



ASSISTANT ADMINISTRATOR FOR WATER

WASHINGTON, D.C. 20460

V 13, 2023

DECISION MEMORANDUM

SUBJECT: Amended Public Interest Waiver of Section 70914(a) of P.L. 117-58, Build America, Buy America Act, 2021 for State Revolving Fund and Water Infrastructure Projects that Initiated Design Planning prior to May 14, 2022

FROM: Radhika Fox

A handwritten signature in black ink, appearing to be "R. Fox", is written over the name "Radhika Fox".

Introduction

The nation's water infrastructure is decades old, with some systems tracing their construction back a century. Over the past 30 years, investment in water infrastructure has plummeted, leaving communities with pipes, treatment plants, and pumps at the end of their lifespans. Cities, suburbs, and rural areas desperately need to upgrade and build new infrastructure but doing so can lead to rate increases and make water unaffordable or inaccessible for the most vulnerable communities. With the need for such investment apparent, the Biden-Harris Administration championed, and Congress passed the *Bipartisan Infrastructure Law* (also known as the *Infrastructure Investment and Jobs Act*), which President Biden signed on November 15, 2021. The BIL will provide an unprecedented level of federal investment in water infrastructure in communities, including disadvantaged communities, across America, with broad eligibilities for drinking water and clean water projects through the State Revolving Funds.

Alongside the BIL, Congress passed the *Build America, Buy America Act* (BABA), which establishes strong and permanent domestic sourcing requirements across all federal financial assistance programs. The U.S. Environmental Protection Agency is honored to play a leadership role in implementing these provisions and is proud of its nearly decade of successful implementation of American Iron and Steel provisions in its State Revolving Fund programs. Through these efforts, the EPA will support efforts to catalyze domestic manufacturing, resilient supply chains, and good jobs – while successfully delivering a wide range of infrastructure projects.

This is a transformational opportunity to build a resilient supply chain and manufacturing base for critical products here in the United States that will catalyze investment in good-paying American manufacturing jobs and businesses. The 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 made domestically. This will take time, and flexibility will be important to ensure that the agency, states, and the water sector can leverage water investments on time and on budget.

Program Waiver

The EPA hereby waives the requirements of Section 70914(a) of the BIL, pursuant to Section 70914(b)(1) (public interest waiver), for eligible projects to be financed by SRF programs and water infrastructure projects subject to SRF requirements funded separately from SRF appropriations (collectively “covered projects”), provided that such projects of either type initiated project design planning prior to May 14, 2022, the statutory effective date of the BABA requirements. This action permits the use of non-domestic manufactured products and construction materials in such covered projects, which includes both infrastructure projects funded by a Clean Water or Drinking Water SRF and eligible water infrastructure projects subject to SRF requirements that may otherwise be prohibited under the BABA requirements of Section 70914. Sections 70917(a) and (b) of BIL provide a savings provision for existing statutory requirements that meet or exceed BABA requirements. The statutory American Iron and Steel requirements of *Clean Water Act* Section 608 and *Safe Drinking Water Act* Section 1452(a)(4) has previously applied to SRF projects and will continue to do so as part of BABA requirements. This waiver applies to funds expended after the effective date of the final waiver (November 13, 2023) for covered projects for which funding was appropriated in fiscal year 2022 (FY22) and 2023 (FY23). For awards obligated on or after the effective date of the final waiver, the final waiver supersedes and replaces the earlier Adjustment Period Waiver for SRF projects issued by the EPA on September 2, 2022. The earlier Adjustment Period Waiver applies to funds obligated to the grant recipient before the effective date of this final waiver if: (i) the project was covered under the earlier Adjustment Period Waiver, and (ii) the award was obligated before this final waiver became effective. The EPA anticipates that a small number of projects, relative to the total number of projects funded, will need to seek waivers, due to the EPA strongly encouraging and working with assistance recipients to ensure they have ample opportunity to utilize BABA compliant products.

For FY22 and FY23 previously planned water infrastructure projects subject to SRF requirements only, the iron and steel requirements of BABA are also waived for such projects not already subject to the American Iron and Steel requirements. For all other eligible projects, a reasonable expectation existed that the American Iron and Steel requirements would apply to the SRF project, and no exceptions to those long-standing requirements are provided through this waiver.

