



## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

SEP 26 2022

THE ADMINISTRATOR

### DECISION MEMORANDUM

**SUBJECT:** Public Interest: Small Project General Applicability Waiver of Section 70914(a) of P.L. 117-58, Build America, Buy America Act, 2021 for U.S. Environmental Protection Agency Financial Assistance Awards

**FROM:**

Michael S. Regan

A handwritten signature in black ink that reads "Michael S. Regan".

#### Introduction

In November 2021 Congress passed, and the President signed the Infrastructure Investment and Jobs Act, which included the Build America, Buy America Act. This is a transformational opportunity to build a resilient supply chain and manufacturing base for critical products here in the United States and that will catalyze new and long-term investment in good-paying American manufacturing jobs and businesses. Consistent with the policy direction of Executive Order 14005: Ensuring the Future is Made in All of America by All of America's Workers, section 70914 of the IIJA establishes governmentwide Buy America conditions on all federally funded infrastructure projects funded after May 14, 2022.

The U.S. Environmental Protection Agency remains committed to implementing Build America, Buy America to cultivate the domestic manufacturing base for a range of products. This waiver allows the EPA's state, local, tribal and nonprofit recipients to manage their federally funded activities more efficiently. For the purposes of this general applicability waiver, the EPA will include small projects, where assistance agreements or subawards under assistant agreements are less than \$250,000.

#### Build America, Buy America Small-Projects Waiver

The Office of Management and Budget's April 18, 2022, memorandum, "Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure" (M-22-11), encourages agencies to consider whether it is in the public interest to waive application of a Buy America preference to awards below the Simplified Acquisition Threshold. The EPA has identified a need for such a waiver in the initial years after enactment of the Infrastructure Investment and Jobs Act, but the agency anticipates that the waiver may be phased out as the EPA develops more efficient waiver review capabilities.

This waiver advances Build America, Buy America by reducing the administrative burden to potential assistance recipients, including predominantly small and disadvantaged communities, where the costs of compliance with Build America, Buy America could significantly negate the benefits of the smallest grants and projects. Failure to provide assistance recipients such flexibilities could perpetuate systemic barriers to opportunities and benefits and limit the agency's ability to deliver resources and benefits equitably to all.

#### Anticipated Program Impacts Absent a Waiver

Build America, Buy America impacts more than 60 EPA programs that provide financial assistance to communities with limited implementation capacity. This waiver is critical to reduce the administrative burden to potential assistance recipients, including predominantly small and disadvantaged communities, where the costs of compliance with Build America, Buy America could significantly negate the benefits of the smallest grants and projects. For example, recipients that manage projects often do not have experience in complying with domestic preference requirements as robust and technically complex as those established in Build America, Buy America. Failure to provide recipients such flexibilities could perpetuate systemic barriers to opportunities and benefits and limit the agency's ability to deliver resources and benefits equitably to all.

Additionally, the EPA will need to dedicate significant staff and contractor time to processing project-specific waivers. A small-projects waiver ensures that the EPA does not devote significant public resources towards compliance activities where there is limited public benefit and ensures that requests for project-specific waivers for larger projects can be responded to in a timely fashion.

#### Assessment of Cost Advantage of a Foreign-Sourced Product

Under OMB Memorandum M-22-11, agencies are expected to assess "whether a significant portion of any cost advantage of a foreign-sourced product is the result of the use of dumped steel, iron or manufactured products or the use of injuriously subsidized steel, iron or manufactured products," as appropriate, before granting a public interest waiver. The EPA's analysis has concluded that this assessment is not applicable to this waiver, as this waiver is not based on the cost of foreign-sourced products. The EPA will perform additional market research as it implements the Build America, Buy America requirements to better understand the market and to limit the use of waivers caused by dumping of foreign-sourced products.

#### Public Notice

On July 27, 2022, the EPA published a notice proposing to issue this waiver, and the comment period was open until August 15, 2022. The agency received 39 comments during the public comment period, two representing federal agencies, nine representing manufacturers and the manufacturing industry, 15 representing state agencies, three representing territories and 10 representing rural partnerships and water associations. Twenty-nine were generally supportive of the waiver with many requesting a threshold higher than the proposed \$250,000. Six commenters opposed the waiver either because the threshold was tied to the Small Acquisition Threshold in federal procurement of \$250,000 or because the waiver could reduce opportunities for American manufacturing. The remaining commenters raised concerns generally unrelated to the specifics

of this waiver about their challenges complying with Build America, Buy America or about how the waiver applies to projects with funding from multiple agencies or matching funding programs.

After reviewing these comments, the EPA concludes that the information provided to the agency generally supports a general applicability waiver for small projects, where assistance agreements or subawards under assistance agreements are less than \$250,000.

#### Waiver Decision

Section 70914(b)(1) of the IIJA authorizes the Administrator to waive the requirements of Build America, Buy America if implementation would be inconsistent with the public interest. Due to the critical need to reduce the administrative burden for recipients and agencies to ensure recipients can effectively carry out the EPA-funded activity in a timely manner thus reducing risks to human health and the environment, it is in the public interest to waive Build America, Buy America requirements for small projects. The EPA will review this waiver every five years after the date on which the waiver is issued.

If you have any questions concerning the contents of this memorandum, please contact Dan Coogan at [EPA\\_BABA\\_Waiver@epa.gov](mailto:EPA_BABA_Waiver@epa.gov).