

Frequently Asked Questions for Build America, Buy America Act (BABA)

Office of Land and Emergency Management

The following frequently asked questions (FAQs) are for federal financial assistance programs under the purview of the Environmental Protection Agency (EPA) Office of Land and Emergency Management (OLEM). Responses are based on Build America, Buy America Act (BABA)¹, Office and Management and Budget (OMB) guidance², and EPA guidance, among other resources.

The FAQs will be updated as necessary if regulations recently proposed by the Office of Management and Budget are finalized³. The FAQs are to assist federal financial assistant recipients and EPA Project Officers determine whether Build America, Buy America Act (BABA) applies to projects planned with federal funding. Recipients are encouraged to work with their EPA project officer and EPA project officers are encouraged to work with their headquarters contacts. Questions may also be submitted to BABA-OLEM@epa.gov.

OLEM programs include, but are not limited to, grants or cooperative agreements awarded pursuant to:

- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) 104(d) – Superfund Cooperative Agreements;
- CERCLA 104(k) and 128(a) Brownfields Cooperative Agreements;
- Leaking Underground Storage Tank Corrective Action Cooperative Agreements under section 9003(h) of the Solid Waste Disposal Act (SWDA);
- Solid Waste Infrastructure for Recycling (SWIFR) Grants under 42 U.S.C. 4282(a);
- Recycling Education and Outreach Grants under section 70402(b) of Public Law 117-58; and;
- Anaerobic Digester Grants under section 8001 of the SWDA.

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¹ Build America, Buy America Act (BABA). Pub. L. No. 117-58, §§ 70901-52

² <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>

³ <https://www.federalregister.gov/documents/2023/02/09/2023-02617/guidance-for-grants-and-agreements>

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SECTION 1: GENERAL INFORMATION

What is Build America, Buy America Act (BABA)?

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, §§ 70901-52. BABA strengthens Made in America Laws and will bolster America's industrial base, protect national security, and support high-paying jobs.

BABA requires that on or after May 14, 2022, the head of each covered Federal agency shall ensure that **“none 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.”** (Build America, Buy America (BABA) Act, P.L. 117-58, Secs 70911 - 70917). EPA is a covered agency.

BABA applies to all federal financial assistance as defined in section 200.1 of title 2, Code of Federal Regulations—whether or not funded through IIJA—where funds are appropriated or otherwise made available and used for a project for infrastructure.

What does this mean, in plain language, for recipients of federal financial assistance agreements (i.e., grants, cooperative agreements, and loans or subgrants/subawards)?

If you are a “non-federal” recipient of a federally funded cooperative agreement, grant (or loan or subgrant from a federal cooperative agreement or grant), you will have a term and condition⁴ in your award that requires compliance with BABA. However, only a subset of cooperative agreements will potentially trigger BABA review and potential application.

BABA applies to federal financial assistance agreements that fund “infrastructure.” BABA (see “infrastructure” defined below).

What is the effective date?

BABA went into effect on May 14, 2022. All new, or amended, federal financial assistance awards made after this date are to comply with BABA. Compliance does include application of existing, or the development of new waivers.

Does this apply to awards made before May 14, 2022?

No. However, amendments that add funding would include new BABA terms and conditions.

Does this apply to amendments of awards made on or after May 14, 2022?

Yes. Amendments made on or after May 14, 2022, that add funds to the award will include new BABA terms and conditions. Some awards made on or after May 14, 2022, may be covered by a waiver. Please see additional questions below for more details.

Does BABA apply to no cost amendments?

No. No-cost amendments (i.e., no additional funding is added) do not trigger inclusion of a BABA term and condition.

Does BABA end or sunset?

No, it is a permanent law.

SECTION 2: APPLICABILITY

What is “federal financial assistance”?

Federal financial assistance means assistance that entities receive or administer in the form of grants, cooperative agreements, non-cash contributions or donations of property, direct assistance, loans, loan guarantees, and other types of financial assistance.

If I am a recipient, but I contract with an entity, does BABA still apply?

⁴ https://www.epa.gov/system/files/documents/2022-09/fy_2022_epa_general_terms_and_conditions_effective_october_1_2022_or_later.pdf

Yes. The BABA requirements attach to the funding. For example, if a recipient hires a contractor to conduct cleanup and that cleanup involved the capping of the site with concrete that contains rebar that rebar would be considered “infrastructure” and would trigger BABA consideration, assuming no waiver applied. The recipient through their contractor would need to make sure that the rebar was made domestically.

Does it matter what type of funding is used on the cooperative agreement or grant (e.g., Superfund tax or special account funds)?

BABA applies to federal financial assistance agreements regardless of the source of the funding (with the exception of funds authorized under certain sections of the Stafford Act⁵). BABA applies to awards funded with, for example, regular annual appropriated funds, IIJA funds, Superfund Special Account funds, and Superfund Tax funds.

SECTION 3: WHAT IS “INFRASTRUCTURE?”

How is “infrastructure” defined for BABA?

The IIJA definition of “infrastructure” encompasses **public** infrastructure projects. The term “infrastructure” includes, at a minimum, the **structures, facilities, and equipment** for, in the United States, roads, highways, and bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems, including drinking water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; **and buildings and real property**.⁶

When determining if a program has infrastructure expenditures, OMB advises federal agencies to interpret the term “infrastructure” broadly and consider the definition provided above as illustrative and not exhaustive. When determining if a particular construction project of a type not listed in the definition above constitutes “infrastructure,” agencies should consider whether the project will serve a **public function**, including **whether the project is publicly owned and operated, privately operated on behalf of the public, or is a place of public accommodation**, as opposed to a project that is privately owned and not open to the public. Projects with the former qualities have greater indicia of infrastructure, while projects with the latter quality have fewer.

Projects consisting solely of the purchase, construction, or improvement of a private home for personal use, for example, would not constitute an infrastructure project.

⁵ As per OMB “This guidance does not apply to expenditures for assistance authorized under section 402, 403, 404, 406, 408, or 502 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170a, 5170b, 16 5170c, 5172, 5174, or 5192) relating to a major disaster or emergency declared by the President under section 401 or 501, respectively, of such Act (42 U.S.C. 5170, 5191) or pre and post disaster or emergency response expenditures.”¹⁴ “[P]re and post disaster or emergency response expenditures” consist of expenditures for financial assistance that are (1) authorized by statutes other than the Stafford Act, 42 U.S.C. §§ 5121 et seq., and (2) made in anticipation of or response to an event or events that qualify as an “emergency” or “major disaster” within the meaning of the Stafford Act, id. § 5122(1), (2).” See, <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>

⁶ IIJA, § 70912(5)o

A Buy America preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project. Nor does a Buy America preference apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project but are not an integral part of or permanently affixed to the structure.

Is there a simple test to determine whether my project is an “infrastructure” project?