Applicability of Existing Domestic Preference Requirements

This waiver does not depend upon the cost or non-availability of U.S. products. This waiver action permits the use of non-domestic items in such projects that may otherwise be prohibited under BIL section 70914. The SRF programs have existing domestic preference requirements for SRF projects under CWA Section 608 and SDWA Section 1452(a)(4) (American Iron and Steel requirements) to install iron and steel products that are produced in the United States. This program waiver does not waive the iron and steel requirements under BABA. Sections 70917(a) and (b) of BIL provide a savings provision for existing statutory requirements that meet or exceed BABA requirements. The statutory American Iron and Steel requirements have previously applied to SRF-funded projects and will continue to do so as part of BABA requirements. Products covered under the American Iron and Steel requirements are primarily iron and steel (*i.e.*, greater than 50 percent iron or steel by material costs), permanently incorporated into the project, and are limited to:

- Lined or unlined pipes and fittings
- Manhole covers and other municipal castings

- Hydrants
- Tanks
- Flanges
- Pipe clamps and restraints
- Valves
- Structural steel
- Reinforced precast concrete
- Construction materials

These listed products are identified by Congress within the American Iron and Steel statute as commonly used iron and steel products in water infrastructure projects. Based on eight successful years of American Iron and Steel implementation, the EPA expects that projects subject to this waiver will obtain the majority of their iron and steel products from domestic sources.

Conditional, Targeted and Time-Limited

This waiver covers projects that have initiated design planning prior to May 14, 2022, the statutory effective date of the BABA requirements. For purposes of this waiver, “initiated project design planning” means documentable efforts made by an assistance recipient to evaluate and identify both technologically and financially viable options for capital improvement projects. These efforts typically start with prepared technical documents describing professional engineering designs. Because the SRF programs are pass-through programs operated through state funding authorities, the state programs will be responsible for assessing and documenting the design status of projects relative to this waiver. For all other water infrastructure projects subject to the SRF requirements, the EPA project officer will be responsible for assessing and documenting the design status of projects relative to this waiver. The EPA places the following conditions (for state programs and/or project officers) implementing this BABA waiver for manufactured products and construction materials:

- 1) SRF programs and/or the EPA project officers shall ensure that all projects subject to the conditions of this waiver provide evidence of initiating design that qualifies the project for this waiver and shall maintain this evidence with project files per applicable state and/or federal requirements or for three years after completion of the project, whichever is greater.
 - a. If a project can provide evidence for any of the following conditions prior to May 14, 2022, it would qualify under this waiver:¹
 - i. Submitted preliminary engineering report, or equivalent (to the state or to the assistance recipient)
 - ii. Issued a Request for Proposal or execution of a contract for design or engineering services (regardless of funding source)
 - iii. Execution of an assistance agreement – that includes design

¹ For previously planned water infrastructure projects subject to SRF requirements also pursuing a waiver of iron and steel products under BABA, the project may qualify based on the conditions listed herein provided the project was not already subject to the American Iron and Steel requirements and with the exception of conditions 1(ii), 1(vii), and 1(viii), provided that the documentation demonstrates commencement of the project prior to May 14, 2022. All inquiries regarding iron and steel product concerns should be addressed to SRF_AIS@epa.gov. In addition, the data information outlined in section (3) should also include the Grant Number corresponding to the Community Grants Data System or other relevant data system.

