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June 29, 2022

The Honorable Michael Reagan
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Program Waiver of Section 70914 of P.L. 117-58, Buy America, Build America Act, 2021 for State Revolving Fund Projects with Submitted Engineering Plans and Specifications

Dear Administrator Regan:

On behalf of the Associated General Contractors of America (AGC), the largest association in the construction industry representing more than 27,000 firms, including America's leading general contractors, specialty-contracting firms, and suppliers, we appreciate the opportunity to comment on the Environmental Protection Agency's (EPA) proposed waiver concerning the application of Buy America, Build America Act (BABAA) to State Revolving Fund (SRF) projects with engineering plans and specifications submitted to an appropriate state agency prior to May 14, 2022, the effective date of BABAA requirements.

AGC members have complied with both Buy American and Buy America requirements on direct federal and federally assisted projects for decades. For example, AGC members who perform water infrastructure construction have complied with existing SRF domestic preference requirements under the American Iron and Steel (AIS) sections of Clean Water Act (CWA) section 608 and Safe Drinking Water Act (SDWA) section 1452(a)(4) and will continue to do so as part of BABAA requirements. However, it is clear to the construction industry that the expansion of Buy America requirements to "construction materials" broadly under BABAA without a thoughtful approach to implementation will create significant problems for delivering clean drinking water and wastewater projects.

While AGC supports and commends the EPA for proposing this waiver, the association urges the agency to do more. Specifically, AGC urges the EPA to expand its proposed waiver to also include a 180-day BABAA waiver from May 14, 2022, to ensure that projects are not needlessly delayed and prospective recipients deterred from seeking the funds. Such a request is in line with the approach taken by the U.S. Department of Transportation,¹ which has the most infrastructure projects impacted by these new requirements, and the U.S. Department of Housing and Urban Development.² Below, AGC provides consideration for such an expanded waiver and further elucidates those considerations herein:

¹ <https://www.federalregister.gov/documents/2022/05/25/2022-11195/temporary-waiver-of-buy-america-requirements-for-construction-materials>

² https://www.hud.gov/program_offices/general_counsel/BABA

I. AGC Maintains Federal Agencies, Including EPA, Must Have Final BABAA Rules & Adequate Time to Implement Them BEFORE Including BABAA Requirements in Contracts

As noted, AGC supports EPA's proposed waiver BABAA requirements. That stated, AGC holds the agency would better serve the interests of implementing BABAA, achieving compliance, and continuing the delivery of timely and on-budget SFR funded projects by additionally expanding the proposed waiver to 180-days from May 14, 2022. The reasons for this are clear:

1. Neither the White House Office of Management and Budget (OMB) nor EPA have put forth final standards governing the definition of "construction materials," the "manufacturing processes" that determine whether a construction material is made in America, and how to differentiate between "construction materials" and "manufactured products," among other things. In the absence of finalized rules, prospective SFR loan recipients and contractors will be unable to adequately scope projects for BABAA compliant construction materials. In turn, prospective recipients may be deterred from seeking these loans. If a recipient includes BABAA requirements in project solicitations, AGC believes that the current flux of the rules places considerable liability on contractors that will significantly limit competition. That liability stems from the regulatory unknowns the EPA would place upon them to have to omnisciently anticipate what those rules will be and how to manage their suppliers and supply chains.
2. When final standards are provided by OMB and put into effect, there must be adequate lead time for compliance. Adjusting supply chains and educating enforcement officials, among others, does not happen in an instance. To these points, EPA needs to ensure that when such standards are released and put into effect that:
 - Manufacturers and suppliers have adequate time to adjust their supply chains to meet these requirements;
 - There is adequate time for EPA to educate their enforcement staff;
 - There is adequate time for potential SRF recipients to consider the new requirements before putting together loan applications; and
 - Provided adequate time for contractors to bid on contracts with the new requirements to ensure those bids correctly incorporate the BABAA-applicable manufactured products and construction materials.

EPA's proposed waiver as written does not sufficiently take these considerations into account. Since May 14, 2022, potential recipients have or are considering engineering or designing projects in anticipation of SRF funding. Just as there were no final standards for BABAA on May 14, there remain no final standards through today, June 29, 2022. These potential recipients would be at a disadvantaged compared to those who acted prior to May 14 for no discernable reason other than the date. Yet those who acted on or after May 14 still do not have final rules to understand how they can appropriately plan, design, and engineer such projects in anticipation of SRF funds.

