



# Build America, Buy America (BABA) Act Office of Water Implementation Procedures Webinar for EPA Regions, States, and State Associations

November 15, 2022

# BUILD AMERICA, BUY AMERICA (BABA) ACT

- Included in the Infrastructure Investment and Jobs Act
  - Public Law Number 117-58
  - Title IX, Subtitle A, Part I – Buy America Sourcing Requirements
  - BABA Sections 70911-70917
- Signed November 15, 2021
- Effective date 180 days after enactment: May 14, 2022
- <https://www.congress.gov/117/plaws/publ58/PLAW-117publ58.pdf>

# 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.
- BABA applies to all Federal financial assistance for infrastructure (not just BIL funding), unless covered by a waiver

# BENEFITS OF BABA

- Establishes strong and permanent domestic sourcing requirements across all Federal financial assistance programs for infrastructure.
- Provides an opportunity to build a resilient supply chain and manufacturing base for critical products in the United States.
- Will help spur investment in good-paying American manufacturing jobs and businesses.



# MADE IN AMERICA OFFICE (MIAO)

- BIL codified the MIAO and centralized the waiver review process required by Executive Order 14005
- MIAO aims to increase reliance on domestic supply chains
  - Gather government-wide data to support decision-making to make U.S. supply chains more resilient
  - Bring increased transparency to waivers in order to send clear demand signals to domestic producers
- MIAO waiver website:
  - <https://www.madeinamerica.gov/waivers/>

# OMB BABA GUIDANCE

- 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 Laws<sup>1</sup> 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 agency<sup>2</sup> 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.”<sup>3</sup>

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.”<sup>4</sup>

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

<sup>1</sup> “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. 14005, 86 Fed. Reg. 7475, § 2(b) (Jan. 28, 2021), available at <https://www.federalregister.gov/documents/2021/01/28/2021-02018-ensuring-the-future-is-made-in-all-of-america-by-all-of-america-s-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.

<sup>2</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(c).

<sup>3</sup> IIJA, § 70914(a).

<sup>4</sup> Exec. Order No. 14005 (see footnote 1).



# 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

**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.

# OFFICE OF WATER PROGRAMS SUBJECT TO BABA

- 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 Set-aside and Drinking Water Infrastructure Grant – Tribal Set-aside
- Coastal Wetlands Planning, Protection and Restoration Act, (CWPPRA) Programs
- Community Grants (also known as Cong. Directed Spending / Community Project Funding)
- Geographic Programs (Chesapeake Bay, Columbia River Basin, Great Lakes Restoration Initiative, Gulf of Mexico, Lake Champlain, Lake Pontchartrain, Long Island Sound, Pacific Northwest, Puget Sound, San Francisco Bay, South Florida, and Southern New England Estuaries)
- Gulf Hypoxia Program
- National Estuaries Program (CWA Section 320)