- iv. For project designed by assistance recipient, documentation of design initiation (such as completed preliminary engineering report)
 - v. Solicitation of construction contract bids
 - vi. Submitted plans and specifications (do not need to be complete) to a state and/or federal funding authority
 - vii. Public referendum or public meeting held regarding proposed project
 - viii. Evidence of new bonds passed, or other new funding backing secured for project
- b. If a project cannot provide any of the above evidentiary documentation but is significantly far enough along in the planning process that complying with BABA would be a detriment to the project proceeding, the project may still qualify for the waiver. However, the assistance recipient (via the state SRF authority and/or the EPA project officer) must request the opinion of the EPA for evaluation of the status of the project (email to BABA-OW@epa.gov with title "Request for Initiated Design Planning Waiver Project Evaluation").
- 2) SRF programs shall update the SRF Data System with the appropriate fields (new field(s) will be added) for projects qualifying for this waiver. Project data must be entered by the end of the quarter in which the assistance agreement was signed. For other programs subject to the SRF requirements, the EPA project officer will maintain data for projects qualifying for this waiver in their respective project files.
- 3) SRF programs shall maintain a list of all projects qualifying under the conditions of this waiver and provide this list to the EPA upon request (no sooner than November 13, 2022, and no more frequently than twice per year). For other programs subject to the SRF requirements, the EPA project officers shall maintain a list of all projects qualifying under the conditions of this waiver, including the following information relating to each project subject to the conditions of this waiver:
- a. Project name
 - b. Assistance agreement identification number (*e.g.*, grant or loan number corresponding to the SRF Data System or relevant grants management system, thereby allowing the EPA to obtain other project information from there, as needed)
 - c. Description of significant manufactured products or construction materials likely subject to the waiver (*e.g.*, a force main construction project could list "three lift station pumps, five valve actuators, three flow meters, and two pressure gauges")
 - i. Up to 10 items. If project has significantly more than 10 significant manufactured products or construction materials potentially subject to the waiver, engineers should use best professional judgment to provide 10 key (major) items to be used, omitting duplicative, minor, and/or miscellaneous products.
 - ii. Complete materials lists are also acceptable, but not required.
 - iii. Note, the origin of the manufactured products and construction materials does not need to be known.
 - d. Date of initiated and documented design activity qualifying project for waiver (under 1(a) above)
- 4) SRF programs and the EPA project officers shall encourage all projects utilizing this waiver to purchase manufactured projects and non-ferrous construction materials wherever possible, while also ensuring that American Iron and Steel requirements are fully met by all treatment works and public water system projects subject to this waiver, where applicable.

Program-Wide Scope

The SRF program's unique financial structure and funding procedures necessitates a program waiver to cover projects that receive SRF funding and meet the conditions of the waiver.

In the SRF funding process, the EPA provides annually appropriated capitalization grants to state financial authorities, which then provide direct assistance to recipient projects. Projects may enter the SRF funding process at every level of design planning. Because the SRFs are state-implemented programs, the specific stages of project design are not known nationally by the EPA. A high percentage of projects have initiated or even completed design by the time they receive an assistance agreement. At any time, as many as several thousand SRF projects may have initiated preparation of engineering plans and specifications, be ready to proceed to construction, or be under construction. In these cases, the projects are at a stage that makes it impractical to retroactively change and apply purchasing requirements. Because of the transition period from federal grant to state funding of projects, it is not possible for the SRF programs to predict the number of projects that, at the time of this waiver, have initiated project design planning or have solicited bids for engineering design services but not yet signed assistance agreements. The table below provides a sample of projects from an existing funding pipeline for a DWSRF state program (one of 102 national DW and CWSRF programs) that are in various levels of design and are typical of the types of projects that would be subject to this waiver.

Project Description	Level of Design as of May 14, 2022
Rehabilitation of Water Treatment Plant	Design in progress. Construction loan pending.
Water Main Construction Project	Design complete. Plans and specifications submitted to state
Consolidation of Water Systems	30% design complete.
Water Storage Tank and Booster Pump Station Rehabilitation	Under construction. Loan agreement pending.
New Water Storage Tank Construction	Design complete. Plans and specifications submitted to state

It is not possible for the EPA to nationally predict the number of, and the level of projects in the funding process. However, the EPA expects similar project impacts for assistance recipients, which are further described below. This waiver only applies to those projects that initiated design prior to the statutory BABA requirements effective date. Projects that receive federal SRF funding from an obligation executed on or after May 14, 2022, and initiated design planning after May 14, 2022 (the statutory effective date of the BABA requirements) will be subject to the full requirements. This waiver does not waive the iron and steel requirements under BABA (except in one limited circumstance described above). Sections 70917(a) and (b) of BIL provide a savings provision for existing statutory requirements that meet or exceed BABA requirements. The statutory American Iron and Steel requirements of CWA Section 608 and SDWA Section 1452(a)(4) have previously applied to SRF projects and will continue to do as part of BABA requirements.

