

# Evaluation of the EPA Office of Water's Guidance to State Revolving Fund Programs for Implementing the Build America, Buy America Act Requirements

February 19, 2025 | Report No. 25-E-0016



## Report Contributors

Lindsay K. Clarke Brubaker

Gila Goldstein

Kayleigh Karlovits

Leah A. Kintner

Anthony Soto McGrath

## Abbreviations

BABA	Build America, Buy America Act
C.F.R.	Code of Federal Regulations
EPA	U.S. Environmental Protection Agency
IJJA	Infrastructure Investment and Jobs Act
OIG	Office of Inspector General
OMB	Office of Management and Budget
Pub. L.	Public Law
SRF	State Revolving Fund

## Cover Image

A municipal casting that says, "WATER USA." (EPA OIG photo)

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# At a Glance

## Evaluation of the EPA Office of Water's Guidance to State Revolving Fund Programs for Implementing the Build America, Buy America Act Requirements

### Why We Did This Evaluation

#### To accomplish this objective:

The U.S. Environmental Protection Agency Office of Inspector General conducted this evaluation to determine the sufficiency of the EPA Office of Water's guidance to the state revolving fund programs for the implementation of the Build America, Buy America Act requirements.

In November 2021, Congress enacted the Infrastructure Investment and Jobs Act, providing the EPA with over \$60 billion to invest in environmental infrastructure improvements. This Act included the Build America, Buy America Act, which requires federal agencies to ensure that all the funds used in federal financial assistance programs for infrastructure only be obligated for projects if all the iron and steel, manufactured products, and construction materials are produced in the United States.

#### To support this EPA mission-related effort:

- *Ensuring clean and safe water.*

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[List of OIG reports.](#)

### What We Found

While the Office of Water issued two memorandums on implementing the Build America, Buy America Act requirements, its guidance related to manufactured products, documenting compliance, the consequences for noncompliance, using current waivers, and applying for new waivers was not sufficient. For example, the Office of Water's guidance did not fully address how to classify an item as a manufactured product or how the amended adjustment period waiver would impact multiyear projects. Rather than issuing additional guidance to address these gaps, the Office of Water waited for the Office of Management and Budget to update its guidance for federal agencies. Without additional guidance, state revolving fund program administrators and manufacturers had concerns about complying with the Act's requirements. After the Office of Management and Budget updated its guidance in October 2023, the Office of Water shared related information with its stakeholders during a presentation. However, the Office of Water did not incorporate this information into its guidance. Insufficient guidance could hinder state revolving fund program efforts to properly plan and implement needed infrastructure projects and use Infrastructure Investment and Jobs Act funds in a timely manner.

**Insufficient guidance can hinder water infrastructure project planning and implementation and may delay the use of Infrastructure Investment and Jobs Act funds for such projects.**

### Recommendations and Planned Agency Corrective Actions

We make four recommendations to the assistant administrator for Water to develop and issue guidance related to the implementation of the Build America, Buy America Act requirements. Specifically, we recommend that the guidance address item classification, cost determination, compliance documentation, adjustment period waivers, and the waiver request process. Further, we recommend that the guidance include job aids and resources to help the state revolving fund programs implement the Act's requirements. The EPA agreed with Recommendations 1 and 4 and provided acceptable corrective actions to address these recommendations. Recommendations 1 and 4 are therefore resolved with corrective actions pending. The EPA did not agree with Recommendations 2 and 3. These recommendations remain unresolved.

### Noteworthy Achievements

The Office of Water leveraged its previous experience with domestic preference requirements to assist the Office of Management and Budget. Through its efforts, the Office of Water contributed to the development of the Office of Management and Budget's governmentwide guidance for applying the Build America, Buy America Act's domestic preference requirements to federal financial assistance programs for infrastructure projects. Additionally, the Office of Water engaged stakeholders before and after the Act became effective.



**OFFICE OF INSPECTOR GENERAL**  
U.S. ENVIRONMENTAL PROTECTION AGENCY

February 19, 2025

**MEMORANDUM**

**SUBJECT:** Evaluation of the EPA Office of Water's Guidance to State Revolving Fund Programs for Implementing the Build America, Buy America Act Requirements  
Report No. 25-E-0016

**FROM:** Nicole N. Murley, Acting Inspector General *Nicole N. Murley*

**TO:** Benita Best-Wong, Deputy Assistant Administrator performing delegated duties as the Assistant Administrator Office of Water

This is our report on the subject evaluation conducted by the U.S. Environmental Protection Agency Office of Inspector General. The project number for this evaluation was OSRE-FY23-0096. This report contains findings that describe the problems the OIG has identified and corrective actions the OIG recommends. Final determinations on matters in this report will be made by EPA managers in accordance with established audit resolution procedures.

The Office of Water is responsible for the issues discussed in this report.

In accordance with EPA Manual 2750, your office provided acceptable planned corrective actions and estimated completion dates for Recommendations 1 and 4. These recommendations are resolved. A final response pertaining to these recommendations is not required; however, if you submit a response, it will be posted on the OIG's website, along with our memorandum commenting on your response.

**Action Required**

Recommendations 2 and 3 are unresolved. EPA Manual 2750 requires that recommendations be resolved promptly. Therefore, we request that the EPA provide us within 60 days its responses concerning specific actions in process or alternative corrective actions proposed on the recommendations. Your response will be posted on the OIG's website, along with our memorandum commenting on your response. Your response should be provided as an Adobe PDF file that complies with the requirements of section 508 of the Rehabilitation Act of 1973, as amended. The final response should not contain data that you do not want to be released to the public; if your response contains such data, you should identify the data for redaction or removal along with corresponding justification.

We will post this report to our website at [www.epaoig.gov](http://www.epaoig.gov).

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# Chapter 1

## Introduction

### Purpose

The U.S. Environmental Protection Agency Office of Inspector General initiated this evaluation to determine the sufficiency of the EPA Office of Water’s guidance to the state revolving fund, or SRF, programs for the implementation of the Build America, Buy America Act, or BABA, requirements. We refer to the Clean Water State Revolving Fund and the Drinking Water State Revolving Fund collectively as the SRF programs.

### Background

#### *The Build America, Buy America Act Requirements in the Infrastructure Investment and Jobs Act*

In November 2021, Congress enacted the Infrastructure Investment and Jobs Act, or IIJA, providing the EPA with over \$60 billion to invest in environmental infrastructure improvements.<sup>1</sup> The EPA will award most of these funds to nonfederal entities, such as states, in the form of grants, cooperative agreements, and other financial assistance for infrastructure projects. The IIJA included BABA, which requires federal agencies to ensure that all the funds used in federal financial assistance programs for infrastructure only be obligated for projects if all the iron and steel, manufactured products, and construction materials are produced in the United States.<sup>2</sup> Specifically, all:

- Iron and steel products used in infrastructure projects must be produced in the United States. Production includes the “manufacturing processes, from the initial melting stage through the application of coatings.”
- Manufactured products used in infrastructure projects must be manufactured in the United States, and “the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States [must be] greater than 55 percent of the total cost of all components of the manufactured product.”
- Construction materials used in infrastructure products must be produced in the United States. Production includes various manufacturing processes for the construction material. See Appendix A for a description of the manufacturing processes that must occur in the United States for each type of construction material.