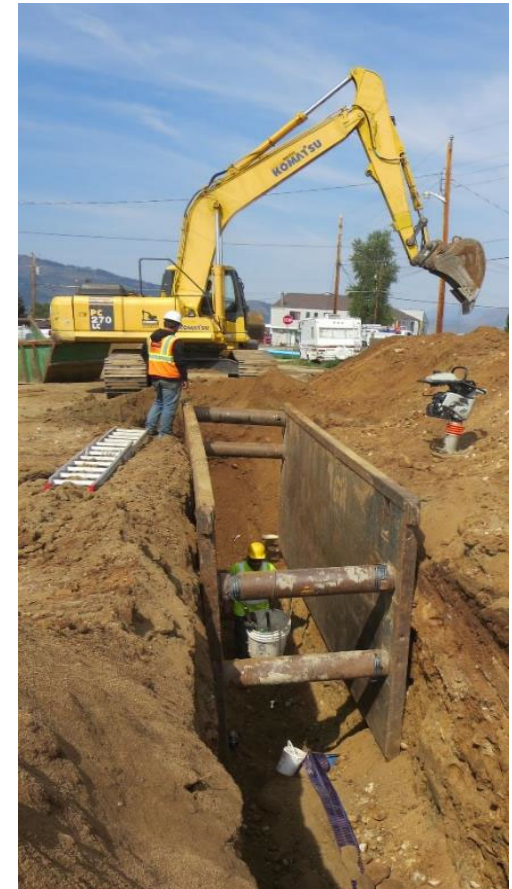


# OW PROGRAMS SUBJECT TO BABA, CONTINUED

- 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)
- United States-Mexico-Canada Agreement (USMCA) Implementing Legislation (Section 821 and Title IX, USMCA Supplemental Appropriations, 2020)
- U.S.-Mexico Border Water Infrastructure Program (BWIP)
- Voluntary School and Child Care Program Lead Testing and Remediation Grant Program (SDWA 1464(d))
- Water Infrastructure Finance and Innovation Act (WIFIA)

# BABA COVERED ITEMS

- Iron and steel + manufactured products + construction materials (non-ferrous)
- Items should only be classified into ONE of the three categories
- Items consumed in, incorporated into, or affixed to an infrastructure project (aka permanently incorporated)
  - Does not apply to items brought to and removed from the construction site prior to the completion of the project (e.g., temporary scaffolding)
  - Does not apply to equipment and furnishings that are used at or within the finished project (e.g., movable chairs, desks, portable computer equipment)





## IRON AND STEEL

- Items 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.
- For OW programs with AIS requirements, implementation will be similar to AIS

# MANUFACTURED PRODUCTS

- Manufactured in the U.S. (Final)
- 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/MIAO is moving forward to provide additional information on the manufactured products content test





# 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
- Asphalt

# BABA WAIVER AUTHORITY

- Pursuant to Section 70914(b) of BABA, EPA may waive BABA requirements where EPA finds that:
  - 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*”)



# BABA WAIVER PRINCIPLES

- Time-limited
  - Agencies should identify a short, definite time frame (e.g., no more than 1-2 years)
  - Ensure domestic producers have prompt access to market
- Targeted
  - Waivers that are overly broad will tend to undermine domestic preference policies
  - Broader waivers will receive greater scrutiny from MIAO
- Conditional
  - Agencies are encouraged to issue waivers with specific conditions that support the policies of BABA

# APPROVED OW/EPA BABA WAIVERS

- “Adjustment Period” Waivers
  - For SRF: Design Planning Waiver
  - For WIFIA: Design Planning Waiver
  - For Selected OW programs: 6-month Waiver (through Mar 1, 2023)
- *De Minimis* public interest waiver
  - Agency-wide: projects may use non-domestic up to 5% of project cost
- Small Project/Award Waiver
  - Agency-wide: waives projects where EPA contribution is under \$250K

# OW SELECTED PROGRAMS ADJUSTMENT PERIOD WAIVER

- For Selected OW Programs: waives projects obligated before March 2, 2023
  - For awards after May 14, 2022, but before September 2, 2022:
    - Project is covered by waiver so long as funds have not been ‘expended’ prior to waiver approval (Sep 2)
    - If funds were expended before September 2, 2022, assistance recipients should contact programs (funding authority) to discuss options

# SRF BABA DESIGN PLANNING WAIVER

- Waives projects that initiated design planning prior to May 14, 2022
  - “Documentable efforts made...to evaluate and identify...viable options”
  - Provides 8 “prescriptive” categories of qualifying documentation:
    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.
  - Alternative option to request case-by-case evaluation review from EPA

# OTHER POTENTIAL BABA WAIVERS

- Other EPA waivers under consideration:
  - Minor Components Waiver – similar to existing AIS manufacturer waiver, would only be for Iron and Steel
  - Program Priority Waivers – EPA may examine other program-level waivers (Community Grants Design Planning)
- Short-term product-specific waivers
  - For products not currently manufactured in the U.S.
  - Research initiated for variety of complex manufactured products

# IMPLEMENTATION

## Excerpts from Section 4: Waivers



#### Q4.1: WHO MAY APPLY for a waiver and how do you apply?

- Assistance Recipients and their authorized representatives
- If co-funded project, the cognizant program would receive the waiver request
  - Cognizant program = the program providing the greatest amount of federal funds to the project
- EPA will not accept waiver requests from suppliers, distributors, or manufacturers
  - Exception: the assistance recipient endorses it and submits the request on its behalf to the funding authority
- Approved “adjustment period” and Agency-wide waivers do not require a separate waiver request