This waiver is an important tool to aid implementation of the BABA requirements in the most efficient manner in order to promote investment in the country's domestic manufacturing base, strengthen critical supply chains, and position U.S. workers and businesses to compete and lead globally in the

21st century. The EPA understands that advancing Made in America objectives is a long game and the EPA plans to move forward with sufficient information to implement the new requirements in a way that maximizes coordination and collaboration to support long-term investments in domestic production.

As the EPA builds toward full implementation of the BABA requirements, the EPA intends to focus on the intersection between these potential critical supply chain issues and product needs that it identifies through its robust and thorough domestic product research program. The EPA has initially identified that some of the manufactured products and non-ferrous construction materials to be waived may, under the targeted conditions of this waiver, fall under water and wastewater infrastructure product categories, which may potentially intersect with the public health (such as water treatment technologies) and information and communications technology (such as computerized control technologies) industrial bases. The EPA is working to address the gaps in its knowledge base for these sectors, specifically the manufactured products and non-ferrous construction materials to be newly required under BABA. The EPA solicited public comment when proposing waiver on information regarding the domestic availability and potential market challenges for products used in water and wastewater infrastructure that may fall under these industrial base categories.

Anticipated Program and Project Impacts Absent a Waiver

After publication of the government-wide BABA guidance issued by the Office of Management and Budget's Made in America Office, the EPA held listening sessions targeting all known potential BABA stakeholders for the SRF programs. The EPA hosted three widely advertised webinars, with sessions soliciting input from the following: (1) potentially affected manufacturers, suppliers, distributors, and representative organizations; (2) water sector and water infrastructure organizations, associations, and professional trade groups; and (3) states, state associations, the EPA Regions, and potential assistance recipients. More than two thousand entities participated in these webinars and submitted hundreds of questions and comments to the EPA regarding the implementation of BABA for the SRF, WIFIA, and other water infrastructure programs. One of the most common and popular topics was the perceived need for the previously issued adjustment period waiver for the SRF programs.

The EPA received 120 responsive comments during the public comment period for the original waiver signed September 2, 2022. The comments generally were in favor of an adjustment period waiver for the SRF programs. One comment from a potential domestic manufacturer opposed adjustment period waivers because they would prefer the manufactured product requirements apply as soon as possible. A significant portion of comments supported an adjustment period waiver but opposed the framework of the proposal based on the date an assistance recipient submits plans and specifications to their state authority. These concerned commenters, comprised of many states, several associations representing states, and organizations representing municipal authorities, requested that the EPA modify the waiver to mirror the approved adjustment period waiver for *Water Infrastructure Finance Innovation Act* projects that have initiated project design planning. The commenters asserted that the proposed plans and specifications waiver would leave behind a significant portion of SRF projects that have progressed beyond committed milestones and could not reasonably comply with the BABA requirements. Similarly, the commenters requested that the EPA more closely coordinate the requirements of the two waivers (for SRF and WIFIA programs) because many projects are co-funded

between the two programs. In response to the persuasive points made by the majority of commenters, the EPA has revised the previously issued adjustment period waiver for SRF programs.

The comments affirmed that the EPA's basis for the public interest program waiver is that due to the uncertainty about the application of BABA requirements prior to publication of guidance by MIAO (April 18, 2022), the potential SRF assistance recipients did not have the opportunity to reasonably plan for the domestic preference requirements for manufactured products and construction materials by the guidance publication date. This waiver does not waive the iron and steel requirements under BABA. Sections 70917(a) and (b) of BIL provide a savings provision for existing statutory requirements that meet or exceed BABA requirements. The statutory American Iron and Steel requirements of CWA Section 608 and SDWA Section 1452(a)(4) have previously applied to SRF projects and will continue to do as part of BABA requirements (except in one limited circumstance as described above).