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<sup>1</sup> Pub. L. 117-58 (2021).

<sup>2</sup> According to 2 C.F.R. § 184.4(e), an item or product should only be classified as either iron and steel, manufactured products, or construction materials.



The Office of Management and Budget, or OMB, requires federal agencies to interpret the term “infrastructure” broadly to include, at a minimum, structures, facilities, and equipment that are permanent, are fixed, and serve a public function.<sup>3</sup> For example, utilities, highways, and airports are considered infrastructure. The OMB instructed federal agencies to apply BABA to all items permanently incorporated in an infrastructure project and not to any materials that will be removed once a project is completed.

According to the director of the OMB Made in America Office, the BABA requirements “will strengthen Made in America requirements and help ensure that Federally funded infrastructure projects use American-made iron, steel, construction materials, and manufactured products.” BABA expands domestic preference requirements to all federal financial assistance for infrastructure projects, not only IJJA-funded infrastructure projects.<sup>4</sup> BABA also creates demand for domestically produced goods, which aims to help develop and grow domestic manufacturing in the United States. The IJJA required federal agencies to apply BABA’s domestic preference requirements no later than May 14, 2022, 180 days after the enactment of the IJJA.

### ***Waiving the Build America, Buy America Act Requirements***

Federal agencies may waive BABA requirements under three circumstances: when compliance with domestic preference requirements would be inconsistent with the public interest,<sup>5</sup> when certain items are not produced in the United States in sufficient quantities or of a satisfactory quality, or when the use of certain items produced in the United States will increase project costs by more than 25 percent.<sup>6</sup> The waivers fall into one of two categories: general applicability waivers or project-specific waivers. General applicability waivers may be applied to multiple projects and can be product specific or non-product specific. Unlike general applicability waivers, project-specific waivers are unique to an individual project. Figure 1 summarizes the three BABA requirements and the two categories of waivers. According to the OMB, waivers should be time limited, targeted, and conditional, meaning that waivers should have clearly defined time frames, should not be overly broad, and should stipulate specific conditions that support the intent of BABA. Additionally, federal agencies are responsible for performing due diligence, including market research, and approving or rejecting waivers.

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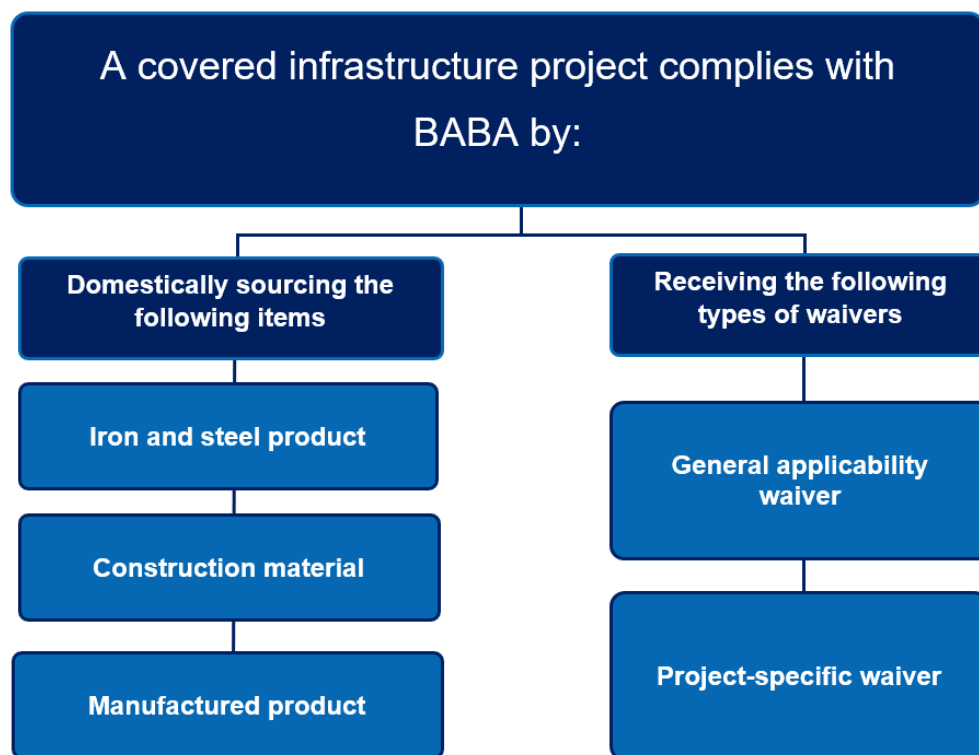
<sup>3</sup> According to section 70912(5) of the IJJA, infrastructure includes structures, facilities, and equipment for “roads, highways, bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems ... electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property.”

<sup>4</sup> Buy American and other domestic preference laws have been in effect for over 90 years. Some examples of previous domestic preference laws include the Buy American Act of 1933; Buy America Act of 1982; the Berry Amendment; the Kissell Amendment; and the Consolidated Appropriations Act of 2014, which included the American Iron and Steel requirement.

<sup>5</sup> According to OMB Memorandum M-24-02, “[a] waiver in the public interest may be appropriate where an agency determines that other important policy goals cannot be achieved consistent with the Buy America requirements established by BABA.” See Appendix B for more information.

<sup>6</sup> IJJA § 70914(b).

**Figure 1: Domestic preference requirements and waivers for BABA**



Source: OIG analysis of the IIJA BABA requirements. (EPA OIG image)

As of December 2023, the EPA had issued 11 waivers for BABA because requiring compliance was inconsistent with the public interest. These were all general applicability waivers. For example, in September 2022, the EPA issued a [waiver](#) for SRF projects that had initiated project design planning prior to May 14, 2022, the effective date of BABA. It allowed the SRF programs to use non-domestic manufactured products and construction materials in infrastructure projects. We refer to this waiver as “the adjustment period waiver.” In November 2023, the EPA amended the adjustment period waiver and made it valid only for “projects for which funding was appropriated in fiscal year 2022 (FY22) and 2023 (FY23).” The prior waiver did not include this limit on the scope of applicability. We refer to this [waiver](#) as “the amended adjustment period waiver.”

#### **Waiving the BABA requirements**

According to the EPA, it can take years to design water and wastewater treatment technologies. Therefore, the EPA found that significant financial resources and effort would be needed to reevaluate the design and feasibility of a project to comply with BABA. This could conflict with both the EPA’s and states’ interests in providing funds to eligible recipients for critical repairs and upgrades to the nation’s water infrastructure in a quick and efficient manner. As a result, the EPA may find that it is in the public’s interest to use waivers for the BABA requirements.



