



August 15, 2022

The Honorable Radhika Fox
Assistant Administrator, Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460
Via: EPA_BABA_Waiver@epa.gov

Re: Request for Comments on Public Interest: *De Minimis* General Applicability Waiver of Section 70914(a) of P.L. 117-58, Build America, Buy America Act, 2021 for EPA Financial Assistance Awards and Procurements

Dear Assistant Administrator Fox,

The Association of State Drinking Water Administrators (ASDWA) and its members would like to commend EPA on its recently proposed waiver for the requirements under Build America, Buy America (BABA) for infrastructure project purchases below a *de minimis* threshold. ASDWA's members are busy working with systems to develop grant applications to ensure successful implementation of the Bipartisan Infrastructure Law (BIL) funding, and any actions by EPA through waivers and otherwise to streamline its processes will help to ensure that obtaining this funding is as smooth and straightforward as possible and will reach the communities that need it most.

ASDWA supports the general intention of this waiver that will exempt projects from the requirements of BABA if the qualifying products represent a small percent of the total cost of the materials used. ASDWA agrees with EPA's conclusion that failing to grant such a waiver would create a "significant administrative burden for EPA and recipients as both sides must negotiate such products on a project-by-project basis, which will increase the cost to the taxpayer, delay the award of assistance agreements and procurement, and has negligible relevance to the intent of BABA."

However, ASDWA recommends that the percentage threshold be based on project costs, not materials costs. Project cost is a more known and easily derived value. The value of the materials cost would need to be determined by the contractor, which may or may not be thorough, and the states would have to take them at their word. Additionally, ASDWA recommends that EPA consider increasing the *De Minimis* calculation amount to 10% or 15%. Although the current *De Minimis* waiver for the American Iron and Steel requirements uses a 5% threshold for material costs, BABA's application goes further and covers both manufactured goods and construction

materials. Therefore, a 5% BABA De Minimis waiver means even less accommodation because we have more materials to cover. A larger percentage is needed to compensate for this difference.

Additionally, ASDWA agrees with EPA's assertion that "some larger projects have such significant material costs that a dollar cap would negate the intent of the *de minimis* waiver" and supports the Agency's decision to include no cap. However, within the "Anticipated Program Impacts Absent a Waiver" section it seems as if the Agency intends to use qualifiers to determine what products can be considered under this waiver. ASDWA recommends that EPA remove any qualifiers as to what can be used under *De Minimis*. Utilizing qualifiers requires an extra evaluation to determine what is "significant" and may cause unnecessary burdens on applicants.

ASDWA continues to recommend that EPA ensure consistency across all the Agency's infrastructure programs for these and future waivers. While ASDWA agrees with the Agency's goal to keep these waivers as narrow as possible, it can be confusing to have different requirements, like BABA, for similar programs that fund the same projects and have the same applicant pools. The principles for waivers should remain the same whether the funding results from Water Infrastructure Financing and Innovation Act (WIFIA), BIL, Congressionally directed spending, America's Water Infrastructure Act (AWIA) or other legislation. The same principles should apply to all.

Having such significant differences among the various waivers is not in the public interest and could adversely affect public health and the environment by slowing down construction and/or increasing construction costs. Many of these projects are also co-funded by more than one funding program. Implementing different requirements for the same project will cause unnecessary confusion and complication. Additionally, the waivers should reflect continuity and clarity across any application of the waivers. As stated previously, navigating this process can be burdensome and confusing for local communities and water systems. EPA should take every action possible to ensure that obtaining infrastructure funds is as smooth and straightforward as possible.

The funding from the BIL represents a once-in-a-generation opportunity for water infrastructure, and this critical funding will assist water systems in addressing much-needed infrastructure improvements, removing lead service lines, and tackling emerging contaminants such as PFAS. But the Federal and state partners must work to lessen the burden and simplify the process for those communities most in need to access these funds. Beyond the initial recommendations stated above, ASDWA recommends that the Agency take the following actions:

- ASDWA recommends that EPA provide BABA waivers for SRF projects in small communities and recommends that the Agency consider a 10,000-population threshold for these waivers.
- ASDWA has interpreted that the BABA requirements would only apply to projects that utilize the federal cap grant funds and not the additional leveraged DWSRF funds. ASDWA supports this application of BABA but recommends EPA give a more explicit explanation as to what funds must comply with the BABA requirements.

- ASDWA also recommends that EPA consider similar waivers for the Davis-Bacon (DB) Act requirements.

ASDWA continues to support the underlying principles of BABA and DB as America needs to increase its ability to manufacture construction materials and components. However, in many cases, these requirements make the DWSRF process insurmountable for many small systems that need the funding the most. Small systems with only a few hundred connections face higher costs for even their basic supplies. Requiring BABA and DB for the infrastructure projects these systems so desperately need only exacerbates the economic disadvantage imposed on these systems. Some states, such as California, have resorted to utilizing their own funding to aid small and disadvantaged communities to overcome these shortcomings of the federal DWSRF program.

Limited BABA waivers assist States in meeting the Agency's goal under the Justice40 initiative to work towards ensuring that at least forty percent of the overall benefits from federal investments go towards disadvantaged communities. Justice40 and the communities that will benefit should be prioritized over BABA and DB. The benefits for the country by implementing BABA will result from much larger community projects that will do the overwhelming amount of purchasing for their much more significant investments. Pitting small communities against large community purchasing power will continue the injustice these communities struggle with every day.

ASDWA's members look forward to further engagement with EPA as the Agency works to implement similar waivers to ensure that state primacy and funding agencies make the most of the opportunities with BIL funding. If you have any questions regarding these comments, please contact me (aroberson@asdwa.org) or Stephanie Schlea (sschlea@asdwa.org).

Sincerely Yours,



J. Alan Roberson, P.E.
ASDWA Executive Director

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