



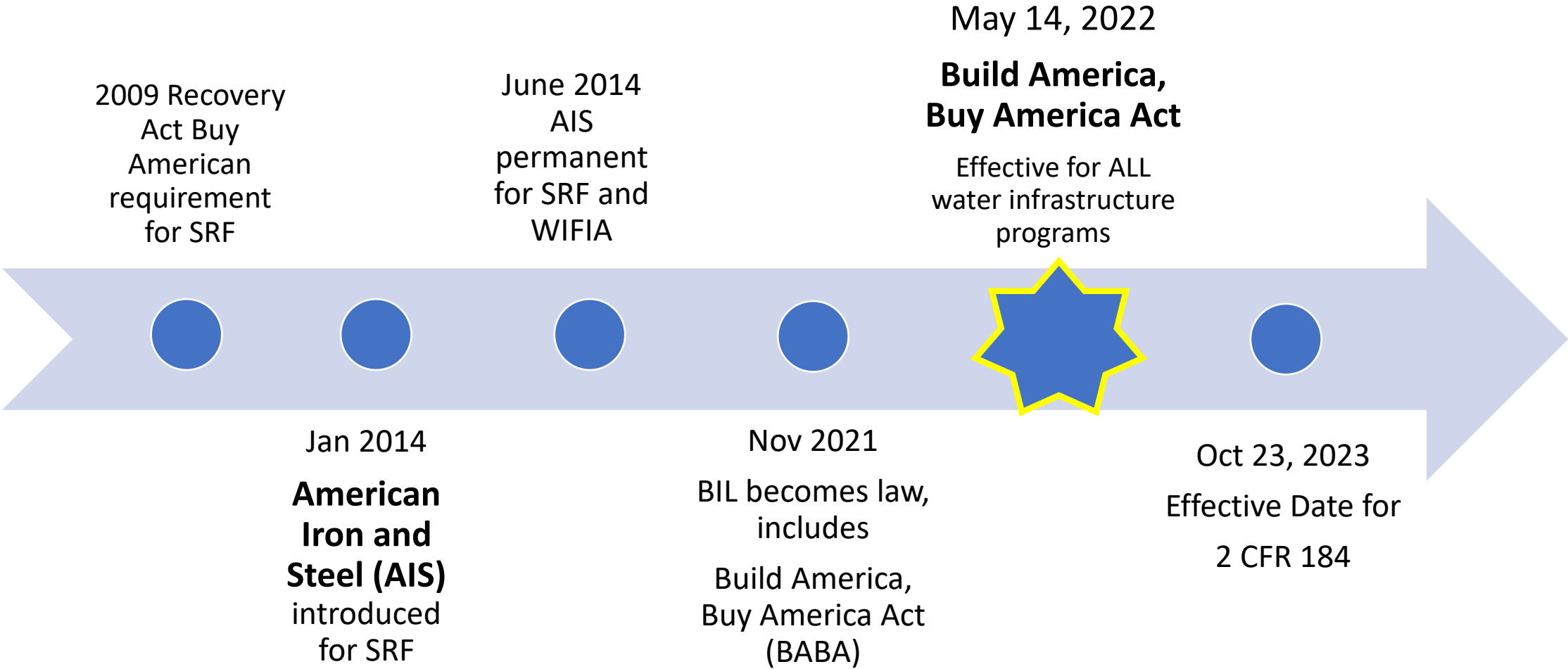
Clean Water
State Revolving Fund



DOMESTIC PREFERENCE REQUIREMENTS UPDATE FEDERAL FINANCIAL ASSISTANCE FOR WATER INFRASTRUCTURE

ASSOCIATED GENERAL CONTRACTORS OF AMERICA SEPTEMBER 2023

EPA WATER – DOMESTIC PREFERENCE HISTORY



AMERICAN IRON AND STEEL (AIS)

- Statutory requirements for State Revolving Fund (SRF) and Water Infrastructure Finance Innovation Act (WIFIA) programs – since January 2014
- Still applicable to many SRF and WIFIA projects
 - Will continue to apply to non-federal SRF projects
- Applies only to projects for *public water systems* (DWSRF), *treatment works* (CWSRF), and eligible WIFIA projects