The following provides an outline of how to determine the outward parameters of whether a project would be considered an “infrastructure” project for OLEM related projects. Where there are gray areas of interpretation, the recipient should contact their project officer for further guidance for their specific situation.

In considering whether a project is a BABA-applicable project, consider the following:

- 1) Does the project involve the construction, alteration, or repair of, e.g., water infrastructure, buildings, or real property? Real property is commonly understood to include land and all that is affixed to it.
 - If no, it is not subject to BABA. If yes, consider the next question.
- 2) Does the project involve leaving iron, steel, manufactured goods, or construction materials, permanently affixed to the land, i.e., will these materials be incorporated in and consumed by the project?
 - If no, then it is not subject to BABA. If yes, then consider the next question.
- a)
- 3) Does the project serve a public function?
 - a) Is the project being carried out on land that is publicly owned or privately owned?
 - i) If the project is on land that is publicly owned, the project must be compliant with BABA (although waiver may be granted).
 - ii) If the project is on land that is privately owned, consider the next question.
 - b) Is the project on land that is privately-owned, but will serve a public function or be a place of public accommodation?
 - i) If the project is privately-owned and will serve a public function or will be a place of public accommodation, then it must be compliant with BABA (although waivers may be granted).
 - ii) If the project is on land that is privately-owned and will not serve a public function, or will not be open to the public, then it does not trigger BABA.

What is a “project”?

A “project” consists of all construction necessary to complete the building or work regardless of the number of contracts or assistance agreements involved so long as all the contracts and assistance agreements awarded are closely related in purpose, time, and place. This precludes the intentional splitting of projects into separate and smaller contracts or assistance agreements to avoid BABA’s applicability on some portions of a larger project, particularly where the activities

are integrally and proximately related to the whole. However, there are many situations in which activities are clearly undertaken in separate phases that are distinct in purpose, time, or place, in which case, separate contracts or assistance agreements would carry separate requirements.

Generally, for OLEM related federal financial assistance agreements, the “project” is associated with either the award (or the subaward or loan derived from the initial revolving loan fund grant). Amendments to awards are also, generally, separate projects using the Purpose, Time, and Place (PTP) test, unless the amendment is used to incrementally fund the same work. There may be instances where an award reflects multiple projects. For example, a Brownfields cleanup grant may include multiple projects, delineated by the purpose, time, and place test.

How is “Purpose, Time, and Place” (PTP) used to determine a project?

EPA will use a “Purpose, Time, and Place” (PTP) test to determine a “project” for BABA applicability. The PTP test has been used in other similar applications, *e.g.*, by the Department of Labor for applicability of Davis Bacon labor standards⁷ and by the EPA in defining a “project” under the American Iron and Steel (AIS) requirements that apply to the Clean Water State Revolving Fund (CWSRF) and Drinking Water State Revolving Fund (DWSRF) programs and the Water Infrastructure Finance and Innovation Act (WIFIA) program.

While each analysis will be fact specific, generally the PTP test will consider whether, regardless of the number of individual contracts, the contracts or activities funded are closely related in purpose, time, and place. The PTP test considers whether the activities are integrally and proximately related to the whole, but also recognizes that many activities are undertaken in segregable phases that are distinct in purpose, time, or place. All three elements must be consistent for the activity to be considered a “project.”

Purpose: Is the purpose for the funded activity segregable? For example, a Brownfields Revolving Loan Fund (RLF) Cooperative Agreement is awarded for \$5M. The recipient plans to award five loans for \$1M each to different recipients for different projects. The purpose for the award is distinct and each loan would be considered distinct “projects.”

Time: Is the timing of the funded activity distinct? For example, in FY23, a state receives a cooperative agreement to develop the structure and guidance for a recycling grant program for their state. In FY24, the state award is amended and it receives additional funds that will fund the grant pool. These are both distinct in purpose and time and would be distinct “projects.”

Place: A county receives a grant from the state in the “time” example above. The city plans to use the grant to fund two recycling facilities. One in the upper county and one in the lower county. Each has unique structural requirements. The place of the activity is distinct and would be considered separate “projects.”

⁷ See, Department of Labor Memorandum dated May 29, 2009, titled “Applicability of Davis-Bacon labor standards to federal and federally-assisted construction work funded in whole or in part under provisions of the American Recovery and Reinvestment Act of 2009” (DOL ARRA DB Memorandum)

If most of the project is BABA compliant, and a small portion is not, can an assistance recipient self-fund (i.e., paying with non-federal dollars) the non-compliant products?

Any project that is funded in whole or in part with federal assistance must comply with the BABA requirements, unless the requirements are otherwise waived. All iron, steel, manufactured products, and construction materials used in a project must meet the BABA requirements unless waived. Absent a waiver, there is no “small portion” or product that does not need to satisfy the BABA requirements unless the requirements are waived (or specifically excluded as is the case for cement and cementitious materials; aggregates such as stone, sand, or gravel; aggregate binding agents or additives; or non-permanent products). An assistance recipient may request a waiver or inquire as to whether a broad waiver, such as a *de minimis* waiver, might apply. Please review the following for an updated list of approved waivers: <https://www.epa.gov/cwsrf/build-america-buy-america-baba-approved-waivers>

Do you have examples of a project that would clearly require BABA compliance? Or ones that would clearly not trigger BABA?

- 1) A city receives a grant to build a new recycling sorter. The project will include the purchase of the sorter (cost of \$500,000) and the construction of a structure to house the sorter (\$100,000). The new sorter will be used by the county contractors that are hired to collect the community’s recycling.
 - a. Does the project involve construction, alteration, or repair of a building or real property? Yes, the city is constructing a building.
 - b. Does the project involve leaving iron, steel, manufactured goods or construction materials permanently affixed to the property? Yes, the city is using construction materials (and probably steel) at a minimum. It is also purchasing a “manufactured item” (the sorter) that will be permanently affixed to the land (it is not a mobile sorter).
 - c. Is the project publicly owned or serve a public function? Yes, the project is both publicly owned and will serve a public function by recycling for the community.

Based on the information, it appears that the project would need to comply with BABA.

- 2) A private company gets a subgrant from a municipality (the municipality received a grant from EPA) and the company will be using that grant to buy a sorter (\$500,000) and construct a facility to house the sorter (\$100,000). The private company will be collecting recyclables from industry clients and then reselling those sorted products. The facility is not open for public use.
 - a. Does the project involve construction, alteration, or repair of a building or real property? Yes
 - b. Does the project involve leaving iron, steel, manufactured goods or construction materials permanently affixed to the property? Yes
 - c. Is the project publicly owned or serve a public function? No, the project is privately-owned and not open to the public.

Because the funding is for a project by a private party and the project is not open to the public, BABA would not apply. .