## ***The EPA's State Revolving Fund Programs***

The EPA provides capitalization grants to eligible state SRF programs in all 50 states and Puerto Rico.<sup>7</sup> States contribute a state match to the EPA's capitalization grants, and together the funds are deposited into the revolving fund.<sup>8</sup> Using these funds, a state SRF program provides loans to community water systems for eligible infrastructure projects. As community water systems repay their loans, the repayments and interest replenish the revolving fund to cover future eligible infrastructure projects. Given that they are federal financial assistance infrastructure programs, the SRF programs must comply with the BABA requirements. According to the EPA's March 2022 guidance, the IIJA requires that 49 percent of IIJA Drinking Water State Revolving Fund General Supplemental funding and Lead Service Line Replacement funding must be provided as forgivable loans or grants to disadvantaged communities.<sup>9</sup> The Safe Drinking Water Act defines a "disadvantaged community" to be "the service area of a public water system that meets affordability criteria established after public review and comment by the State in which the public water system is located."<sup>10</sup>

The SRF programs fund infrastructure projects that range in complexity from a water pump improvement to the construction of a new water treatment plant that requires years of planning and thousands of manufactured products, which may be made of many components. Planning can occur years before construction begins. Additionally, SRF water infrastructure projects can receive funds over multiple years. The projects can also use funds from multiple sources; this is known as co-funding. Some co-funded water infrastructure projects receive funds from multiple federal agencies, such as the EPA, the U.S. Department of Agriculture, the Federal Emergency Management Agency, and the Bureau of Reclamation. Other co-funded water infrastructure projects receive funds from multiple EPA water infrastructure programs, such as the SRF programs, Water Infrastructure Finance and Innovation Act program, Sewer Overflow and Stormwater Reuse Municipal Grants program, and Community Grants program. Co-funding can help small and disadvantaged communities because they may face difficulties in financing, operating, and maintaining infrastructure assets.

## ***The Office of Management and Budget's Statutory Authority***

As of December 2023, the OMB had released two memorandums and published guidance in the Code of Federal Regulations to help agencies implement the BABA requirements. In April 2022, nearly one month before BABA was required to go into effect, the OMB published preliminary guidance, Memorandum M-22-11, which included information on the waiver processes and how to apply the BABA requirements to infrastructure projects. This memorandum stated that federal agencies should

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<sup>7</sup> The EPA also provides direct grant funding for the District of Columbia, the U.S. Virgin Islands, American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands.

<sup>8</sup> Pursuant to applicable laws and the terms of the capitalization grants, state match requirements may vary.

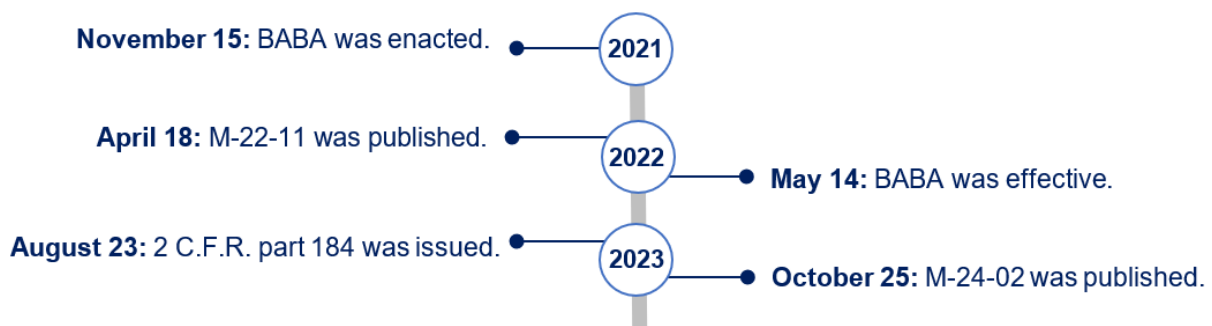
<sup>9</sup> EPA, Implementation of the Clean Water and Drinking Water State Revolving Fund Provisions of the Bipartisan Infrastructure Law (March 8, 2022).

<sup>10</sup> The Safe Drinking Water Act, 42 U.S.C. § 300j-12(d)(3).

determine how to best apply the preliminary guidance to their programs and consult with the OMB as necessary.

In August 2023, the OMB issued 2 C.F.R. part 184 to improve the consistency of BABA implementation across federal agencies.<sup>11</sup> In October 2023, the OMB rescinded Memorandum M-22-11 and replaced it with Memorandum M-24-02. Memorandum M-24-02 stated that it “removes” conflicts between Memorandum M-22-11 and 2 C.F.R. part 184, which is the OMB’s primary guidance on the BABA requirements for federal agencies. Memorandum M-24-02 also summarized information from 2 C.F.R. part 184, including definitions for manufactured products and other key terms, and updated guidance on the waiver process. Finally, Memorandum M-24-02 stated that federal agencies should develop policies and practices to ensure consistency with the OMB’s guidance. Figure 2 illustrates the evolution of statutes and guidance related to BABA.

**Figure 2: Timeline of statutes and guidance related to BABA**



Source: OIG analysis of the IIJA and OMB documents. (EPA OIG image)

### *The Office of Water’s Guidance for Implementing the BABA Requirements*

According to the [Standards for Internal Control in the Federal Government](#), a government entity should communicate information to its stakeholders so that the stakeholders can help the entity achieve its objectives.<sup>12</sup> For BABA, the Office of Water issued guidance to explain the requirements and to provide information for state SRF programs and manufacturers—two of the office’s stakeholders.<sup>13</sup> While guidance may help these stakeholders and EPA employees implement and comply with the law, guidance is not legally binding. As of December 2023, the Office of Water had released two memorandums to help state SRF programs implement the BABA requirements. In November 2022, the Office of Water released a [memorandum](#) to supplement OMB Memorandum M-22-11. The November 2022 memorandum provided implementation procedures specific to water infrastructure

<sup>11</sup> Pursuant to 2 C.F.R. § 1500.2, the EPA adopted and gave regulatory effect to 2 C.F.R. part 200—including 2 C.F.R. § 200.322(c)—and, in turn, 2 C.F.R. part 184.

<sup>12</sup> U.S. Government Accountability Office Report No. GAO-14-704G, *Standards for Internal Control in the Federal Government* (2014).

<sup>13</sup> Other stakeholders include suppliers, distributors, and contractors.

programs.<sup>14</sup> This memorandum was in a question-and-answer format and included clarifications and answers to questions from the state SRF programs and other stakeholders. In May 2023, the Office of Water released a second [memorandum](#) that answered additional questions. In addition to issuing guidance, the Office of Water presented information at industry conferences and in trainings from 2022 through 2023.

## Responsible Offices

The Office of Water works with states, tribes, and other partners to ensure safe drinking water and to restore and maintain oceans, watersheds, and other aquatic ecosystems. The Office of Ground Water and Drinking Water oversees and assists with funding for state drinking water programs, including the Drinking Water State Revolving Fund. The Office of Wastewater Management supports implementation of the Clean Water Act by overseeing the Clean Water State Revolving Fund. The EPA’s ten regional offices are responsible for executing related programs in their respective states and territories. The IIJA appropriated more than \$43 billion to the SRF programs for federal fiscal years 2022 through 2026, as summarized in Table 1. Of that \$43 billion, \$12.7 billion was appropriated to the Clean Water State Revolving Fund, and \$30.7 billion was appropriated to the Drinking Water State Revolving Fund. The EPA must ensure that the use of appropriated funds complies with the BABA requirements.