BUILD AMERICA, BUY AMERICA (BABA) ACT

- Introduced in BIL (PL 117-58, Sections 70911-70917)
 - <https://www.congress.gov/117/plaws/publ58/PLAW-117publ58.pdf>
- Became effective May 14, 2022
- Applies to more than 70 EPA infrastructure assistance programs
 - ~ 20 EPA **federal** financial assistance programs provide grants and loans (direct and indirect) for water infrastructure improvement projects

BUILD AMERICA, BUY AMERICA ACT (BABA):

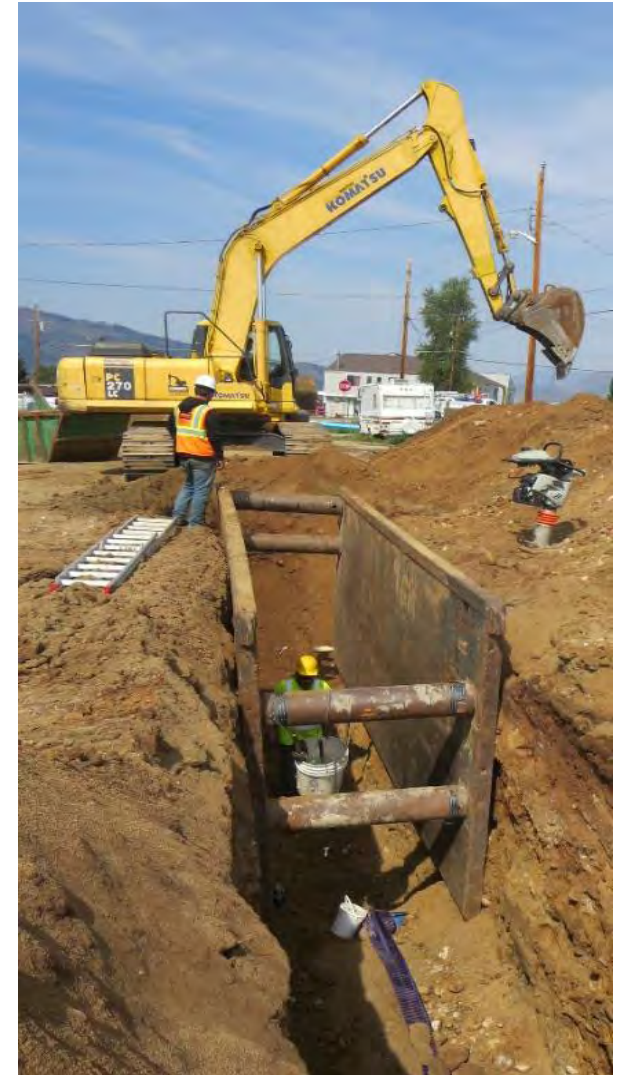
- “[N]one of the funds made available for a Federal financial assistance program for infrastructure...may be obligated for a project unless all of the **iron, steel, manufactured products, and construction materials** used in the project are **produced in the United States.**”
- Applies to **all federal** financial assistance programs for infrastructure.
- “Project” means any activity related to the construction, alteration, maintenance, or repair of infrastructure in the U.S.
- “Infrastructure” means anything fixed, permanent, and that serves the public interest.

SO, NOW WHAT? AIS + BABA?

- AIS and BABA will not apply to individual projects at same time
- BABA in effect, but did not apply to all projects immediately
 - SRF Equivalency + Design Planning and Adjustment Period waivers
- AIS continues to apply to many Public Water and Treatment Works projects underway and future SRF projects (non-federal)
- Construction Contract Bids will clearly state what requirements apply to a water infrastructure project (AIS or BABA, not both)

BABA COVERED ITEMS

- Iron and steel + manufactured products + construction materials
- Items classified into only ONE of the three categories
- Applies to items incorporated into or affixed to a project (aka permanently incorporated)
 - Similar to American Iron and Steel (AIS)
 - Scaffolding, Trench Boxes, Sheet Piling removed - Excluded