- 3) A tribe gets a brownfields cleanup cooperative agreement. The grant is for \$500,000. \$100,000 is for overhead costs (e.g., salaries) and \$400,000 will be to hire a contractor to remove asbestos and lead paint from the interior and exterior of a community center and to repair the ceilings, floor, and replace the windows (which were sealed shut with lead paint). The contractor is donating his labor costs.
- Does this project involve the construction, alteration or repair of a building or real property? Yes
 - Does this project involve leaving iron, steel, manufactured goods, or construction materials permanently affixed to the property? Yes, windows would be manufactured goods and assuming there would be drywall, nails, and other construction materials affixed.
 - Is this project publicly owned or serve a public function? Yes, it is a tribal community center for use by the tribal members/public.

Based on the information, it appears that the project would need to comply with BABA.

- 4) A state receives a cooperative agreement to excavate and haul away lead contaminated soil from a Superfund site. The cooperative agreement is for \$1M. Once the soil is removed, EPA will subsequently contract to install an impervious membrane and backfill with cleanup soil at an anticipated cost of another \$1M.
- Does this project involve the construction, alteration or repair of a building or real property? Yes, removing soil from land.

Does this project involve leaving iron, steel, manufactured goods or construction materials permanently affixed to the land? No. The state “project” (using purpose, time, and place analysis noted in these FAQs) is for the soil removal only. Based on this information, the “project” does not involve the use of iron, steel, manufactured goods, or construction materials that will be permanently affixed to the land and is, therefore, not subject to BABA.

(Note: If the state portion of the project did involve affixing the barrier and backfilling with clean soil, it would trigger the final question of whether this project was publicly owned or served a public function. If at the time of Superfund cooperative agreement award the site was a private site and there was no clear public use or access, this would not trigger BABA.)

Does BABA apply to post-cleanup construction work at a former Brownfields or Superfund sites that were remediated with federal funding?

No, using the purpose, time, and place test described above, BABA would not apply because post-cleanup work is not eligible for funding under either Brownfields or Superfund programs. The purpose of the project would be distinct from the original EPA funding work.

(Note: if the post-cleanup construction work is funded by other federal funds, BABA may apply and further coordination with the relevant federal agency may be needed.)

How long does something need to be installed at a site to be considered permanently affixed?

Generally, in the context of real property, the term “affix” means to attach something to real estate in a permanent way. For example, constructing a building. Affixed items are permanent and cannot be picked up and moved away. There is no set duration of time that constitutes “permanence.”

Recipients are encouraged to check with their project officer to determine whether projects may use items considered to be “permanently affixed.” Some examples of remediation materials that *may* be considered permanently affixed may include monitoring wells, vapor intrusion mitigation systems embedded in the structure and solidification materials.

How do I know if my project is “publicly owned”?

Generally, the project may be “publicly owned” when the recipient is a governmental entity. However, in some instances a recipient may own a property but whether the project will serve a public function remains unclear.

Do I need to know the end use to determine “serve a public function?”

To determine whether a project will “serve a public function,” EPA will look at the purpose of the project at that time and for that place. If it is clear, at time of project funding, on the basis of the purpose, time, and place that there is an intended outcome that will serve the public, e.g., purchase of a recycling sorter for community recycling center, the project will be determined to “serve a public function.” However, there are instances where a recipient may be conducting a cleanup with no planned end use at the time the purpose, time, and place test is applied. For example, a recipient may receive funds to remove lead contaminated soil, install a barrier, and backfill with clean soil. The site is not open to the public and its future use is not clear based on the purpose, time, and place analysis. In these instances, we could reasonably conclude that there is no “public function” as there will be no public access or use associated with the project funded.

SECTION 4: PRODUCT COVERAGE

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 SWIFR program. BABA includes a “Savings Provision” (Section 70917(b)) that states that BABA does not affect existing domestic content procurement preferences for infrastructure projects funded by federal financial assistance programs that meet the requirements of section 70914. EPA views the AIS requirements as meeting the “iron and steel” product requirements of BABA Section 70914, as they both include the key requirement that items made of iron and steel be wholly manufactured in the United States from the point of melting and/or pouring the iron or steel components through final manufacturing step. Because of the “Savings Provision” of Section 70917, the AIS

requirements satisfy the “iron and steel” requirements of BABA. For the programs that have AIS requirements, EPA intends to implement BABA requirements the same way for iron and steel items as it has done for AIS products.

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.

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

For AIS, EPA did not require raw materials used in the production of steel or iron to be domestically sourced. For BABA, EPA interprets the requirements to be the same. Like AIS, raw materials in the production of iron and steel subject to BABA requirements would not need to be domestically sourced. The key step for both AIS and BABA domestic iron and/or steel production is the initial melting/pouring (that is, the location of the furnace), which must be in the United States.

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. For iron and steel products, the process should remain the same for AIS and BABA. EPA recommends for manufactured products and for construction materials that certification letters include direct reference to the product/material content requirements under BABA, in addition to an affirmative statement verifying that the product meets the BABA requirements.

Will duplicate certification letters be required for AIS and BABA for iron/steel products?

Compliance with BABA requirements will be sufficient to demonstrate compliance with AIS requirements for iron and steel products. If a project is subject to BABA, the only demonstration of compliance necessary is with the BABA requirements, of which the iron and steel requirements are equivalent to those of the AIS statutory requirements: the iron or steel in a product made primarily or predominantly of iron and steel (comprising more than 50 percent iron and steel by material cost) must be melted and/or poured in the United States and all subsequent manufacturing processes must occur in the United States.

For products made of iron and steel, what is the difference between predominantly and primarily iron and steel?

EPA considers the terms “predominantly” and “primarily” to be interchangeable, such that a product is considered predominantly (or primarily) iron and steel if it contains greater than 50 percent iron and steel by material cost.

What is the definition of construction materials (with examples)?

From OMB Guidance M-22-11: “construction materials” include an article, material, or supply (other than an item of primarily iron or steel; a manufactured product; cement and cementitious materials; aggregates such as stone, sand, or gravel; aggregate binding agents or additives; or non-permanent products) that is or consists primarily of:

- non-ferrous metals,
- plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables), (including optic glass),
- lumber, and
- drywall.

For example, a plate of glass would be a construction material under BABA, but a framed window that incorporates the glass into a frame would be a manufactured product. Another common construction material for water infrastructure projects would be polyvinyl chloride (PVC) pipe and fittings. However, if PVC components are incorporated into a more complex product such as instrumentation and control equipment or a water treatment unit, those items would be manufactured products.

What are manufactured products (with examples)?

From OMB Guidance M-22-11: “...all manufactured products used in the project are produced in the United States—this means the manufactured product was manufactured in the United States; and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation...”

The manufactured products category is anticipated to cover the majority of potential infrastructure products, including complex products made up of a variety of material types and components. Common manufactured products would include, but not be limited to, pumps, motors, blowers, aerators, generators, instrumentation and control systems, gauges, meters, measurement equipment, treatment equipment, dewatering equipment, actuators, and many other mechanical and electrical items. Other items may include anaerobic digesters, optical sorters, geomembranes, and liners.