Until detailed guidance was issued on April 18, 2022, potential SRF assistance recipients were unable to solicit bids from construction firms with appropriate definitions of key terms and concepts that were elucidated in the guidance. Additionally, projects that initiated design planning without knowledge of the BABA requirements would be required to redesign elements of the project, investigate potential domestic products, revise engineering drawings and bid specifications, and resubmit plans and specifications for approval, thereby substantially delaying the initiation of construction and adding to the cost of the project. Projects that advertised contract bids prior to the guidance being issued, also could be required to rebid the project, or submit change orders to comply with the new requirements, which would likely delay initiation of construction and unduly burden the SRF projects and assistance recipients. These potential delays associated with rebidding of construction contracts could significantly affect the cost and schedule of projects. Absent the waiver, assistance recipients may decline subsidized federal funds in favor of more expensive sources of financing to minimize such impacts. In all cases where this waiver applies, the other requirements for SRF funding still apply, which includes the American Iron and Steel requirements.

The imposition of the BABA requirements on projects eligible for SRF assistance whose assistance recipients had initiated design planning prior to May 14, 2022, the statutory effective date of the BABA requirements, could require the time-consuming and expensive redesign of those projects. Specifically, those projects that can show a reasonable basis for initiating design prior to this date could be harmed by the imposition of these requirements after the fact. This imposition could conflict with both the EPA's, as well as the states', interest in providing funding to eligible assistance recipients in an expeditious and efficient manner, as required by the CWA and the SDWA. Project delays could increase the time necessary to comply with CWA and SDWA requirements, and therefore, adversely impact protection of public health and the environment. A targeted waiver for projects that initiated design planning will provide a bridge for the EPA and its stakeholders' long-term ability to adjust from the American Iron and Steel requirements to the BABA requirements, including manufactured products and non-ferrous construction materials.

Public Notice

The EPA received sixteen (16) responsive comments to the amended SRF waiver proposed June 8, 2023, for a 30-day public comment period. Commenters were generally supportive of expanding this waiver to include other programs with SRF requirements.

The majority of comments expressed opposition to the agency's proposal of a sunset date of September 30, 2024, for projects to utilize the waiver. One (1) commenter expressed support for the sunset date but requested clarity from the EPA regarding the impact of amended SRF assistance agreements on the applicability of the waiver. Comments, by state environmental agencies, public utilities, and associations representing them, opposing the proposed sunset date questioned the need for a sunset clause and asserted that the EPA had not proposed a rationale supporting the need for the sunset date or explained how it would be implemented. Commenters noted that because the waiver is based on the effective date of the BABA requirements (May 14, 2022), a future sunset date is not necessary as the pool of eligible projects will automatically narrow and ultimately close. Multiple commenters asserted that many major water infrastructure projects have long planning horizons, extending more than 30 months. The commenters claimed that the proposed sunset date will cause construction delays and cost overruns. Several commenters requested that if the sunset date is retained that it be extended to five (5) years to account for complex water infrastructure projects that may have unavoidable interruptions in funding processes – such as those requiring negotiations around ongoing consent decree modifications – which could delay funding subsequent to design planning. Commenters asserted that applying a sunset date could jeopardize the timely completion of critical water infrastructure projects, thereby undermining public health and affordability of safe drinking water, wastewater services, and stormwater management.

The EPA acknowledges concerns expressed by a wide range of commenters regarding the timing of the sunset date. As commenters note, complex water infrastructure projects may require many months (more than two years for some subset of projects) to secure and proceed to approval and funding subsequent to design planning. The EPA agrees that for a significant subset of complex, often very large, water infrastructure projects that a sunset date could interrupt and delay critical water infrastructure projects. As such, the final amended waiver adjusts the approach to phasing out this waiver. The EPA views the need for this general applicability waiver will decline over time, as the availability of BABA-compliant products and materials increases, and as more targeted product waivers are developed based on robust market research. While the agency understands that many complex, large water infrastructure projects have extended and extensive design planning and pre-construction processes, it is the agency's view many years of notice of the domestic preference requirements provides sufficient time for projects to adapt to implementation of the BABA requirements.

Two (2) commenters expressed concern and opposition toward the proposal for waiving iron and steel requirements for projects that were not subject to the American Iron and Steel requirements prior to May 14, 2022, asserting that the American Iron and Steel requirements have been in effect for nearly nine (9) years and that implementation for the American Iron and Steel requirements through the SRF program is widely practiced and successful. Another commenter expressed concern that the conditions of the waiver in the "Conditional, Targeted and Time-Limited" section were not clearly applied to all potential projects subject to the waiver and recommended that the EPA clarify that the conditions and data sections apply to all projects subject to the waiver.