BABA: IRON AND STEEL

- Same as American Iron and Steel (AIS)
- BABA Iron and Steel \Leftrightarrow AIS products
- Items that are primarily / predominantly iron or steel, unless another standard applies under law or regulation
- All manufacturing processes, from the initial melting stage through the application of coatings, must occur in the U.S.
 - Minor difference to AIS: coatings



BABA: MANUFACTURED PRODUCTS

- Final Manufacturing in the United States
- Cost of components that are mined, produced, or manufactured in the U.S. is greater than 55 percent of the total cost of all components of the manufactured product
- Guidance provided in 2 CFR 184
 - **More on this later!**



BABA: CONSTRUCTION MATERIALS (NON-FERROUS)

- Includes:
 - **Non-ferrous** metals
 - Plastic and polymer-based products (PVC, etc.)
 - Glass
 - Optical Fiber
 - Fiber Optic Cable
 - Lumber
 - Drywall
 - Engineered Wood
- Excludes (70917(c) Materials):
 - Items made primarily of iron or steel
 - Manufactured products
 - Cement and cementitious materials
 - Aggregates such as stone, sand, or gravel
 - Aggregate binding agents / additives
 - Flora (plantings, landscaping)
 - Non-permanent / temporary items

BUILD AMERICA, BUY AMERICA: GUIDANCE W/ UPDATES



OMB INITIAL BABA GUIDANCE

- Released April 18, 2022
 - To be revised this fall (updated to M-23-xx)
- “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure”
- <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>

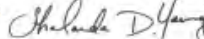


EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

April 18, 2022

M-22-11

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Shalanda D. Young 
Director

SUBJECT: Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure

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 (“the Act”). Pub. L. No. 117-58, §§ 70901-52. The Act strengthens Made in America Laws¹ and will bolster America’s industrial base, protect national security, and support high-paying jobs. The Act requires that no later than May 14, 2022—180 days after the enactment of the IIJA—the head of each covered Federal agency² shall ensure that “none of the funds made available for a Federal financial assistance program for infrastructure, including each deficient program, 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.”³

The Act affirms, consistent with Executive Order 14005, *Ensuring the Future Is Made in All of America by All of America’s Workers* (“the Executive Order”), this Administration’s priority to “use terms and conditions of Federal financial assistance awards to maximize the use of goods, products, and materials produced in, and services offered in, the United States.”⁴

The Act provides statutory authorities for the Made in America Office (“MIAO”) in the Office of Management and Budget (“OMB”) to maximize and enforce compliance with Made in

¹ “Made in America Laws” means all statutes, regulations, rules, and Executive Orders relating to Federal financial assistance awards or Federal procurement, including those that refer to “Buy America” or “Buy American,” that require, or provide a preference for, the purchase or acquisition of goods, products, or materials produced in the United States, including iron, steel, and manufactured products offered in the United States. Made in America Laws include laws requiring domestic preference for maritime transport, including the Merchant Marine Act of 1920 (Pub. L. No. 66-261), also known as the Jones Act. Exec. Order No. 14,005, 86 Fed. Reg. 7475, § 2(b) (Jan. 28, 2021), available at <https://www.federalregister.gov/documents/2021/01/28/2021-02033/ensuring-the-future-is-made-in-all-of-america-by-all-of-america-workers>. Made in America Laws also include laws that give preference to Indian-owned and -controlled businesses, such as the Buy Indian Act (25 U.S.C. 47), that produce stress in the United States.

² For the purposes of this guidance, the terms “Federal agency” and “agency” mean any authority of the United States that is an “agency” (as defined in section 3502 of title 44, United States Code), other than an independent regulatory agency (as defined in that section). IDA, § 70912(c).

³ IIJA, § 70914(a).

⁴ Exec. Order No. 14,005 (see footnote 1).