Which category will valves fall under for BABA? Will it differ from the American Iron and Steel (AIS) requirements?

For programs that are subject to BABA and AIS (for OLEM this is SWIFR only), projects using valves should classify them as iron and steel products under BABA as long as their material cost

is made up of more than 50 percent iron and/or steel. Valves with 50 percent or less iron and/or steel by material cost would be considered manufactured products under the BABA requirements.

In accordance with OMB Guidance M-22-11, an article, material, or supply should be classified into only one of the three categories: iron and steel, manufactured products, or construction materials. Under the AIS requirements, all valves made primarily of iron and steel (that is, those with iron and/or steel material cost greater than 50 percent) must comply with the AIS requirements. For BABA, EPA interprets Section IV of OMB Guidance M-22-11 to mean that iron and steel products are those items that are primarily iron and steel, the same as for the AIS requirements.

Does EPA have a list of products to be classified as “Iron and Steel” under BABA?

Although this list is not comprehensive, the following products were classified as AIS products if made primarily (more than 50 percent) of iron and/or steel by materials cost (for programs subject to both AIS and BABA, this list would be equivalent for “iron and steel” items or products under either requirement).

Products likely made “primarily” of iron and steel to be classified as <u>Iron and Steel</u> under BABA		
Lined and Unlined Pipe	Lined and Unlined Fittings	Tanks
Flanges	Pipe Clamps and Restraints	Structural Steel
Valves	Hydrants	Pre-Cast, Iron/Steel Reinforced Concrete (of all types, regardless of iron/steel content percentage)
Manhole Covers and other Municipal Castings	Access Hatches	Ballast Screens
Iron or Steel Benches	Bollards	Cast Bases
Cast Iron Hinged Hatches	Cast Iron Riser Rings	Catch Basin Inlets
Cleanout/Monument Boxes	Construction Covers and Frames	Curb and Corner Guards
Curb Boxes	Curb Openings	Curb Stops
Detectable Warning Plates	Downspout Shoes	Drainage Grates
Drainage Grate Frames and Curb Inlets	Inlets	Junction Boxes
Lampposts	Manhole Rings and Frames	Manhole Risers
Meter Boxes	Service Boxes	Steel Hinged Hatches
Steel Riser Rings	Trash Receptacles	Tree Grates
Tree Guards	Trench Grates	Valve Boxes
Valve Box Covers and Risers	Access Ramps	Aeration Pipes and Fittings (separate from aeration/blowers)
Angles	Backflow Preventers/Double Check Valves	Baffle Curtains

Products likely made “primarily” of iron and steel to be classified as <u>Iron and Steel</u> under BABA		
Iron or Steel Bar	Bathroom Stalls	Beam Clamps
Cable Hanging Systems	Clarifier Tanks	Coiled Steel
Column Piping	Concrete Reinforcing Bar, Wire, and Fibers	Condensate Sediment Traps
Corrugated Pipe	Couplings	Decking
Digester Covers	Dome Structures	Door Hardware
Doors	Ductwork	Expansion Joints
Expansion Tanks (diaphragm, surge, and hydropneumatics)	Fasteners	Fencing and Fence Tubing
Fire Escapes	Flanged Pipe	Flap Gates
Framing	Gate Valves	Generic Hanging Brackets
Grating	Ground Testing Boxes	Ground Test Wells
Guardrails	HVAC Registers, Diffusers, and Grilles	Joists
Knife Gates	Ladders	Lifting Hooks, J-bar, Connectors within, and Anchors for Concrete
Lockers	Man Baskets and Material Platforms	Manhole Steps
Mud Valves	Municipal Casting Junctions	Non-mechanical (aka stationary) Louvers and Dampers
Overhead Rolling Doors/ Uplifting Doors (manual open, no motor)	Pipe Connectors	Pipe Hangers
Pipe Pilings (any type of steel piling)	Pipe Spool (pipe, flanges, connectors, etc.)	Pipe Supports
Pitless Adaptors	Pre-fab Steel Buildings/Sheds (simple structure, unfurnished)	Pre-stressed Concrete Cylinder Pipe (PCCP)
Railings	Reduced Pressure Zone (RPZ) Valves	Roofing
Service Saddles	Sheet Piling	Sinks (not part of eyewash systems)
Solenoid Valves	Stairs	Static Mixers
Stationary Screens	Surface Drains	Tapping Sleeves
Telescoping Valves	Tipping Buckets	Trusses
Tubing	Valve Stem Extensions	Valve Stems (excluding handwheels and actuators)
Wall Panels	Wall Sleeves/Floor Sleeves	Welding Rods
Well Casing	Well Screens	Wire
Wire Cloth	Wire Rod	Wire Rope and Cables

Does EPA have a list of products that could be made “primarily” of iron and steel but would be classified as “manufactured products” under BABA?

Although this list is not comprehensive, the following products would be considered “manufactured products” under the BABA requirements, even if the item might be composed primarily of iron and steel by materials cost (note, these items are not subject to the AIS requirements):

Products likely made “primarily” of iron and steel to be classified as <u>Manufactured Products</u> under BABA		
Actuator Superstructures/ Support Structures	Aeration Nozzles and Injectors	Aerators
Analytical Instrumentation	Analyzers (e.g., ozone, oxygen)	Automated Water Fill Stations
Blowers/Aeration Equipment	Boilers, Boiler Systems	Chemical Feed Systems (e.g., polymer, coagulant, treatment chemicals)
Chemical Injection Quills	Chemical Injectors	Clarifier Mechanisms/Arms
Compressors	Controls and Switches	Conveyors
Cranes	Desiccant Air Dryer Tanks	Dewatering Equipment
Dewatering Roll-offs	Disinfection Systems	Drives (e.g., variable frequency drives)
Electric/Pneumatic/Manual Accessories Used to Operate Valves (such as electric valve actuators)	Electrical Cabinetry and Housings (such as electrical boxes/enclosures)	Electrical Conduit
Electrical Junction Boxes	Electronic Door Locks	Elevator Systems (hydraulic, etc.,)
Emergency Life Systems (including eyewash stations, emergency safety showers, fire extinguishers, fire suppression systems including sprinklers /piping/valves, first aid, etc.)	Exhaust Fans	Fall Protection Anchor Points
Fiberglass Tank w/Appurtenances	Filters (and appurtenances, including underdrains, backwash systems)	Flocculators
Fluidized Bed Incinerators	Galvanized Anodes/Cathodic Protection	Gear Reducers
Generators	Geothermal Systems	Grinders
Heat Exchangers	HVAC (excluding ductwork)	HVAC Dampers (if appurtenances to aerators/blowers)