#### Q4.1: Who may apply for a waiver and HOW DO YOU APPLY?

Project-specific waiver requests should generally include:

- (1) Brief summary of the project
- (2) Description and explanation of the need for the waiver for the product(s) in question
- (3) Brief summary of the due diligence conducted in search of domestic alternatives
  - Correspondence between assistance recipient and supplier/distributors
- (4) Quantity and materials of the product(s)
- (5) Engineering specifications and project design considerations
- (6) Approximate unit cost of items (both foreign and domestic), estimated cost of the materials, overall project cost

## Q4.1: Who may apply for a waiver and HOW DO YOU APPLY? (continued)

Project-specific waiver requests should generally include, continued:

(7) Date any products will be needed on site in order to avoid significant project schedule disruptions

(8) All other pertinent information relevant to EPA's consideration of the waiver

- Project dates (plans and spec submission, construction initiation, expected project completion)
- Special considerations: zoning, ordinances, seismic, noise or odor requirements, etc.
- For SRF: Is it an equivalency project?

NOTE: For indirect federal assistance (like SRF), the state reviews request and sends to EPA:

- Clean Water SRF Waivers: [CWSRFWaiver@epa.gov](mailto:CWSRFWaiver@epa.gov)
- Drinking Water SRF Waivers: [DWSRFWaiver@epa.gov](mailto:DWSRFWaiver@epa.gov)

#### Q4.4 What information is needed when applying for a cost waiver under BABA?

- Cost waiver must clearly show that implementation of the BABA requirements will increase the **overall project cost more than 25 percent**.
- Documentation must be provided to justify the cost waiver
  - Should compare project costs with and without BABA
  - May include itemized cost estimates or bid tabulation cost comparison
- Assistance recipients should begin assessing the potential cost impacts of the BABA requirements during the design phase of a project.

# IMPLEMENTATION

## Excerpts from Section 5: Documenting Compliance

## Q5.1: Who will be responsible for BABA compliance?

EVERYONE has a role: manufacturers, suppliers, contractors, recipients, and funding authorities.

- **Manufacturers:** Provide adequate and accurate documentation of the products manufactured
- **Suppliers/distributors:** Pass along compliance documentation for products supplied to projects
- **Assistance recipient** (and their representatives): Ensure any documentation collected for products used in the project is sufficient to document compliance with the BABA requirements
- **Funding authority:** Provide oversight and guidance as needed to ensure the proper implementation of the requirements

Product Manufacturer(s)

Product Supplier(s)

Assistance Recipient

Funding Authority



### Q5.3: How can product compliance with the BABA requirements be demonstrated?

- Assistance recipients (and their representatives) collect compliance documentation for products received at the project site.
  - Use a signed certification letter for the product (as the most direct and effective method of demonstration).
- Verify products used on-site are BABA-compliant prior to their installation.
- Maintain documentation, which should be made available to the funding authority upon request.
  - Documentation may be received and maintained in hard copy, electronically, or could be embedded in construction management software.

### Q5.3: How can product compliance with the BABA requirements be demonstrated? (continued)

Collect compliance documentation for the product(s) that collectively show:

- The associated project (name, project location, contract number, or project number)
- The identity of the product(s) being supplied to the project (could also be in the form of an associated purchase order, invoice, or bill of lading)
- A statement attesting that the products supplied are compliant with BABA requirements (the “certification”)
- Location(s) of manufacturing being certified (city and state)
  - Minimum: documenting final point of manufacturing in the United States
- Signature of company representative making the certification (on company letterhead, signature can be electronic)
  - Certifying statement affirms knowledge of manufacturing processes for the product(s) and attests that the product meets the BABA requirements

# IMPLEMENTATION

## Excerpts from Section 6: Programs with AIS Requirements

### Q6.1: Does BABA supersede the American Iron and Steel (AIS) Requirements?

The BABA requirements for items considered “iron and steel” are equivalent to those for covered iron and steel products under the AIS requirements in the Clean Water Act and the Safe Drinking Water Act.

### Q6.2: For iron and steel products, does a manufacturer need to demonstrate compliance from initial melting through the finished product?