EPA OW IMPLEMENTATION MEMO

- Released November 3, 2022
- “Build America, Buy America Act Implementation Procedures for EPA Office of Water Federal Financial Assistance Programs”
- Supplemental to OMB M-22-11 guidance
- <https://www.epa.gov/system/files/documents/2022-11/OW-BABA-Implementation-Procedures-Final-November-2022.pdf>



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF WATER

November 3, 2022

MEMORANDUM

SUBJECT: Build America, Buy America Act Implementation Procedures for EPA Office of Water Federal Financial Assistance Programs

FROM: Radhika Fox
Assistant Administrator

A handwritten signature in black ink, appearing to be "Radhika Fox".

TO: EPA Regional Water Division Directors, Regions I – X
EPA Office of Water Office Directors

OVERVIEW

The Biden-Harris Administration recognized the Nation's critical need for infrastructure investment, championing the Bipartisan Infrastructure Law (BIL), which Congress passed on November 15, 2021 (also known as the Infrastructure Investment and Jobs Act (IIJA)). The BIL will provide an unprecedented level of federal investment in water and wastewater infrastructure in communities across America.

In Title IX of the IIJA, Congress passed the Build America, Buy America (BABA) Act, which establishes strong and permanent domestic sourcing requirements across all Federal financial assistance programs for infrastructure. The U.S. Environmental Protection Agency (EPA) Office of Water is honored to help lead the implementation of these provisions and is proud of its near decade of successful implementation of the American Iron and Steel (AIS) provisions for its flagship water infrastructure programs.

This is a transformational opportunity to build a resilient supply chain and manufacturing base for critical products here in the United States that will spur investment in good-paying American manufacturing jobs and businesses. 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 currently made domestically. This will take time, and flexibility will be important to ensure that EPA can leverage critical water investments on time and on budget to protect public health and improve water quality.

EPA OW BABA IMPLEMENTATION MEMO

- Section 1: General
- Section 2: Product Coverage
- Section 3: Co-funding
- Section 4: Waivers
- **Section 5: Documenting Compliance**
- Section 6: Programs with American Iron and Steel Requirements
- Section 7: Program-Specific Issues
- Appendix 1: Example BABA Construction Contract Language
- Appendix 2: Example BABA Assistance Agreement Language



HOW CAN PRODUCT COMPLIANCE BE DEMONSTRATED?

Manufacturer's documentation for the product(s) should include:

- Project identifier (name, location, contract number, or project number)
- The identity of the product(s) being supplied to the project (can be simple)
- A statement attesting that the products supplied are compliant with BABA requirements (the “certification”)
 - Certifying statement affirms knowledge of manufacturing processes and attests that the product meets BABA (noting product category)
- Location(s) of manufacturing being certified (city and state)
 - ✓ Minimum: documenting final point of manufacturing in the United States
- Signature of company representative making the certification (on company letterhead, signature can be electronic)

THE CERT LETTER HOLY GRAIL



MINAS MORGUL

Minas Morgul Steel, Inc.
1245 Barad Dur Ave.
Mordor, Middle Earth
+1 555 867 5309

Material Certification

August 29, 2017
Gondor Supply Co.
3477 One Ring Ln.
Fort Tirth, IA 50501

RE: Job Name: Saruman Contracting
Project#: Hobbiton Water Treatment Plant, The Shire, WY
Order Type: Submittal

QUANTITY	DESCRIPTION
30	8550350 66-S VLV BOX 26T 30B 1.5 WTR

Dear Valued Partner:

We hereby certify that the iron used to make the construction castings manufactured by MMS for the above referenced project is in full compliance with ASTM A48, Class 35B and AASHTO M105 for gray iron castings and ASTM A536, Grade 70-50-05 for ductile iron castings. Thank you for specifying and using products manufactured by Minas Morgul Steel, Inc.

The above listed castings are melted and manufactured 100% in the United States of America at our foundries in Moria, OK and Isengard, MI. These castings comply with the applicable provisions of the Code of Federal Regulations 23 CFR 635.410 BUY AMERICA Requirements.

We also certify that the above listed products supplied to the subject project are in full compliance with the American Iron and Steel (AIS) requirement as mandated in EPA's State Revolving Fund Programs.