Products likely made “primarily” of iron and steel to be classified as <u>Manufactured Products</u> under BABA		
HVAC Louvers (mechanical)	Intake and Exhaust Grates (if appurtenances to aerators/blowers)	Instrumentation
Laboratory Equipment	Ladder Fall Prevention Systems	Ladder Safety Posts
Lighting Fixtures	Lightning and Grounding Rods	Mechanical or Actuated Louvers/Dampers
Membrane Bioreactor Systems	Membrane Filtration Systems	Metal Office Furniture (fixed)
Meters (including flow, wholesale, water, and service connection)	Motorized Doors (unit)	Motorized Mixers
Motorized Screens (such as traveling screens)	Motors	Pelton Wheels
Pipeline Flash Reactors (similar to injectors)	Plate Settlers	Precast Concrete without Iron/Steel Reinforcement
Furnished Pre-fab Buildings (such as furnished with pumps, mechanics inside)	Presses (including belt presses)	Pressure Gauges
Pump Cans/Barrels and Strainers	Pumps	Mechanical Rakes
Safety Climb Cable	Sampling Stations (unless also act as hydrant)	Scrubbers
Sensors	Sequencing Batch Reactors (SBR)	Steel Shelving (fixed)
Slide and Sluice Gates	Spray Header Units	Steel Cabinets (fixed interior/furniture)
Supervisory Control and Data Acquisition (SCADA) Systems	Tracer Wire	Valve Manual Gears, Actuators, Handles
Voltage Transformer	Water Electrostatic Precipitators (WESP)	Water Heaters
Weir Gates		

Is asphalt paving a covered product under BABA?

No. EPA interprets Section 70917(c) of the IIJA to exclude asphalt from BABA requirements. Asphalt paving is a type of concrete composed of an aggregate material mixed with a binder (bitumen). EPA considers asphalt concrete to be excluded by section 70917(c) due to its similarities with cement and cementitious materials.

SECTION 5: IMPLEMENTATION (COMPLIANCE AND WAIVERS)

How will project requirements be determined for co-funded projects subject to potentially different general applicability/programmatic waiver conditions (such as different adjustment period waivers)?

OMB Guidance M-22-11 addresses cases with project co-funding from separate programs. EPA would apply the guidance's "cognizant" program determination to projects that are co-funded with different general applicability/programmatic waivers. For instance, if a project were co-funded between EPA and HUD and the majority of the federal funding for the project is from EPA, then EPA would be the "cognizant" program for application and determination of waivers. In that case, any conditions from an applicable EPA waiver would apply.

Are there waivers that might apply to my project?

There are program-wide waivers and project-specific waivers. EPA has issued several program-wide waivers that may be applicable to certain projects. The information below is subject to change and will be updated as additional waivers are developed. Recipients are encouraged to review the EPA BABA website for the latest information <https://www.epa.gov/cwsrf/build-america-buy-america-baba>.

- ***Adjustment Period Waiver***

CERCLA (Superfund or Brownfields) ***Adjustment Period Waiver***: applies to Superfund or Brownfields cooperative agreements awarded between August 31, 2022 and February 28, 2023 (see, <https://www.epa.gov/system/files/documents/2022-08/CERCLA%20Adjustment%20Waiver.pdf>) If a Superfund cooperative agreement or Brownfields cooperative agreement was awarded on or after May 14, 2022, but before August 31, 2022, and funds are expended between August 31, 2022, and February 28, 2023, the temporary adjustment period will apply to that award.

- ***Small Project Waiver***

If the project is less than \$250,000 and was awarded between September 26, 2022 and September 26, 2027, it may qualify for a ***Small Project Waiver*** (see, <https://www.epa.gov/system/files/documents/2022-09/Small%20Proj%20Gen%20App%20Waiver%20BABA%20EPA.pdf>) If the project was awarded on or after May 14, 2022 through September 25, 2022, but BABA related expenditures did not occur until on or after September 26, 2022, the small project waiver may apply.

- ***De Minimis Waiver***

There may be costs associated with the project that would be subject to BABA but are considered *de minimis* to the overall project (no more than a total of 5% of total project cost). In this instance, the recipient may qualify for a ***De Minimis Waiver*** (see, <https://www.epa.gov/system/files/documents/2022-10/EPA%20BABA%20De%20Minimis%20Waiver%20Final%20Oct%202022.pdf>)

What should I do if I'm covered by a program-wide waiver? Do I need to maintain documentation?

If you believe your award or project is covered by a program-wide waiver, please contact your project officer and provide your rationale. The project officer will respond with either an affirmative or negative response. Both the project officer and the recipient will retain that communication with their records.

For example, a recipient may seek to apply the adjustment period waiver. Recipient submits an email to the project officer citing the award date as their rationale. The project officer will respond that they agree the adjustment period waiver applies to this award. Recipient and project officer retain this communication within their grant files.

(Note: Subaward and loan recipients should work with the primary grant recipient. The primary recipient will work with EPA to determine the applicability of waivers. Subaward or loan recipients should also retain communications for their records.)

Project officers should coordinate with their headquarters contact or submit a question to BABA-OLEM@epa.gov, if there is any ambiguity. Recipients may also submit questions to BABA-OLEM@epa.gov, if they have questions or disagree with the determination made by the project officer.

What if my design and cost estimate were completed prior to May 14, 2022?

If the recipient or project does not qualify for other available waivers, a recipient may seek a project-specific “Design and Planning” project waiver.

My award is covered by the adjustment period waiver, but does that include expenditures that occur after the end of the waiver period, i.e., February 28, 2023?

For awards covered by the adjustment period waiver, future expenditures of that award funding, i.e., after February 28, 2023, remain covered by the waiver.

Who may apply for a waiver and how do you apply?

Assistance recipients and their authorized representatives may apply for a project-specific waiver. EPA does not accept waiver requests from suppliers, distributors, or manufacturers unless the assistance recipient endorses and submits the request on its own behalf to the funding authority. In the case where multiple programs are providing federal funds to the project, the assistance recipient should submit the waiver request to the cognizant program, the one providing the greatest amount of federal funds for the project.

Project-specific waiver requests should generally include: (1) a brief summary of the project, (2) a description and explanation of the need for the waiver for the product(s) in question, (3) a brief summary of the due diligence conducted in search of domestic alternatives (which could include correspondence between assistance recipient and supplier/distributors), (4) the quantity and materials of the product(s) in question, (5) all engineering specifications and project design considerations relevant to the product(s) in question, (6) the approximate unit cost of items (both foreign and domestic) in addition to an estimated cost of the materials and overall project, (7) the date any products will be needed on site in order to avoid significant project schedule disruptions, and (8) any other pertinent information relevant to EPA’s consideration of the

waiver (e.g., the date the plans and specifications were submitted to the state, the date of construction initiation, expected date of project completion, any special considerations such as local zoning and building ordinances, seismic requirements, or noise or odor control requirements).

Can an assistance recipient request a waiver based on a specification written for a specific brand or model of product (that is, a specification that names a branded item or model)?