3. Small local and rural water agencies have the least amount of resources to expend on compliance, among other things. For many, the cost of administering SRF funding to meet EPA reporting requirements demands is already too high. In AGC's experience, water

authorities need to hire at least one employee to solely handle these reporting requirements. Asking small entities to enforce BABAA requirements for which there are no final standards would add to the reasons for them not to consider SRF funding. This is not in the interests of the mission of the SRFs to help deliver clean and safe water to communities, especially those that are small and disadvantaged.³ Because the SRFs tend to benefit smaller, disadvantaged and less sophisticated entities than those utilizing EPA’s WIFIA program, AGC holds that different BABAA waivers for the SRF and WIFIA programs make sense and are warranted.

There remain significant questions regarding much of the above that could complicate both BABAA compliance and the SRFs’ objectives to deliver on time and on budget water projects to communities throughout the nation. The EPA would best serve those communities by providing time for them to understand the rules when they are written, rather than providing them with funding and changing their understanding of the rules along the way. This could lead to compliance issues that delay or even cancel projects, thereby undermining such entities’ interest in utilizing SRF funding and undermining the value of these EPA programs in the minds of these communities who need these projects.

II. The EPA Needs Time to Assess Record Inflation and Historic Construction Materials and Manufactured Product Shortages and Delays BEFORE Including BABAA Requirements in Contracts

Infrastructure project costs continue to climb amid rising construction materials prices and shortages. Material price increases have doubled or even tripled in some cases. Lead times for procurement and delivery of many of these materials has dramatically increased as well. And prospects for the rest of the year are worse. As a result, many infrastructure projects across the country face the risk of significant delay or a reduction in scope.

AGC recommends the agency review the association’s Construction Inflation Alerts⁴ detailing the historic challenges already facing the supply chain and its impact on construction projects today. To help articulate this point, AGC members have shared some of the supply chain constraints currently threatening the feasibility of infrastructure projects across the country. The information our members have shared denote significant new surcharges on existing orders and future orders, pricing for materials being finalized at shipment—as opposed to initially ordered—or even upon delivery, and significant delivery delays from one year ago. For example:

- Received from an AGC member: “The current supply issues we are facing with extraordinary lead times are the cast iron epoxy coated, bronze and brass fittings for water mains. On projects that do not have the Buy America or American Made standards we are experiencing lead times of 6-9 months on hydrants depending on which brand is specified. On projects that DO have Buy America or American Made standards we are experiencing

³ Less than 25 percent of SRF funds have reached socially and economically divested communities. Applications to the SRFs require engineering designs and environmental assessments that are complicated and costly to complete: estimates suggest the average cost just to apply is \$17,000. Utilities that serve overburdened communities often lack the technical and financial capacity to apply for and equitably manage these funds. Thousands never take the first steps towards applying for funding. Source information available at:

https://nicholasinstitute.duke.edu/sites/default/files/publications/Uncommitted-State-Revolving-Funds_2.pdf

⁴ <https://www.agc.org/learn/construction-data/agc-construction-inflation-alert>

lead times of 11-14 months. The lead times of the individual fittings are anywhere from 6-12 weeks out depending on manufacturer. The manufacturers are not accepting new accounts currently . . . so we are at the mercy of the manufacturer the supplier has accounts already established with. All of these manufacturers are not honoring pricing and are reserving the right to sell the parts at the current market price on the day of shipment NOT the day the quote is provided even if we sign the quote and secure the order the day we receive it.”

- Received from an AGC member: “Below is one of our Aluminum Extruding Mill’s lead times. Its showing 66-68 weeks, which is impossible for us to use. The lead time up until about a year ago was more like 6 weeks. We are a metal railing fabricator for roadway bridges, pedestrian bridges & railroad bridges.”
- Received from an AGC member: “Nucor Tubular just announced a \$200/ton increase effective immediately 5 minutes ago. Beams are probably going up tonight or tomorrow. Don’t know how much yet.”

As you can see, our members are facing unprecedented supply chain challenges in the construction industry. AGC refers EPA to our supplemental comments to the OMB RFI that provide additional examples from manufacturers about price increases and material delays/shortages plaguing the industry.⁵

To better position itself, the EPA should conduct a thorough analysis of domestic manufacturing capabilities to avoid any unnecessary delays to these projects that communities rely on for clean and safe water. Including a 180-day waiver period would allow EPA time to better assess the market and have a more informed path for revamping its waiver process to include construction materials. Rushing through this process could further drive inflation and result in significant delays to projects.

Again, we appreciate the opportunity to comment on this important matter. We look forward to collaborating with the EPA to ensure that the president and Congress’ intention to source more American manufactured material in our water and wastewater projects is met while not unnecessarily delaying the delivery of projects.

Thank you for giving this matter the consideration it warrants.

Sincerely,



Allen S. Gray
Director, Utility Infrastructure Division

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<https://www.agc.org/sites/default/files/Files/Govt%20Regulations%20and%20Executive%20Orders/AGC%20Supplemental%20BABAA%20Comments%20to%20OMB%20RFI%206.6.22.pdf>