**Table 1: Summary of IIJA appropriations to SRF programs**

Appropriation	FY 2022 (\$)	FY 2023 (\$)	FY 2024 (\$)	FY 2025 (\$)	FY 2026 (\$)	Five-year total (\$)
<b>CWSRF General Supplemental</b>	1.9 billion	2.2 billion	2.4 billion	2.6 billion	2.6 billion	<b>11.7 billion</b>
<b>CWSRF Emerging Contaminants*</b>	100.0 million	225.0 million	225.0 million	225.0 million	225.0 million	<b>1.0 billion</b>
<b>DWSRF General Supplemental</b>	1.9 billion	2.2 billion	2.4 billion	2.6 billion	2.6 billion	<b>11.7 billion</b>
<b>DWSRF Emerging Contaminants</b>	800.0 million	800.0 million	800.0 million	800.0 million	800.0 million	<b>4.0 billion</b>
<b>DWSRF Lead Service Line Replacement</b>	3.0 billion	3.0 billion	3.0 billion	3.0 billion	3.0 billion	<b>15.0 billion</b>

Notes: To improve readability, we rounded the appropriations. FY = Fiscal Year. CWSRF = Clean Water State Revolving Fund. DWSRF = Drinking Water State Revolving Fund.

Source: OIG analysis of the IIJA appropriations to SRF programs. (EPA OIG table)

\* According to the [EPA](#), “[e]merging contaminants refer to substances and microorganisms, including manufactured or naturally occurring physical, chemical, biological, radiological, or nuclear materials, which are known or anticipated in the environment, that may pose newly identified or re-emerging risks to human health, aquatic life, or the environment.”

<sup>14</sup> In addition to the state SRF programs, other Office of Water programs subject to the BABA requirements include the Alaska Native Villages and Rural Communities Water Grant Program; National Estuaries Program; Reducing Lead in Drinking Water grant program; Sewer Overflow and Stormwater Reuse Municipal Grants program; and the United States-Mexico Border Water Infrastructure Program.

Many offices and stakeholders have a role in ensuring compliance with BABA. For example, the Office of Water is responsible for developing program-specific guidance as needed to implement BABA. The EPA regional offices are responsible for working with their assigned state SRF programs to ensure that appropriate BABA-related terms are in the respective SRF grant agreements. The regional offices are also responsible for oversight activities to ensure compliance with the terms of those grant agreements. The EPA regional offices also field questions and serve as a conduit between the Office of Water and state SRF programs as needed.

State SRF programs are responsible for ensuring that appropriate BABA-related terms are in the loan agreements. They are also responsible for conducting oversight of subrecipients to ensure compliance with the terms of the loans. Then, state SRF program funding recipients are responsible for maintaining forms of compliance documentation, such as a *de minimis* list and certification letters from manufacturers.<sup>15</sup> Manufacturers are responsible for issuing certification letters that indicate that products comply with BABA.

## Noteworthy Achievements

The Office of Water had a noteworthy role in the development of governmentwide guidance related to BABA and in stakeholder engagement. As an EPA office with prior experience implementing domestic preference requirements across financial assistance infrastructure programs, the Office of Water assisted the OMB by providing feedback on draft guidance, participating in a weekly interagency workgroup, and sharing resources and best practices. The Agency's participation contributed to the development of Memorandum M-24-02, 2 C.F.R. part 184, and 2 C.F.R. § 200.322. Additionally, the Office of Water began engaging stakeholders before BABA became effective, demonstrating its understanding of the importance of stakeholder involvement in implementing BABA. The Office of Water continued to engage stakeholders through various outreach efforts, such as presentations at North America's largest annual water quality exhibition and at an association conference at which the office conducted a question-and-answer session with the audience.

## Scope and Methodology

We conducted this evaluation from August 2023 through November 2024 in accordance with the *Quality Standards for Inspection and Evaluation* published in December 2020 by the Council of the Inspectors General on Integrity and Efficiency. Those standards require that we perform the evaluation to obtain sufficient and appropriate evidence to support our findings.

We collected and analyzed documents and other information related to BABA as of December 2023. This included the BABA section of the IJA; OMB Memorandums M-22-11 and M-24-02; EPA webinars;

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<sup>15</sup> The concept of *de minimis* acknowledges the importance of reducing the administrative burden to potential assistance recipients where the costs of compliance could hinder the efficient use of limited resources. Therefore, federal agencies may issue *de minimis* public interest waivers up to a value threshold, such as five percent of applicable project costs. If a recipient is using a *de minimis* waiver, it may need to maintain a list or track costs to ensure that it is below the *de minimis* cost threshold.

and other EPA resources, such as memorandums on the Office of Water’s website. We also reviewed various reports and documents, such as the U.S. Government Accountability Office’s [\*Standards for Internal Control in the Federal Government\*](#), for additional context. For this evaluation, we considered the following Office of Water *Implementation Procedures* memorandums as guidance:

- [\*Build America, Buy America Act Implementation Procedures for EPA Office of Water Federal Financial Assistance Programs\*](#), issued in November 2022.
- [\*Supplemental Questions and Answers for Build America, Buy America Act Implementation Procedures for Office of Water Federal Financial Assistance Programs\*](#), issued in May 2023.

We also interviewed administrators in nine selected state SRF programs, employees in the seven EPA regional offices that oversee those state SRF programs, and employees in the Office of Water. We conducted the interviews to better understand the Office of Water’s guidance and how the Office of Water responded to state SRF program questions and concerns. See Appendix C for more details on how we selected state SRF programs and analyzed the information we collected.

## Prior Reports

As of June 2024, there were seven EPA OIG oversight reports related to the EPA’s guidance to state SRF programs, BABA, or both.

In 2024, the OIG published Report No. [\*24-N-0047\*](#), *Management Implication Report: Clean Water State Revolving Fund American Iron and Steel Requirement*. In this report, the OIG identified ambiguity related to American Iron and Steel requirements for polyvinylchloride components used in Clean Water State Revolving Fund projects. The OIG notified the Agency of the concern so that the Agency could take steps, as appropriate, to include updating the March 2014 memorandum to provide guidance for the implementation of American Iron and Steel requirements when polyvinylchloride is used in a manufactured product.

In 2024, the OIG published Report No. [\*24-E-0042\*](#), *New Mexico’s Capacity to Effectively Manage Clean Water Infrastructure Funds Faces Challenges*. In this report, New Mexico Environment Department staff told the OIG that they had received limited guidance from the EPA on federal requirements in the IIJA, such as BABA. The OIG recommended that the regional administrator for Region 6 provide training on grant requirements enacted with the passage of the IIJA. The EPA proposed providing training on BABA. The OIG considered this recommendation resolved.