In most cases, performance-based specifications are expected and required for the majority of infrastructure projects funded by EPA's financial assistance programs. In rare cases where "branded" or product-specific sourcing may be included in project specifications, it is suggested that the specifications include the item in question (that is, not simply a catalog page, but also materials of construction, sizing, quantities, and applicable engineering performance design characteristics for the project, etc.) in addition to the standard phrase "or equal." For the purposes of product alternative market research, EPA will evaluate the BABA requirements based on performance-based engineering specifications for the product(s) in question. If the project's specifications do not include performance-based specifications, or at least an "or equal" designation, EPA will base its research on an "or equal" designation using best professional judgment to the extent practicable.

If a manufactured product is not readily available domestically, will EPA provide short-term "limited availability" product waivers?

EPA will address the unavailability of domestic products through the waiver process, including potential national short-term waivers for specific products, if appropriate. To the extent practicable and with the intent to maximize domestic market and supply chain development, EPA intends to address issues of broad product unavailability with targeted, time-limited, and conditional waivers, as prescribed in OMB Guidance M-22-11. EPA will follow its robust and thorough product research processes (those put into place for the AIS requirements for the SRF and WIFIA programs and expanded for the new BABA requirements) to identify and determine those products for which proposed national/general applicability waivers may be appropriate.

What if compliance with BABA will increase the costs of my project, can I seek a waiver? What information is needed to justify a waiver based on costs?

If cost of compliance with BABA will increase the overall project cost by more than 25 percent, a recipient may seek a "cost waiver." As part of the cost waiver request, the assistance recipient must demonstrate that implementation of the BABA requirements will increase the overall project cost more than 25 percent. Depending on the circumstances of the overall project cost increases, documentation to justify the cost waiver can vary but may include itemized cost estimates or bid tabulations comparing project costs with and without BABA implementation. Assistance recipients should begin assessing the potential cost impacts of the BABA requirements during the design phase of a project.

Can administrative costs associated with tracking and verification of certifications be considered when determining if the cost of a project increases by 25 percent or more?

Yes. Section 70914(b)(3) of the IIJA states that a waiver may be provided if the overall cost of the project increases by more than 25 percent due to the “inclusion of iron, steel, manufactured products, or construction materials produced in the United States.” EPA interprets this to mean that the “inclusion” of the BABA-covered products could encompass reasonable administrative costs associated with complying with the BABA requirements, such as staff, contractor, and technological resources to collect and track BABA compliance documentation.

How can assistance recipients and construction contractors address product delivery delays?

Assistance recipients should reasonably plan for material procurement to account for known potential supply chain issues or extended lead times and shall notify the funding authority well in advance of the issues so that prompt attention can be given to explore options. Where extended lead times for compliant products are impacting project schedules and may significantly impact construction progress, timely communication with the funding agency is important. For products that are unavailable within a reasonable timeframe to meet the objectives and schedule of a project, EPA may consider a non-availability waiver with adequate justification. An assistance recipient would need to apply for the waiver and contact its funding authority (such as EPA and/or a state) to initiate the waiver process.

Will EPA provide documentation for BABA for bid solicitations and suggested contract language? Will EPA provide suggested language for Assistance Agreements?

See Appendix 1, which includes suggested language for construction contracts which addresses the BABA requirements. In addition to the language suggested in Appendix 1, EPA also recommends that assistance recipients prepare contract bid solicitation documents with a statement for the consulting engineers and construction firms as follows: “By signing payment application and recommending payment, Contractor certifies they have reviewed documentation for all products and materials submitted for payment, and the certifications are sufficient to demonstrate compliance with Build America, Buy America Act requirements.” In most cases, the assistance recipient’s representatives assume the responsibility for their clients to conduct due diligence on compliance with applicable domestic preference requirements.

All federal financial infrastructure assistance agreements subject to BABA must have a clause requiring compliance with the requirements. See Appendix 2 for example assistance agreement language.

Who will be responsible for BABA enforcement?

Responsibility for BABA implementation applies at all levels, from manufacturers to suppliers and distributors, construction contractors, assistance recipients, and funding authorities.

The manufacturers have responsibility to provide adequate and accurate documentation of the products manufactured. If suppliers and distributors are involved, they are responsible for passing along compliance documentation for products supplied to projects that are subject to the BABA requirements.

The assistance recipient and their representatives are primarily responsible for ensuring the documentation collected for products used on the project is sufficient to document compliance with the BABA requirements.

The funding authority is responsible for providing oversight and guidance as needed to ensure the proper implementation of the requirements. The Uniform Grants Guidance (UGG) (Title 2 of the Code of Federal Regulations (CFR) Part 200) applies to many federal financial assistance agreements that will include BABA requirements. The general provisions of 2 CFR Part 200 determine the responsible party for the grant funding authority.

At all levels, where fraud, waste, abuse, or any violation of the law is suspected, the Office of Inspector General (OIG) should be contacted immediately. The OIG can be reached at 1-888-546-8740 or OIG_Hotline@epa.gov. More information can be found at this website: <http://www.epa.gov/oig/hotline.htm>.

When will the BABA requirements be assessed for compliance? Do assistance recipients need to have waivers for potential non-domestic products before assistance agreements are in place, at the time products are procured or products are incorporated into the project (i.e., used)?

Compliance is assessed where the domestic product is used (or installed) at the project site. Proper compliance documentation, whether it is a BABA certification letter or a waiver, should accompany a product prior to its “use”, in accordance with Section 70914(a) of IIJA. This may occur prior to assistance agreements being in place but is not necessary. Additionally, communication of BABA requirements through appropriate Terms and Conditions in financial assistance agreements and in project solicitation and contract documents is key in ensuring all parties involved are informed of the requirements for the project before construction is underway.

How can product compliance with the BABA requirements be demonstrated?

Assistance recipients and their representatives should ensure that the products delivered to the construction site are accompanied by proper documentation that demonstrate compliance with the law and be made available to the funding authority upon request. The documentation may be received and maintained in hard copy, electronically, or could be embedded in construction management software. The use of a signed certification letter for the project is the most direct and effective form of compliance documentation for ensuring products used on site are BABA-compliant prior to their installation; however, other forms of documentation are also acceptable as long as collectively, the following can be demonstrated:

- (1) Documentation linked to the project. For example, this can be in the form of the project name, project location, contract number, or project number.
- (2) Documentation linked to the product used on the project. For example, description of product(s) (simple explanation sufficient to identify the product(s)), or an attached (or electronic link to) purchase order, invoice, or bill of lading.
- (3) Documentation includes statement attesting that the products supplied to the assistance recipient are compliant with BABA requirement. Reference to the

Infrastructure Investment and Jobs Act (“IIJA”) or the Bipartisan Infrastructure Law (BIL) are also acceptable. For iron and steel items under BABA, references to the American Iron and Steel (AIS) requirements are also acceptable and reciprocal with BABA for such items.

