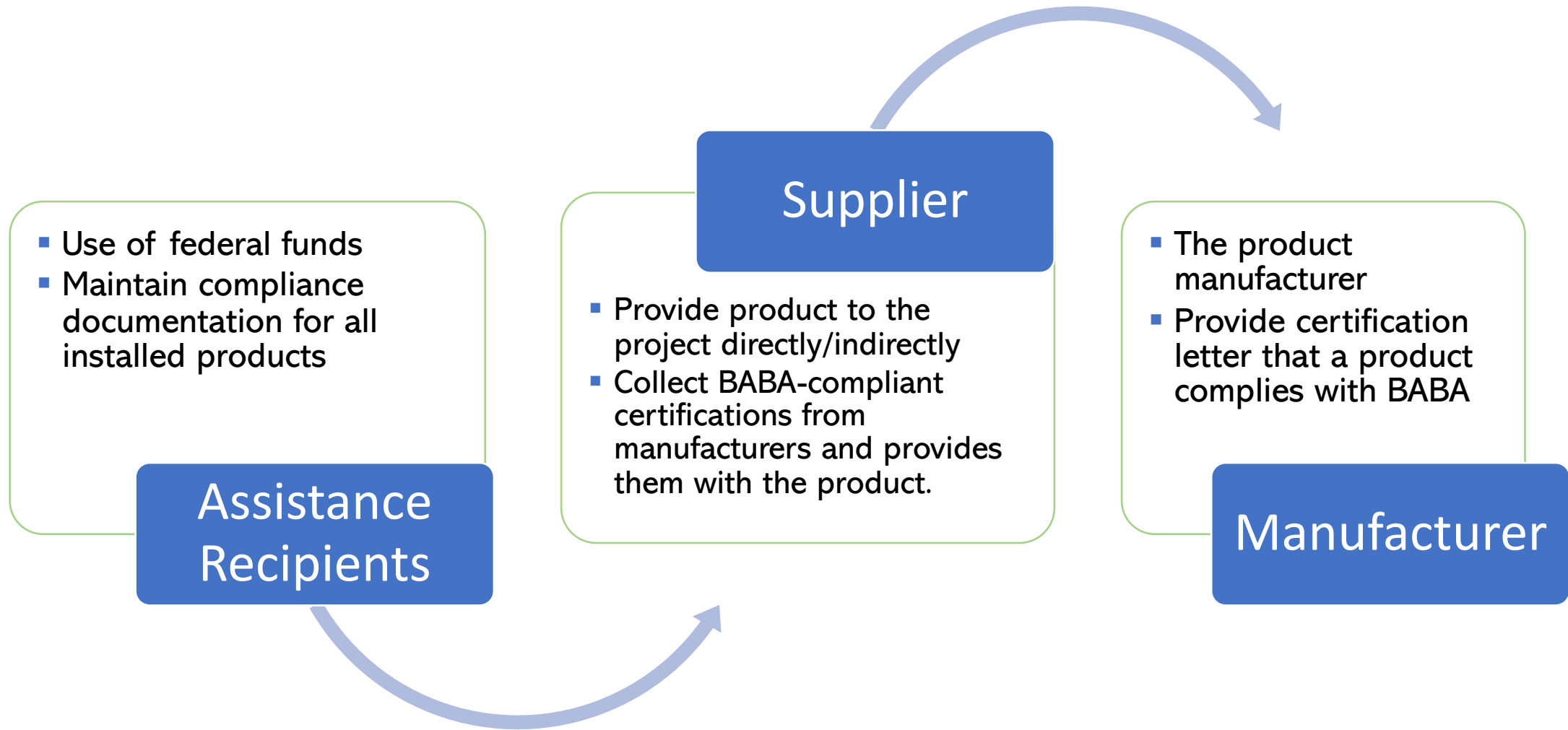
- EPA will implement BABA requirements for Iron and Steel products under BABA in the same way as AIS
- Certification must mention either compliance with AIS, BABA iron and steel, or both. A certification noting BABA compliance can be used as certification for AIS compliance and vice versa for iron and steel products ONLY.
- Certification will be newly implemented for construction materials and manufactured products under BABA, but similar compliance documentation and manufacturer's certification expectations applies.