For iron and steel products, the BABA requirements are the same as the existing AIS requirements, in that all of the iron and steel in a covered product (that is, the product is comprised of more than 50 percent iron and steel by material cost) must be melted and poured in the United States and all subsequent manufacturing processes (such as grinding, rolling, bending, reheating, and casting) must occur in the United States.

Q6.3: Will EPA apply the same manufacturing standards for BABA iron and steel products as for the American Iron and Steel (AIS) requirements?

Yes.

Q6.4: Will the certification process be similar to the process established for the American Iron and Steel requirements?

EPA expects the certification process for the BABA requirements to be very similar to that established for the AIS requirements

Q6.5: Will duplicate certification letters be required for AIS and BABA for iron/steel products?

No.

# IMPLEMENTATION

## Excerpts from Section 7: Program-specific Issues (SRF)



### Q7.3: For SRF programs, is BABA considered a federal cross-cutting authority? (i.e., do “equivalency” rules apply?)

- Yes, BABA is considered a federal cross-cutting requirement that applies to SRF assistance equivalent to the federal capitalization grant (i.e., “equivalency” projects)
- EPA’s SRF regulations require states and recipients of SRF funds equivalent to the amount of the federal capitalization grant to comply with federal cross-cutting requirements
- BABA only applies to projects funded in an amount equivalent to the federal capitalization grant and not to those projects receiving funds in excess of the capitalization grant (i.e., “non-equivalency” projects).

(Note: The AIS requirements continue to apply for all SRF projects, including non-equivalency projects, and all WIFIA and Community Grant projects, because equivalency does not apply.)

## Q7.6: What are the roles and responsibilities for SRF programs for BABA implementation?

- Implementation of the BABA requirements for the SRF programs will continue the roles and responsibilities from the successful AIS implementation process.
- It is both the recipient's and the state's responsibility to ensure compliance.
- States are strongly advised to conduct site visits during construction and review documentation demonstrating compliance (contract and product documents).
- Assistance recipients must maintain documentation of compliance.
  - The documentation must be kept by the assistance recipient and should be reviewed by the state during project reviews.