- (4) Documentation that manufacturing occurred in the United States, which could include, for example, the location(s) of manufacturing for each manufacturing step that is being certified. It is acceptable for manufactured products to note a single point of manufacturing, documenting that the final point of manufacturing is in the United States.

(Note: each BABA category may require different determinations for compliance.)

- (5) Signature of company representative (on company letterhead and signature can be electronic). The signatory of the certifying statement affirms their knowledge of the manufacturing processes for the referenced product(s) and attests that the product meets the BABA requirements.

In addition to compliance documentation, assistance recipients or their representatives should also conduct a visual inspection of the product when it arrives to the project site, especially for iron and steel products which are often stamped with the country of origin.

(Note: A country of origin stamp alone is not sufficient verification of compliance with BABA and assistance receipts should not rely on it to ensure compliance.)

EPA may develop alternative procedures for demonstrating compliance. Additional project- or program-specific instructions may be developed on a case-by-case basis in order to meet individual circumstances.

Will EPA provide a form or template for tracking and documenting compliance?

EPA does not require a specified format for tracking or documenting compliance. Assistance recipients are free to develop any system (from simple to complex software) for tracking items used on the project and the accompanying compliance documentation, e.g., certification letters, applicable waivers, if it helps with implementation and compliance. Elements that may help with keeping track of compliance may include: product description, quantity required/used, product category (i.e., iron and steel, manufactured product, or construction material), status of obtaining certification letter, product cost, and whether the item might qualify as *de minimis*, or qualify under another applicable waiver.

If a manufacturer claims to comply with the Buy American Act, does it also comply with BABA?

With the exception of the AIS requirements – which EPA interprets to be equivalent to the “iron and steel” requirements under BABA – EPA does not have an interpretation about the comparability of other domestic preference requirements relative to BABA. Any products that are to be certified as compliant with BABA should include a specific reference to the BABA requirements and appropriate attestation from a responsible manufacturing company official.

How will assistance recipients manage certification letters for hundreds, possibly thousands of products?

EPA is concerned about the potential administrative burden that this would place on assistance recipients. EPA recommends that projects with a high number of potentially covered products meet with their funding authority about potential compliance strategies to minimize burden and streamline compliance activity. Assistance recipients should prepare contract bid solicitation documents with a statement for the consulting engineers and construction firms as follows: “By signing payment application and recommending payment, Contractor certifies they have reviewed documentation for all products and materials submitted for payment, and the documentation is sufficient to demonstrate compliance with Build America, Buy America Act requirements.” In most cases, the assistance recipient’s representatives may assume the responsibility for their clients to conduct due diligence on compliance with applicable domestic preference requirements.

Who is responsible for documenting the 55 percent content requirement for manufactured products under BABA? What if the final manufacturer cannot trace or verify domestic origin for all components?

The manufacturer who signs a certification letter is responsible for documenting compliance with any of the three categories of products (iron and steel, manufactured products, or construction materials). For manufactured products, BABA requires that greater than 55 percent of the total cost of all components of the manufactured product be from domestic sources. EPA recommends that the certification letter for manufactured products document whether the item passes the content test in the final product along with a statement attesting to compliance with the BABA requirements for manufactured products.

How do final product fabricators document compliance when the final step of manufacturing may be simply assembling components?

It is acceptable, in many cases, especially for highly complex manufactured products that utilize many sub-components, for the final point of assembly to certify without using a “step certification” process. Multiple certifications (i.e., step certifications) or a singular certification can be used for a product, as long as the certifying official is willing to attest to the product’s compliance with BABA requirements at all stages of manufacturing.

Will Material Test Reports be acceptable in lieu of a BABA certification for iron and steel?

Material Test Reports (MTRs, commonly referred to as “Mill Certifications” or “Mill Certs”) provide the chemical composition of steel and iron from a mill or foundry. If an MTR accompanies the delivery of steel or iron to a project site with an invoice or bill of lading, EPA will consider it sufficient to demonstrate compliance (equivalent to a certification letter) as long as the MTR includes a manufacturer representative’s signature in addition to the location (city and state) of the mill/foundry. It is common for MTRs to be the first letter in a “step certification” if the product is further fabricated or painted, etc., by another manufacturer.

Can a manufacturer use a fillable certification letter for products?

EPA recommends that certifications be signed by representatives of the manufacturing entity. EPA does not oppose manufacturers using forms to internally develop letters within their company, thereby providing signed, non-manipulable certification letters to suppliers, distributors, and/or assistance recipients. A fillable form that can be changed by someone outside of the manufacturer after signature does not demonstrate compliance and may create compliance concerns for the manufacturer or assistance recipient.

Are product certifications from suppliers and distributors allowed?

EPA recommends that representatives of product manufacturers certify compliance and discourages suppliers and distributors from creating certification letters. EPA does not rule out the possibility that a third-party certification process, such as a certification by a distributor, may be viable. However, EPA is currently not aware of a system or proposed system that meets the EPA's recommendations for documentation of product certification.

How long should assistance recipients keep compliance documentation?

Assistance recipients should apply recordkeeping requirements for the project according to the procedures dictated by the funding authority. For most EPA grant programs, this is prescribed in the UGG at 2 CFR 200.334-200.338. Other funding programs may require longer documentation retention periods (e.g., Superfund)

What are the roles and responsibilities for programs for BABA implementation?

It is the assistance recipient's responsibility to ensure compliance with the BABA requirements. Recipients are strongly advised to conduct site visits of projects during construction and review documentation demonstrating the assistance recipient's proof of compliance. Observed best practices typically include a meeting early in the process (sometimes before bid and usually prior to commencing construction) and at least one project site visit during the construction process. Assistance recipients must maintain documentation of compliance with the BABA requirements, as explained.

How does a funding recipient submit a waiver?

The framework described below establishes the process for an assistance recipient to apply for waivers of the BABA requirements directly to EPA Headquarters. For Brownfields Revolving Loan Fund grants, only waiver requests received and/or endorsed by the primary grant recipient will be considered, i.e., not the loan or subgrant recipient, if they differ. Pursuant to BABA, EPA has the responsibility to make findings as to the issuance of waivers to the BABA requirements.

Step-by-step Waiver Process

The waiver process begins with the assistance recipient (this may be the loan or subgrant recipient). To fulfill the BABA requirements, the assistance recipient must in good faith design the project (where applicable) and solicit bids for construction with American-made iron and steel, manufactured goods, and construction materials. It is essential that the assistance recipient include the BABA terms in any request for proposals or solicitations for bids, and in all contracts (see Appendix 2 for sample construction contract language). The assistance recipient may

receive a waiver at any point before, during, or after the bid process, if one or more of three statutory conditions is demonstrated to EPA and approved.