The EPA disagrees with the few commenters who expressed opposition to waiving the iron and steel requirements for projects that were not previously subject to the American Iron and Steel requirements. Because a small subset of projects had no information or notice that iron and steel requirements would apply, the agency finds that waiving the iron and steel requirements for those

projects that were not previously subject to the SRF requirements is consistent with the rationale for the original waiver.

For the remainder of comments received, the final amended waiver reflects changes to address these comments, including concerns about the balanced application of conditions to all projects subject to the waiver.

Impacts on Recipients with Respect to Iron and Steel Requirements

Assistance recipients of water infrastructure projects funded through the FY22 and FY23 appropriations that had not previously been subject to SRF requirements were unable to solicit bids from construction firms with knowledge of the requirements of the statute, specifically the American Iron and Steel requirements. Projects that had already commenced without knowledge of the applicability of American Iron and Steel requirements would be required to redesign elements of the project, investigate potential domestic products, revise engineering drawings and bid specifications, and resubmit plans and specifications for approval, thereby substantially delaying the initiation of construction and adding to the cost of the project. Projects that advertised contract bids could also be required to rebid the project or submit change orders to comply with the new requirements, which would likely delay initiation of construction and unduly burden assistance recipients. These potential delays associated with rebidding construction contracts could significantly affect the cost and schedule of projects. In all cases where this waiver applies, the other requirements for projects, as outlined in relevant guidance documents, still apply.

The imposition of BABA's iron and steel requirements on projects whose recipients had commenced design or planning prior to May 14, 2022, the implementation date of BABA, could require the time-consuming and expensive redesign of those projects. Specifically, those projects that can show a reasonable basis for commencement of the project prior to and including this date could be unduly harmed by the imposition of these requirements after the fact. Project delays could also increase the time necessary to comply with environmental statutes, including the *National Environmental Policy Act*, CWA, SDWA, and other statutory requirements, and therefore, adversely impact protection of public health and the environment. A targeted waiver for projects that commenced prior to and including the implementation date of BABA will provide a bridge for the EPA and its recipients' long-term ability to adjust to the iron and steel requirements for all future projects.

Re-evaluation of Design Decisions

SRF and other assistance recipients apply a tremendous amount of effort and expenditure in planning, design, and even early construction and mobilization activities.

It is common for planning and development of complex projects to begin years prior to construction. This process often includes estimation of project benefits and costs to evaluate design alternatives and in many cases, involves complex environmental assessments, site reviews, local funding processes, and prioritization efforts. Although these early stages of project planning and design may be performed years in advance of construction, they incorporate, and are influenced by, the expected availability of supplies, materials, manufactured products, equipment, packaged technological solutions, local budget approvals, and even siting options. Design and construction of these projects are carefully choreographed and interdependent processes and imposing new conditions on the tail end of the

process may require re-evaluating earlier decisions on which the whole project is established, which may have included referenda and/or public approval processes.

Years of work are informed by early design considerations for water and wastewater treatment technologies, many times in response to federal requirements, compliance objectives, and/or enforcement agreements. With a project already designed around (in many cases) complex treatment equipment, subsequently applying new purchasing requirements, significant costs and effort would be needed to re-evaluate BABA-compliant technology alternatives and assess the implications of design alterations on the overall feasibility of the project. Many SRF projects, absent this waiver, would potentially need to stop work, delay critical-path construction activities, forego portions of planned projects, potentially fail compliance actions, and/or seek alternative funding as re-designing and finding domestic alternatives may not be feasible.

Increased Project and Construction Costs

The EPA has received a consistent message from assistance recipients of its water infrastructure programs: projects requiring re-design to comply with BABA may lead to significant cost and schedule increases for much needed infrastructure. Furthermore, changes in design, treatment plant equipment, and materials could require communities with approved permits to resubmit engineering plans and specifications for state approval. Requiring projects that have initiated design planning to undergo a re-evaluation of their plans to comply with BABA may lead to significant cost and schedule increases for much needed infrastructure.