Stamps, Seals, Stickers on Products indicating 'Buy American'

- NONE are currently being accepted as a replacement for AIS or BABA certification of compliance



Compliance Roles and Responsibilities



Role of Design Builders

- None of the EPA OW programs require DB on projects, but we see a lot.
- DB firms are Key Support to Assistance Recipients (Owners)
 - Importance of maintaining adequate compliance documentation for installed products
- Areas of Consideration
 - Identify products early during design. Determine feasibility of BABA-compliant products.
 - Initiate consultations for project waivers early.
 - Share market knowledge on non-available products with implementing programs
 - Share your knowledge of the DB process

BABA Waiver Types

Similar to AIS, under BABA, EPA has the authority to issue three different waiver types:

- Nonavailability 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
- Public Interest Waiver - inconsistent with the public interest
- Cost Waiver – inclusion of BABA-compliant materials will increase the overall project costs by 25% or more

BABA: Agency-Wide, Program Waivers

- Pursued on a program or agency-level
- Program-specific waivers – to ease transition into the BABA implementation
- Agency-wide –
 - De minimis – to lessen burden on funding recipients
 - Minor Components – to lessen burden on product manufacturers
 - Pacific Territories – to lessen burden on recipients with very limited product markets

BABA: Project-Specific Waivers

- Pursued on a project-level
- May be Nonavailability, Public-interest, or Cost
- Waiver Timeline (Key steps for approval)
 - **Waiver review and recommendation (market research, supporting evidence of waiver need)
 - Waiver approval (management and MIAO)

BABA: Broad Product-Specific, Non-Availability Waivers

- For products not currently manufactured in the U.S.
- Short-term, Targeted, and Conditional (M-22-11)
- Past examples:
 - Small Horsepower Motors – Recovery Act Buy American
 - Stainless Fasteners for Couplings & Restraints - AIS
- Research pending for many complex manufactured products

QUESTIONS AND DISCUSSION

BABA: Resources



OMB BABA GUIDANCE (M-22-11)

- Released April 18, 2022
- “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure”
- <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>




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

April 18, 2022

M-22-11

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Shalanda D. Young 
Director

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

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 (“the Act”). Pub. L. No. 117-58, §§ 70901-52. The Act strengthens Made in America Laws¹ and will bolster America’s industrial base, protect national security, and support high-paying jobs. The Act requires that no later than May 14, 2022—180 days after the enactment of the IIJA—the head of each covered Federal agency² shall ensure that “none of the funds made available for a Federal financial assistance program for infrastructure, including each deficient program, 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.”³

The Act 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 “use terms and conditions of Federal financial assistance awards to maximize the use of goods, products, and materials produced in, and services offered in, the United States.”⁴

The Act provides statutory authorities for the Made in America Office (“MIAO”) in the Office of Management and Budget (“OMB”) to maximize and enforce compliance with Made in

¹ “Made in America Laws” means all statutes, regulations, rules, and Executive Orders relating to Federal financial assistance awards or Federal procurement, including those that refer to “Buy America” or “Buy American,” that require, or provide a preference for, the purchase or acquisition of goods, products, or materials produced in the United States, including iron, steel, and manufactured products offered in the United States. Made in America Laws include laws requiring domestic preference for maritime transport, including the Merchant Marine Act of 1920 (Pub. L. No. 66-261), also known as the Jones Act. Exec. Order No. 14,005, 86 Fed. Reg. 7475, § 2(b) (Jan. 28, 2021), available at <https://www.federalregister.gov/documents/2021/01/28/2021-02033/ensuring-the-future-is-made-in-all-of-america-by-all-of-america-workers>. Made in America Laws also include laws that give preference to Indian-owned and -controlled businesses, such as the Buy Indian Act (25 U.S.C. 47), that produce items in the United States.

² 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).

³ IIJA, § 70914(a).

⁴ Exec. Order No. 14,005 (see footnote 1).

EPA OW IMPLEMENTATION MEMO

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



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 "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.