In 2024, the OIG published Report No. [\*24-N-0037\*](#), *The EPA Does Not Always Track the Use of Build America, Buy America Act Waivers for Infrastructure Projects*. This report said that the EPA only tracked the use of one of the 11 waivers that it issued. As a result, the Agency was unable to provide the number of award recipients using general applicability waivers and project-specific waivers. Further, the Agency did not have a method in place to track this information. Although the EPA developed a dashboard to track approved waivers, it did not show which or how many projects or award recipients used each waiver. With over \$60 billion in IIJA projects potentially subject to the BABA requirements, the OIG

recommended that the Agency develop and implement a method to track all waivers across EPA-funded infrastructure projects. The EPA agreed with the recommendation, and the OIG considered this recommendation resolved.

In 2024, the OIG published Report No. [24-P-0028](#), *The EPA Should Improve Annual Reviews to Protect Infrastructure Investment and Jobs Act Grants to Clean Water State Revolving Funds*. This report found that the Office of Water's annual review guidance on Clean Water State Revolving Fund audit requirements was inconsistent with program regulations. The OIG recommended that the Office of Water update the annual review guidance. The EPA agreed with the recommendation, and the OIG considered the recommendation resolved.

In 2024, the OIG published Report No. [24-E-0022](#), *Perspectives on Capacity: Managing Drinking Water State Revolving Fund Infrastructure Investment and Jobs Act Funding*. In this report, drinking water state SRF program administrators said that insufficient federal guidance on BABA was an obstacle. Administrators reported obstacles with ensuring that staff were fully trained to meet the BABA requirements and with not receiving clear or timely guidance on how to determine whether manufactured products and construction materials were made in the United States. The OIG concluded that the EPA should address the state SRF program administrators' desire for additional guidance as an opportunity for improvement.

In 2023, the OIG published Report No. [23-P-0022](#), *The EPA Could Improve Its Review of Drinking Water State Revolving Fund Programs to Help States Assist Disadvantaged Communities*. This report identified five barriers that contributed to state Drinking Water State Revolving Fund programs not consistently meeting loan subsidy requirements, including inadequate oversight by the EPA regional offices. When states do not provide loan subsidies, infrastructure improvements may not occur, negatively affecting disadvantaged communities' ability to provide safe drinking water. The OIG recommended that the EPA update regional review guidance and work with states to clarify set-aside use requirements. As of July 2023, the OIG considered this recommendation resolved.

In 2022, the OIG published Report No. [23-N-0004](#), *American Recovery and Reinvestment Act Findings for Consideration in the Implementation of the Infrastructure Investment and Jobs Act*. This report developed lessons learned from 28 prior OIG reports related to the EPA's management of American Recovery and Reinvestment Act funds. Lesson one was for the EPA to ensure that federal requirements are met. Ten prior reports identified areas of noncompliance with various federal requirements, including the American Recovery and Reinvestment Act Buy American requirements. Lesson two was for the EPA to provide clear and comprehensive guidance. Nine prior reports identified challenges related to the EPA's guidance, including that the EPA did not develop and issue clear and comprehensive guidance for the SRF programs.



## Chapter 2

# The Office of Water Did Not Provide Sufficient Guidance on Manufactured Products and Compliance

Federal agencies are responsible for establishing program-specific guidance to implement BABA. Within the EPA, the Office of Water is responsible for developing this guidance for the SRF programs. While the Office of Water issued two memorandums related to BABA, its guidance related to manufactured products, documenting compliance, and consequences for noncompliance was not sufficient. Rather than issuing additional guidance, the Office of Water waited for the OMB to update its guidance for federal agencies. Without additional guidance, stakeholders did not know whether or how they could comply with the BABA requirements. After the OMB updated its guidance, the Office of Water shared related information during a presentation. However, the Office of Water had not incorporated this information into its guidance. Insufficient guidance could delay IJIA-funded water infrastructure projects or result in noncompliance with the BABA requirements.

### The Office of Water Could Improve Its Guidance on Manufactured Products

Although the Office of Water developed some guidance on manufactured products, the guidance did not fully address how to classify an item as a manufactured product or determine the cost of components for manufactured products. According to state SRF program administrators, the lack of guidance created concerns for them and for manufacturers—the entities responsible for certifying compliance with BABA. Two EPA regional offices and one state SRF program administrator expressed concerns that IJIA-funded water infrastructure projects could be delayed because stakeholders do not know how to meet the BABA requirements.

#### *The Guidance Did Not Fully Address How to Classify an Item as a Manufactured Product*

The Office of Water did not develop sufficient guidance on how to determine whether an item should be classified as a manufactured product. According to 2 C.F.R. part 184, items should be classified as iron and steel products, manufactured products, or construction materials, and items should only be classified as one of these categories.<sup>16</sup> However, there are challenges in distinguishing among these three categories and determining what counts as a manufactured product. For example, a construction material, once combined with other items during the assembly process, could become a manufactured product. Additionally, it is unclear when the manufacturer should classify an item—at the time the item is brought to the worksite for incorporation into an infrastructure project or at the time the item is produced or incorporated into a manufactured product, regardless of the location. Finally, one state SRF

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<sup>16</sup> 2 C.F.R. § 184.4(e).

program administrator anticipated challenges with determining how to classify premanufactured kits for on-site assembly.<sup>17</sup>

Guidance on how and when to classify products is important for sourcing BABA-compliant products because of the different definitions and items that could be included as a manufactured product. The Office of Water could have issued its own guidance on how to classify items as manufactured products; however, employees in the office said that they did not want to issue guidance that could conflict with the OMB's final guidance. Consequently, the Office of Water did not issue guidance, which left several EPA regional offices and state SRF program administrators with many questions. During interviews, one EPA regional office and one state SRF program administrator suggested that the Office of Water create a database to classify manufactured products and identify which products are approved for use in infrastructure projects. Another state SRF program administrator mentioned flow charts as a tool for determining whether a manufactured product was made in the United States.

**Iron and steel products, manufactured products, and construction materials**

See Appendix A for definitions of iron and steel products, manufactured products, and construction materials; the standards for determining whether these items were produced in the United States; and examples of these items and what counts as produced in the United States.

### ***The Guidance Did Not Include Instructions on How to Determine the Cost of Components in Manufactured Products***

The Office of Water did not develop guidance for determining the cost of components in manufactured products. To be considered produced in the United States, the cost of a manufactured product's components that are mined, produced, or manufactured in the United States must be at least 55 percent of the total cost of all product components. To calculate whether a manufactured product meets this threshold, a manufacturer must determine both the cost of the components manufactured in the United States and the cost of the components not manufactured in the United States. However, determining the cost of each product is a complex process. For example, component cost may include overhead and transportation, among other costs. However, guidance did not describe which costs to include in determining the total cost of all product components. Further, as one state SRF program administrator explained, a manufactured product may include components that are fully manufactured in the United States, components partly manufactured in the United States, and components that are fully manufactured outside the United States. This highlights the complexity of calculating whether 55 percent of the total product cost is from components that are mined, produced, or manufactured in the United States.