To apply for a project-specific waiver:

- The assistance recipient should contact their EPA project officer and alert them to the planned waiver request. A draft waiver request may be submitted to the project officer at this point.
- The regional project officer will alert the headquarters program contact of the potential waiver request.
- Once it is determined that sufficient documentation or rationale exists for the waiver to be submitted, the recipient will email the request in the form of a Word document (.doc) or editable PDF (.pdf) to the BABA-OLEM@epa.gov and evaluation by EPA will commence.

It is strongly recommended that each primary financial assistance recipient identify a person or persons for BABA communications. If this is a loan or subgrant, the primary financial assistance recipient will review the application for the waiver and determine whether the necessary information has been included.

(Note: More information may be provided in the future regarding what information is required to be included in waiver requests).

Evaluation by EPA

After receiving an application for waiver of the BABA requirements and ensuring sufficient information was provided, EPA will publish the request on its website for 15 days and receive public comment. EPA will then determine whether the application properly and adequately documents and justifies the statutory basis cited for the waiver.

In the event that EPA finds that adequate documentation and justification has been submitted, the Administrator may grant a waiver to the assistance recipient. EPA will notify the designee whether a waiver request has been approved or not approved as soon as such a decision has been made.

Granting such a waiver is a four-step process:

- Research – After receiving an application for a waiver, EPA will perform market research to determine whether the iron, steel, manufactured goods, or construction materials are available domestically.
- Posting – After research, if no domestic product has been identified, EPA is required to publish the application and all material submitted with the application on EPA's website for 15 days. During that period, the public will have the opportunity to review the request and provide informal comment to EPA. The website can be found at: <https://www.epa.gov/cwsrf/build-america-buy-america-baba-waivers-open-public-comment>

- Evaluation – After receiving an application for waiver of the BABA requirements, EPA will determine whether the application properly and adequately documents and justifies the statutory basis cited for the waiver to determine whether or not to grant the waiver.
- Signature of waiver approval by the Administrator or another agency official with delegated authority – As soon as the waiver is signed and dated, EPA will notify the assistance recipient and post the signed waiver on the Agency’s website. The assistance recipient should keep a copy of the signed waiver in its project files.

(Note: Additional steps may be required in the future regarding the waiver process depending on additional guidance from OMB.)

SECTION 6: MISCELLANEOUS

How do international trade agreements affect the implementation of the BABA requirements?

The BABA requirements apply in a manner consistent with United States obligations under international trade agreements. Typically, these obligations only apply to direct procurement by the entities that are signatories to these trade agreements. In general, assistance recipients are not signatories to such agreements, so these trade agreements have no impact on BABA implementation. In the few instances where such an agreement applies to a municipality, that municipality is responsible for determining its applicability and requirements and communicating with the funding authority (such as EPA and/or a state) on the actions taken to comply with BABA.

APPENDIX 1

Appendix 1: Example Build America, Buy America (BABA) Act Construction Contract Language

ALL CONSTRUCTION CONTRACTS MUST HAVE A CLAUSE REQUIRING COMPLIANCE WITH THE BABA REQUIREMENTS. THIS IS AN EXAMPLE OF WHAT COULD BE INCLUDED IN A PROJECT'S CONSTRUCTION CONTRACT. EPA MAKES NO CLAIMS REGARDING THE LEGALITY OF THIS CLAUSE WITH RESPECT TO STATE OR LOCAL LAW:

The Contractor acknowledges to and for the benefit of the _____ (“Owner”) and the _____ (the “Funding Authority”) that it understands the goods and services under this Agreement are being funded with federal monies and have statutory requirements commonly known as “Build America, Buy America;” that requires all of the iron and steel, manufactured products, and construction materials used in the project to be produced in the United States (“Build America, Buy America Requirements”) including iron and steel, manufactured products, and construction materials provided by the Contractor pursuant to this Agreement. The Contractor hereby represents and warrants to and for the benefit of the Owner and Funding Authority (a) the Contractor has reviewed and understands the Build America, Buy America Requirements, (b) all of the iron and steel, manufactured products, and construction materials used in the project will be and/or have been produced in the United States in a manner that complies with the Build America, Buy America Requirements, unless a waiver of the requirements is approved, and (c) the Contractor will provide any further verified information, certification or assurance of compliance with this paragraph, or information necessary to support a waiver of the Build America, Buy America Requirements, as may be requested by the Owner or the Funding Authority. Notwithstanding any other provision of this Agreement, any failure to comply with this paragraph by the Contractor shall permit the Owner or Funding Authority to recover as damages against the Contractor any loss, expense, or cost (including without limitation attorney’s fees) incurred by the Owner or Funding Authority resulting from any such failure (including without limitation any impairment or loss of funding, whether in whole or in part, from the Funding Authority or any damages owed to the Funding Authority by the Owner). If the Contractor has no direct contractual privity with the Funding Authority, as a lender or awardee to the Owner for the funding of its project, the Owner and the Contractor agree that the Funding Authority is a third-party beneficiary and neither this paragraph (nor any other provision of this Agreement necessary to give this paragraph force or effect) shall be amended or waived without the prior written consent of the Funding Authority.

APPENDIX 2

Appendix 2: **Example Build America, Buy America (BABA) Act Assistance Agreement Language**

ALL FEDERAL FINANCIAL INFRASTRUCTURE ASSISTANCE AGREEMENTS MUST HAVE A CLAUSE REQUIRING COMPLIANCE WITH THE BABA REQUIREMENTS. THIS IS AN EXAMPLE OF WHAT COULD BE INCLUDED IN AN ASSISTANCE AGREEMENT (E.G., SRF LOAN AGREEMENT). EPA MAKES NO CLAIMS REGARDING THE LEGAL SUFFICIENCY OF THIS CLAUSE WITH RESPECT TO STATE LAW:

Comply with all federal requirements applicable to the assistance received (including those imposed by the Infrastructure Investment and Jobs Act (“IIJA”), Public Law No. 117-58) which the Participant understands includes, but is not limited to, the following requirements: that all of the iron and steel, manufactured products, and construction materials used in the Project are to be produced in the United States (“Build America, Buy America Requirements”) unless (i) the Participant has requested and obtained a waiver from the cognizant Agency pertaining to the Project or the Project is otherwise covered by a general applicability waiver; or (ii) all of the contributing Agencies have otherwise advised the Participant in writing that the Build America, Buy America Requirements are not applicable to the Project.

Comply with all record keeping and reporting requirements under all applicable legal authorities, including any reports required by the funding authority (such as EPA and/or a state), such as performance indicators of program deliverables, information on costs and project progress. The Participant understands that (i) each contract and subcontract related to the Project is subject to audit by appropriate federal and state entities and (ii) failure to comply with the applicable legal requirements and this Agreement may result in a default hereunder that results in a repayment of the assistance agreement in advance of the maturity of the Bonds, termination and/or repayment of grants, cooperative agreements, direct assistance or other types of financial assistance, and/or other remedial actions.