Delay in Compliance with CWA and SDWA Requirements

The country faces unprecedented challenges with aging drinking water distribution systems and wastewater conveyance and treatment plants that have far exceeded their useful life. Many facilities need to make improvements to their system to return their community to compliance with the CWA or SDWA. Communities that are required to redesign systems will not only face increased planning, design, and construction costs, but may ultimately delay and perhaps even prevent some improvements necessary to meet requirements.

Such delays conflict with the EPA's, as well as prospective assistance recipients', interest in investing in the nation's water infrastructure and initiating construction in an expeditious and efficient manner, results antithetical to the goals of the BIL. This further prevents the assistance recipients' ability to timely address compliance issues under the CWA and SDWA and adversely impacts the protection of public health and the environment. For many of these projects, planning and design activities will have already begun to meet stringent federal and state regulations with court-enforced deadlines. A majority of SRF projects are necessary to meet regulatory requirements or resolve public health or environmental violations or enforcement actions.

A Decline in the Use of Federal Funds

Assistance recipients faced with a need to re-design and re-permit projects may decline subsidized federal funds in favor of more expensive sources of financing to minimize such impacts. By declining to use SRF programs as a funding source, no domestic preference for American iron and steel will be required, potentially leading to a reduction in the use of domestic iron and steel. Similarly, the

intended long-term benefits of BABA implementation will be missed. This program waiver seeks to provide a reasonable transition period for BABA implementation while minimizing impacts to projects.

Program Implementation Considerations

The EPA's implementation of American Iron and Steel requirements for the SRF programs has assured almost all iron and steel products in water, wastewater, and stormwater infrastructure projects are domestically sourced. However, the domestic availability of other non-ferrous construction materials and manufactured products incorporated in projects is largely unknown at this time. The list of items included on these projects can be vast. For example, a project bid tabulation for a large wastewater infrastructure project listed approximately 9,000 unique items, with most of those listing construction materials, equipment, or manufactured goods.

To further support the administration's priorities to steward investments to build a better America and promote domestic manufacturing and jobs, the SRF program will aim to collect information from projects covered by this waiver to help evaluate the domestic market availability of commonly used infrastructure products.

Through these efforts, the EPA will support government-wide efforts to catalyze domestic manufacturing, resilient supply chains, and good jobs while successfully delivering a wide range of public health protection and water quality improvement infrastructure projects. The EPA intends to build on its near decade of success implementing the American Iron and Steel requirements for thousands of SRF-funded projects, bridging that success to the BABA requirements for manufactured products and non-ferrous construction materials. The EPA intends to support the creation of resilient supply chains and manufacturing base for critical products here in the United States that will bring about investment in good-paying American manufacturing jobs and businesses. The creation of jobs in communities will also alleviate supply chain disruptions through cultivation of the domestic manufacturing base for a wide range of products commonly used across the water sector but not yet made domestically.

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 BABA requirements to better understand the market and to limit the use of waivers caused by dumping of foreign-sourced products.

Waiver Decision

Section 70914(b)(1) of the BIL authorizes the Administrator to waive the requirements of Section 70914 in any case or category of cases in which they find that applying subsection (a) would be inconsistent with the public interest. Due to the critical need to repair and upgrade the nation's water infrastructure in a timely and cost-effective manner, and for the foregoing reasons, imposing the BABA

requirements on projects, that initiated project design planning prior to May 14, 2022, is not in the public interest. For water infrastructure projects subject to SRF requirements only, application of the iron and steel requirements of BABA are also waived for those projects not already subject to the American Iron and Steel requirements. For awards obligated on or after the effective date of the final waiver, the final waiver supersedes and replaces the earlier Adjustment Period Waiver for SRF projects issued by the EPA on September 2, 2022. The earlier Adjustment Period Waiver applies to funds obligated to the grant recipient before the effective date of this final waiver if: (i) the project was covered under the earlier Adjustment Period Waiver, and (ii) the award was obligated before this final waiver became effective.

If you have any questions concerning the contents of this memorandum, please contact Timothy Connor, Chemical Engineer, State Revolving Fund Branch, Water Infrastructure Division, at connor.timothy@epa.gov or (202) 566-1059 or Kiri Anderer, Branch Supervisor, Water Infrastructure Technical Support Branch, Drinking Water Infrastructure Development Division, at anderer.kirsten@epa.gov or (202) 564-3134.