To aid state SRF program administrators in determining the cost of components, one state SRF program administrator suggested price estimators. Additionally, one state SRF program administrator wanted examples and "cheat sheets," like those developed for the American Iron and Steel requirements, with

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<sup>17</sup> According to the Office of Water, kits from a manufacturer or supplier have a unified function and are assembled at a construction site.

all the requirements for determining the cost of components in manufactured products. During interviews, one EPA regional office said that it was eager for tools to assist the state SRF programs.

However, neither the OMB's initial guidance nor the Office of Water's guidance included instructions for determining the cost of components in manufactured products. The Office of Water did not issue this guidance, as the Agency waited for the OMB to update its guidance for federal agencies. Consequently, state SRF program administrators did not know how to calculate the cost of components. One state SRF program administrator explained that contractors may talk to manufacturers to estimate the cost of a compliant product when preparing a bid. If manufacturers are unsure whether the products would be BABA-compliant, the manufacturer may not be able to provide the contractor with the needed information to develop a bid. According to an EPA regional office, contractors may not bid for projects if manufacturers cannot determine the cost of components and are unsure whether the products would be BABA-compliant or waiver-eligible.

## **The Office of Water Could Also Improve Its Guidance for Documenting Compliance and the Consequences for Noncompliance**

Although the Office of Water developed guidance on oversight responsibilities, the guidance did not include sufficient requirements for documenting compliance and the consequences for noncompliance. This created concerns among state SRF program administrators about higher rates of noncompliance, especially during the early implementation stages of BABA when stakeholders were learning how to comply with the new requirements.

### ***The Guidance Did Not Include Sufficient Requirements for Documenting Compliance of Manufactured Products and Construction Materials***

The Office of Water's guidance did not include sufficient requirements for documenting that manufactured products and construction materials comply with BABA. Guidance should define oversight responsibilities and documentation requirements. However, the guidance did not clearly specify what information state SRF program administrators should look for to determine whether the manufacturer's certification letter was adequate. The Office of Water did not include this information in guidance because the Agency waited for the OMB to update its guidance for federal agencies. Consequently, two state SRF program administrators reported that they did not know how to document compliance for manufactured products and construction materials. Several other state SRF program administrators questioned the certification process. For example, one administrator asked whether manufacturers should certify every component of a manufactured product or provide an overall statement of certification.

To help state SRF programs document and track compliance, three state SRF program administrators and one EPA regional office suggested that the Office of Water develop sample certification letters like the certification letters under the American Iron and Steel requirements. Two state SRF program administrators compared BABA to the American Iron and Steel requirements and looked for resources like those provided to facilitate compliance with the American Iron and Steel requirements. One of

these state SRF program administrators suggested that the Office of Water develop tracking sheets that state SRF programs could use for documenting compliance.

One state SRF program administrator noted that unclear guidance is further complicated by federal agencies that may have different compliance documentation requirements. For example, this state SRF program administrator and an Office of Water employee said that the U.S. Department of Agriculture accepts affidavits to document compliance. The same Office of Water employee anticipated that the different requirements would create a challenge for projects that receive funding from multiple federal agencies. One EPA regional office emphasized that some small municipalities struggle to comply with common federal financial assistance requirements, such as submitting two years of financial statement audits. This regional office said that without guidance on how to document compliance, it foresaw roadblocks with these municipalities abiding by BABA's procurement rules. Infrastructure projects could have hundreds of manufactured products with thousands of components and subcomponents, such as pumps, valve actuators, and treatment equipment systems, that need to demonstrate compliance with BABA, underscoring the need for clear and coordinated guidance.

Two EPA regional offices and one state SRF program administrator emphasized that one of the best ways to avoid noncompliance is to "understand how to comply" in the first place. During interviews, several EPA regional offices and state SRF program administrators noted that it was important to issue guidance early. Early guidance empowers stakeholders to comply with the requirements. However, a state SRF program administrator said that the Office of Water's guidance on certification letters used language that was too vague, which caused confusion about what documents would be accepted. Another state SRF program administrator said that, to be helpful, guidance should include real-world scenarios. During a webinar on how to document compliance for manufactured products and construction materials, Office of Water employees that were responsible for working on domestic preference requirements shared information with EPA regional offices and state SRF programs. They explained that documenting manufactured products' and construction materials' compliance with BABA would be similar to documenting compliance with the American Iron and Steel requirements. An Office of Water employee expected that these similarities would facilitate compliance with BABA, but that employee also recognized there may be higher rates of noncompliance because BABA has new requirements. As of December 2023, the information from the Office of Water's webinar had not been incorporated into its guidance.

### ***The Guidance Did Not Include Sufficient Detail on Applying Consequences for Noncompliance***

The Office of Water's guidance did not include sufficient detail on the potential consequences for noncompliance with the BABA requirements, including when and how to take action in the event of noncompliance. EPA regional employees and state SRF program administrators said that they did not understand their options for remedying noncompliance with the BABA requirements. While the Office of Water's guidance included sample assistance agreement language with potential consequences for noncompliance, such as repayment and termination, the guidance provided no other context for how and when consequences should be implemented.

Consequently, several EPA regional offices and state SRF program administrators said that they did not understand their options for remedying noncompliance. For example, one state SRF program administrator and one EPA regional office said that they were not aware of the consequences that may be imposed if a product was inappropriately installed in a project. This SRF program administrator said that it was unclear whether the noncompliant product should be removed or whether there are other remedies, such as assessing a fine or issuing a warning. Based on their experience with prior domestic preference requirements, two EPA regional offices suggested that recipients return the funds used for the noncompliant product to the EPA. However, BABA does not allow for partial payment, meaning that recipients could not simply return part of the funds that they received.

Several state SRF program administrators and EPA regional employees stressed the importance of having early guidance. One EPA regional office recalled the initial struggle with determining what to do when noncompliant materials were used in the context of the American Recovery and Reinvestment Act—another Act with domestic preference requirements. This regional office stressed that it is important to educate EPA employees and stakeholders up front on how to comply with and oversee the requirements so that there are fewer instances of noncompliance and, therefore, fewer challenges with enforcing the consequences for noncompliance. The Office of Water’s guidance did not describe a process to follow after identifying noncompliance and did not describe the available remedies or factors to consider when determining whether a given remedy is appropriate. As a result, EPA regional offices and state SRF program administrators may not know how to respond to noncompliance with the BABA requirements.

## Recommendations

We recommend that the assistant administrator for Water:

1. Develop and issue guidance that clarifies how to determine whether an item should be classified as a manufactured product and how to determine the cost of manufactured product components. The guidance should include other resources, such as job aids, examples, or flow charts.
2. Develop and issue guidance for documenting compliance with the Build America, Buy America Act requirements. The guidance should provide more detail on the potential consequences for noncompliance and include real-world scenarios and other job aids or resources.

## Agency Response and OIG Assessment

Appendix D includes the Agency’s response to our draft report. The Office of Water provided separate technical comments, which we used to update the report where appropriate.