Meriadoc Brandybuck
Product Quality Manager
Minas Morgul Steel, Inc.

- Key Elements:
- Project reference
 - Specific list of products
 - Location of manufacturing (city and state)
 - Signature of representative
 - Dom Pref. requirement reference (+BABA Category Reference)

OMB – FINAL GUIDANCE – 2 CFR 184

- Published August 23, 2023
- Final guidance for manufactured products component cost test, product categorization, and non-ferrous construction materials definitions
- Effective Date: October 23, 2023
- Includes definitions of manufactured products and guidance on determining the cost of components
 - Definition of “cost of components” mirrors Federal Acquisition Regulation (FAR) with some changes/differences

OMB MADE IN AMERICA – FINAL GUIDANCE HIGHLIGHTS

- OMB requested comments addressing 11 topics
 - Final guidance summarizes response to ~ 2000 comments
 - Key text of guidance begins at 88 FR 57787
- Section 184.3 - definitions of key terms, including:
 - Manufactured Product means –
 - "(1) Articles, materials, or supplies that have been:
 - (i) Processed into a specific form and shape; or
 - (ii) Combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies."

OMB MIAO – FINAL GUIDANCE HIGHLIGHTS, CONT.

- Component –
"an article, material, or supply, whether manufactured or unmanufactured, incorporated directly into: (i) a manufactured product; or, where applicable, (ii) an iron or steel product."
- Manufacturer –
"the entity that performs the final manufacturing process that produces a manufactured product."
- Produced in the United States –
"(i) The product was manufactured in the United States; and
(ii) 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."

OMB MIAO – FINAL GUIDANCE HIGHLIGHTS, CONT.

- Construction Material Clarifications:
 - Engineered wood – construction material
 - Drop cable = fiber optic cable – construction material
 - Bricks – manufactured products
 - Minor Additions – each agency decides amount allowed in "construction materials"
- Kit = a manufactured product assembled on site
 - Kits are from a manufacturer or supplier that have a unified function and are assembled on site (distinct items...not whole project)
 - Manufacturing product component test applies (55%)

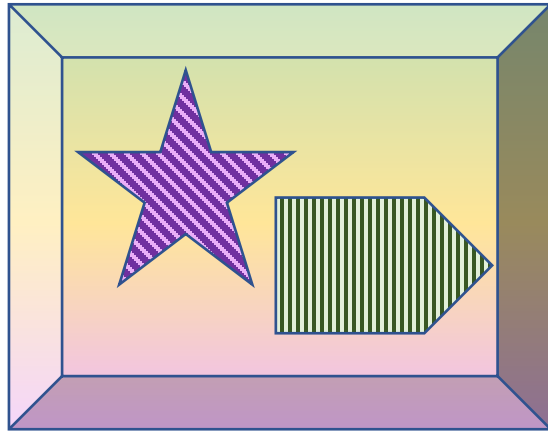
OMB MIAO – FINAL GUIDANCE HIGHLIGHTS, CONT.

§184.5 Determining the cost of components for manufactured products

- (a) For components purchased by the manufacturer, the acquisition cost, including transportation costs to the place of incorporation into the manufactured product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or
- (b) For components manufactured by the manufacturer, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (a) of this section, plus allocable overhead costs, but excluding profit. **Cost of components does not include any costs associated with the manufacture of the manufactured product.**

"Manufacturer Product" Certification

This product
meets the 55%
component test
= BABA
compliant
~ *Manufacturer C*



Five Key Elements of a Manufactured Product Certification

1. Letter on a company letterhead and signed by a company representative
2. Reference to the project
3. List of products
4. City and State of manufacturer
5. Reference to BABA
 - a) Should include "meets 55% component test" for manufactured products

RESOURCES

- Websites:
 - www.epa.gov/cwsrf/build-america-buy-america-baba
 - <https://www.madeinamerica.gov/>
- Email Inboxes:
 - BABA-OW@epa.gov (hyphen!)
 - SRF_AIS@epa.gov (underscore!)