## Q7.6: What are the roles and responsibilities for SRF programs for BABA implementation? (continued)

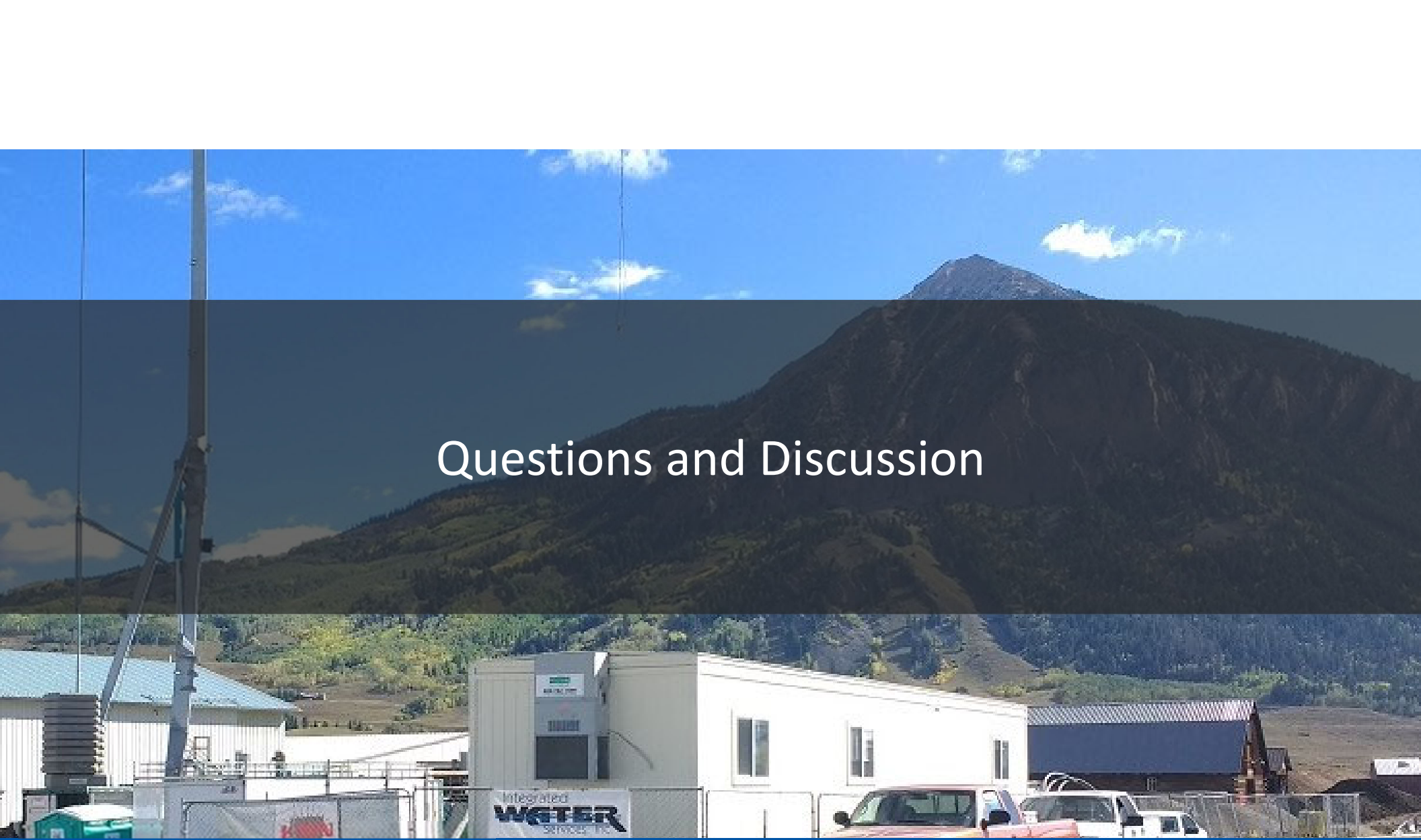
- The state's role in the waiver process is to review any waiver requests submitted to the state to ensure that all necessary information has been provided by the assistance recipient prior to forwarding the request to EPA.
- If a state finds the request lacking, the state should work with the assistance recipient to help obtain complete information (especially product specifications!).
- The implementation procedures memorandum outlines the step-by-step SRF waiver process:
  - Market research – EPA conducts independent market research for the product
  - Public Notice – if no domestic product is identified, 15 days of public notice are required
  - Evaluation – after completing the public comment period, EPA will examine if the waiver should proceed and submit to Made in America Office for final review
  - Approval –EPA will notify State SRF program and post the signed waiver on EPA website
    - Assistance recipient should keep a copy of signed waiver with project files

# EPA BABA IMPLEMENTATION NEXT STEPS

- Outreach on OW Implementation Procedures
  - Assessing program-specific needs after Implementation Memo
  - Assessing future BABA training needs (specialized training?)
- Initiating market research on product-specific availability
  - Awaiting potential new information from OMB on manufactured products content test before fully proceeding with product research
  - Ready for national research efforts through assessment of potential categories of key products and identifying potential manufacturers

# RESOURCES

- OMB Guidance:
  - <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>
- EPA Websites:
  - [www.epa.gov/cwsrf/state-revolving-fund-american-iron-and-steel-ais-requirement](http://www.epa.gov/cwsrf/state-revolving-fund-american-iron-and-steel-ais-requirement)
  - [www.epa.gov/cwsrf/build-america-buy-america-baba](http://www.epa.gov/cwsrf/build-america-buy-america-baba)
- Email Inboxes:
  - [SRF\\_AIS@epa.gov](mailto:SRF_AIS@epa.gov) (underscore!)
  - [BABA-OW@epa.gov](mailto:BABA-OW@epa.gov) (hyphen!)
  - Made in America Office: [MBX.OMB.MadeInAmerica@omb.eop.gov](mailto:MBX.OMB.MadeInAmerica@omb.eop.gov)

The background image is a composite. The upper portion shows a dark, forested mountain peak against a bright blue sky with scattered white clouds. The lower portion shows an industrial or construction site with a white modular building, a crane, and other structures. A semi-transparent dark blue horizontal band is placed over the mountain image, containing the title text.

# Questions and Discussion