In its response, the Office of Water asserted that we mischaracterized its *Implementation Procedures* memorandums as “guidance.” However, one important criterion we used for guidance was the Agency’s own definition of guidance. The Agency’s [website](#) states that the “EPA works to inform and educate the public about its policies and activities. This includes issuing materials that could be broadly considered

‘guidance’ such as interpretive memoranda, policy statements, manuals, bulletins, and advisories.” Using this definition, we determined that the Office of Water’s *Implementation Procedures* memorandums are guidance to help stakeholders implement BABA and that it is the Office of Water’s responsibility to issue program-specific guidance for use by the state SRF programs. This conclusion is supported by one of the Office of Water’s *Implementation Procedures* memorandums, which states that “[t]he following questions and answers serve to supplement OMB Guidance M-22-11 with implementation procedures specific to EPA’s relevant water infrastructure programs.” In its response, the Office of Water acknowledged that its *Implementation Procedures* memorandums may need to be revised to align with the most recent OMB guidance. Updating the *Implementation Procedures* memorandums would meet the intent of our recommendations.

The Agency also asserted that “most stakeholders are simply seeking confirmation of what the OMB wrote in (or excluded from) their extensive guidance” and that stakeholders want the Office of Water to “simplify and/or highlight key excerpts from the OMB guidance.” These statements contradict the testimony we collected during our interviews with EPA employees and state SRF program administrators who specifically requested guidance, including job aids, from the Office of Water.

Regarding our recommendations, the Office of Water agreed with Recommendation 1 and will update the existing *Implementation Procedures* memorandums and provide additional supplemental Questions and Answers by December 31, 2025. The proposed corrective actions and estimated completion date satisfy the intent of our recommendation. Recommendation 1 is resolved with corrective actions pending. While we agree to the Office of Water’s proposed corrective action completion date, we encourage the Office of Water to provide guidance as soon as practicable to address the immediate need for guidance for determining whether and item should be classified as a manufactured product and the cost of manufactured product components.

The Office of Water did not agree with Recommendation 2. The Office of Water said that it “already provided significant direction and resources for stakeholders” and that “additional guidance from the EPA would usurp state responsibilities and create implementation problems.” First, the evidence we collected contradicts the Office of Water’s statement that it provided sufficient direction or resources regarding compliance. As highlighted in our report, there are gaps in the detail on applying consequences for noncompliance available in the guidance. Second, we focused on the Office of Water’s oversight responsibilities of the SRF program and their role with helping ensure compliance with the BABA requirements. We are concerned that the Office of Water disagrees with Recommendation 2 but plans to continue helping states address noncompliance without documenting the potential consequences for noncompliance in guidance. As the Office of Water stated in its response to our draft report, as many as 34 programs in the Office of Water are potentially subject to the BABA requirements. This underscores the far-reaching impact that improved guidance could have, per our recommendation. Guidance that addresses common questions or concerns remains a relevant and efficient means to help stakeholders implement the BABA requirements consistently across programs. Recommendation 2 is unresolved.



# Chapter 3

## The Office of Water Did Not Provide Sufficient Guidance on Current and New Waivers

As part of its responsibility to develop guidance for the SRF programs, the Office of Water issued two memorandums related to implementing BABA. However, the guidance on using current waivers and applying for new waivers was not sufficient. In particular, state SRF program administrators expressed concerns about the scope of applicability for the amended adjustment period waiver ending with fiscal year 2023 funding and wanted guidance on how this would impact ongoing water infrastructure projects. Several state SRF program administrators also had concerns regarding how much time it would take to apply for and receive a new waiver. Rather than issuing guidance on current and new waivers, the Office of Water waited for the OMB to update its guidance for federal agencies. Gaps in guidance could hinder state SRF programs from properly planning and implementing needed infrastructure projects and may delay the use of IJA funds for water infrastructure projects that start in fiscal year 2024.

### The Office of Water Could Improve Its Guidance on How to Use the Amended Adjustment Period Waiver

The Office of Water did not develop guidance that addressed how the amended adjustment period waiver would impact multiyear projects. As discussed previously, the EPA granted state SRF programs a waiver for projects that initiated design planning prior to May 14, 2022. However, administrators in five state SRF programs reported concerns regarding the adjustment period waiver, including concerns about the waiver's scope of applicability.

In November 2023, the EPA issued an amended adjustment period waiver and made it valid only for "projects for which funding was appropriated in fiscal year 2022 (FY22) and 2023 (FY23)." The prior waiver did not include this limit on the scope of applicability. Some state SRF program administrators questioned whether the adjustment period waiver would no longer be applicable in fiscal year 2024, regardless of whether multiyear projects had been completed. Another state SRF program administrator assumed that the initial adjustment period waiver would last for the life of the projects. This state SRF program administrator reported being shocked after learning that the adjustment period waiver could end and said that the EPA would make "liars" of the program administrators because they told their stakeholders that the waivers would be in effect for the life of the project if the project was planned before the May 14, 2022 effective date. As of December 2023, the Office of Water had not issued guidance on how the adjustment period waiver would impact multiyear projects. Lack of guidance on the adjustment period waiver's scope of applicability causes confusion and may impact state SRF program administrators' ability to properly plan for project implementation.

## The Office of Water Could Improve Its Guidance on Applying for New Waivers

The Office of Water's guidance did not include information on the OMB's review of new waiver requests or clearly communicate when to apply for a waiver. At the time of our review, most state SRF programs that we interviewed were eligible for the adjustment period waiver for projects that were underway, but they expected to need other waivers once projects were no longer eligible for the adjustment period waiver as some manufactured products are not produced in the United States. Without clear guidance, state SRF program administrators did not know when to apply for a waiver or how long the waiver application process would take. State SRF program administrators expressed concerns about how lengthy processes and uncertainty could affect their projects, and they requested job aids to explain and facilitate the waiver request process.

### *The Guidance Did Not Mention the OMB's Review of Waiver Requests*

Although federal agencies are responsible for approving waiver requests within their programs, agencies must consult with the OMB for proposed waivers with broader applicability prior to posting the proposed waiver for public comment. In addition, agencies must submit proposed waivers to the OMB before they are issued.<sup>18</sup> However, the Office of Water's guidance did not mention that the EPA would need to submit and, as applicable, consult with the OMB on its proposed waivers. As such, administrators in several state SRF programs did not know how long the waiver process would take. Two state SRF program administrators expressed a lack of confidence in their ability to adhere to water infrastructure project timelines. State SRF program administrators anticipated needing product-specific waivers because the water industry still relies on products that are not produced in the United States. One administrator said that the OMB review would be "somewhat bothersome" and that it could be a challenge to spend funds within the intended time frames because of uncertainty in the waiver process timeline.

One state SRF program administrator remembered challenges obtaining a waiver for the American Iron and Steel domestic preference requirements. Although the American Iron and Steel waivers did not need OMB review, the administrator recalled that the waiver approval process was lengthy and that it delayed the project. The administrator said that water infrastructure projects that are subject to the BABA requirements may face similar challenges. The administrator highlighted the need for clear guidance on the amount of time required for proposed waivers to be reviewed and the sequence of steps to follow when applying for waivers. The Office of Water's guidance should help the state SRF programs and stakeholders forecast how much time they will need for the waiver request process.