RESOURCES

- EPA Websites:
 - [BABA Materials for OW Programs](#)
 - [AIS Materials for SRF and WIFIA](#)
 - [WIFIA Borrower Guide to Federal Requirements](#)
- Email Inboxes:
 - [SRF AIS@epa.gov](mailto:SRF_AIS@epa.gov) (underscore!)
 - BABA-OW@epa.gov (hyphen!)
- WIFIA-specific:
 - wifia@epa.gov
 - Dan-Tam Nguyen, nguyen.dan-tam@epa.gov

SAVE THE DATE

UPCOMING EVENTS

DBIA National - BIM Execution Planning

May 8, 2023 – Virtual

DBIA WPR – LA/OC Chapter Lunch Program

THE DECARBONIZATION IMPERATIVE AND PLANNING FOR A RESILIENT FUTURE

May 9, 2023 – DoubleTree Los Angeles Downtown, Los Angeles, CA

DBIA WPR – Bay Area Chapter Lunch Program

IPD VS. PROGRESSIVE DESIGN-BUILD

May 10, 2023 – Arup Office, San Francisco, CA

DBIA National - Certification Workshop

May 10-12, 2023 – Virtual

DBIA WPR – San Diego Chapter Lunch Program

BUILDING A HEALTHY FUTURE: DESIGN-BUILD IN HEALTHCARE CONSTRUCTION

May 18, 2023 – Farmer & The Seahorse, San Diego, CA

DBIA-WPR REGIONAL CONFERENCE AND AWARDS PROGRAM

June 13 -16, 2023 – JW Marriott, Anaheim, CA

Please check dbiawpr.org for updated information.



APPENDICES

Bipartisan Infrastructure Law (BIL)

- Also known as Infrastructure Investment and Jobs Act (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 strengthen the nation's drinking water and wastewater systems – the single largest investment in water the federal government has ever made.
- Approximately \$43.4B of this funding through the existing CWSRF and DWSRF programs.



EPA's Office of Water: Covered Infrastructure Programs

- Alaska Native Villages and Rural Communities Water Grant Program (ANV)
- Clean Water and Drinking Water State Revolving Fund Programs (CW and DWSRF)
- Clean Water and Drinking Water Grants to U.S. Territories and the District of Columbia
- Clean Water Indian and Drinking Water Tribal Infrastructure Grant Set-aside
- Coastal Wetlands Planning, Protection and Restoration Act, (CWPPRA) Programs
- Congressionally Directed Spending/Community Project Funding (also known as Community Grants)
- Geographic Programs (Great Lakes Restoration Initiative, Chesapeake Bay, San Francisco Bay, Puget Sound, Long Island Sound, Gulf of Mexico, South Florida, Lake Champlain, Lake Pontchartrain, Southern New England Estuaries, Columbia River Basin, Pacific Northwest)
- Gulf Hypoxia Program

Covered Infrastructure Programs (cont'd)

- National Estuaries Program (CWA Section 320)
- 319 Nonpoint Source Management Program Implementation
- Reducing Lead in Drinking Water Grant Program (SDWA §1459B)
- Assistance for Small and Disadvantaged Communities Grants: Small, Underserved, and Disadvantaged Community Grant Program (SUDC), Emerging Contaminants in Small or Disadvantaged Communities (EC-SDC) and Drinking Water Infrastructure Resilience & Sustainability (SDWA §1459A)
- Sewer Overflow and Stormwater Reuse Municipal Grants (OSG)
- USMCA Implementing Legislation (Section 821 and Title IX, USMCA Supplemental Appropriations, 2020)
- U.S.-Mexico Border Water Infrastructure Program
- Voluntary School and Child Care Program Lead Testing and Remediation Grant Program (SDWA 1464(d))
- Water Infrastructure Finance and Innovation Act (WIFIA)

Covered programs that also have AIS requirements

- If BABA requirements are met, AIS requirements will be met
- BABA may not apply to all federally funded projects immediately
- Projects will indicate the applicable requirements (AIS or BABA) for purchase orders
- Newly awarded projects may begin to see BABA requirements as we phase out of this transition period