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<sup>18</sup> OMB, Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure (2023).

### **The American Iron and Steel waiver process**

While the Office of Water, EPA regional offices, and state SRF programs have had years to implement the American Iron and Steel requirements, challenges still exist. For example, one state SRF program experienced challenges procuring a domestic product and notified the Office of Water of the issue in January 2023. According to the state SRF program, during market research, the domestic product manufacturer told the Office of Water that the product would be available in a timely manner. The state SRF program claimed that the Office of Water initially determined that the project did not qualify for a nonavailability waiver. However, the state SRF program explained that the manufacturer could not deliver the product in a timely manner and that the project engineer had to request a nonavailability waiver again. The state SRF program said that the Office of Water approved the second waiver request, yet the waiver process took over nine months and caused the project to miss its 2023 construction window.

### ***The Guidance Did Not Clearly Communicate When to Apply for a Waiver***

The Office of Water's guidance did not clearly communicate when to apply for project-specific waivers. For example, the current guidance did not explain whether and when programwide nonavailability waivers would be available for specific products that are not produced or readily available in the United States, despite the water industry using such products. State SRF program administrators did not know whether they should apply for a waiver or wait for the Office of Water to issue a waiver that applies to multiple projects. The Office of Water's guidance as of December 2023 on products that are not readily available in the United States says:

"Q4.3: If a manufactured product is not readily available domestically, will EPA provide short-term 'limited availability' product waivers?"

"A4.3: EPA will address the unavailability of domestic products through the waiver process, including potential national short-term waivers for specific products, if appropriate. To the extent practicable and with the intent to maximize domestic market and supply chain development, EPA intends to address issues of broad product unavailability with targeted, time-limited, and conditional waivers.... EPA will follow its robust and thorough product research processes ... to identify and determine those products for which proposed national/general applicability waivers may be appropriate."

The current guidance refers to the waiver process but does not make the process clear. Consequently, state SRF program administrators are left wondering when they should individually apply for a project-specific waiver and when the EPA will address product nonavailability waivers programwide.

One state SRF program administrator believed that the Office of Water was developing a list of manufactured products and construction materials that are not available domestically and that the EPA will issue a programwide waiver for these products. The program administrator said that this list and guidance on when to apply for waivers are needed as soon as possible. Contractors may be reluctant to submit competitive bids for projects if they have doubts about the availability of these waivers.

Further, state SRF program administrators said that the guidance on when to apply for waivers was inconsistent. For example, the guidance tells state SRF programs to make a “good faith” effort to design projects and solicit bids from contractors that will incorporate American-made products, but it also says that state SRF programs may request a waiver at any point in the bidding process. One state SRF program administrator described the current waiver process as a “chicken and egg” scenario in which contractors are asked to bid on projects before they know whether they can comply with the BABA requirements or whether the requirements will be waived. This administrator said that the waiver process puts the contractor in a challenging situation; the contractor can either bid on an infrastructure project without knowing whether they are going to be able to meet the requirements or not bid at all. Stakeholders could use additional guidance to clarify steps in the waiver process. During interviews, state SRF program administrators suggested job aids, such as customizable templates, tracking sheets, and examples of a completed waiver request, as useful guidance.

Without clear guidance on when to apply for waivers, the IJIA funds may not be used in a timely manner. Stakeholders and state SRF program administrators may direct more questions and requests to the Office of Water, increasing the office’s workload. The Office of Water acknowledged the potential increase in waiver workload. Additional guidance could head off the questions about the waiver process and reduce the Office of Water’s workload.

## Recommendations

We recommend that the assistant administrator for Water:

3. Develop and issue guidance that explains how the adjustment period waiver impacts multiyear projects.
4. Develop and issue clarifying guidance on the Build America, Buy America Act waiver request and determination process. The guidance should include job aids.

## Agency Response and OIG Assessment

Appendix D includes the Agency’s response to our draft report. The Office of Water provided separate technical comments, which we used to update the report where appropriate.

In its response, the Office of Water asserted that we exaggerated the challenges associated with BABA waiver requests by incorrectly conflating them with those related to a single American Iron and Steel waiver request. However, our report clearly indicates that one state SRF program administrator described challenges with obtaining an American Iron and Steel waiver and shared concerns about encountering similar challenges with obtaining a BABA waiver. The example illustrates the risk when processes remain unclear. This example is additionally relevant because state SRF program administrators and EPA employees mentioned that the American Iron and Steel processes served as a model for BABA processes. The Office of Water echoed this sentiment in its statement that it used the American Iron and Steel framework for BABA. Our identification of a single challenge with receiving a

waiver under an established program, the American Iron and Steel program, raises concerns for new programs, such as BABA, when stakeholders do not have sufficient guidance.

Regarding our recommendations, the Office of Water disagreed with Recommendation 3. In its response, the Office of Water stated that the “State Revolving Fund projects receiving funding today are likely no longer covered by the Amended Design Planning waiver, therefore some of the concerns in the draft report are outdated and no longer relevant.” Based on the use of the word “likely” in its response, the Office of Water has indicated that the issue may not be fully resolved. As reported in [OIG Report No. 24-N-0037](#), issued in May 2024, *The EPA Does Not Always Track the Use of Build America, Buy America Act Waivers for Infrastructure Projects*, the Agency did not always track the use of the waivers. Therefore, the extent to which infrastructure projects are using the waivers is unknown. Furthermore, we are concerned that the Office of Water is willing to “continue to provide individual technical assistance to affected projects that may still have concerns about the waiver and project eligibility” without using the experience and knowledge gained from instances of requested technical assistance to generate written guidance. Recommendation 3 is unresolved.

The Office of Water agreed with Recommendation 4 and will provide additional supplemental Questions and Answers and update outreach resources by December 31, 2025. The proposed corrective actions and estimated completion date satisfy the intent of our recommendation. Recommendation 4 is resolved with corrective actions pending. While we agree to the Office of Water’s proposed corrective action completion date, we encourage the Office of Water to provide guidance as soon as practicable to address the immediate need for stakeholders to understand the waiver request and determination process.

## Status of Recommendations

Rec. No.	Page No.	Recommendation	Status*	Action Official	Planned Completion Date
1	14	Develop and issue guidance that clarifies how to determine whether an item should be classified as a manufactured product and how to determine the cost of manufactured product components. The guidance should include other resources, such as job aids, examples, or flow charts.	R	Assistant Administrator for Water	12/31/25
2	14	Develop and issue guidance for documenting compliance with the Build America, Buy America Act requirements. The guidance should provide more detail on the potential consequences for noncompliance and include real-world scenarios and other job aids or resources.	U	Assistant Administrator for Water	—
3	19	Develop and issue guidance that explains how the adjustment period waiver impacts multiyear projects.	U	Assistant Administrator for Water	—
4	19	Develop and issue clarifying guidance on the Build America, Buy America Act waiver request and determination process. The guidance should include job aids.	R	Assistant Administrator for Water	12/31/25

\* C = Corrective action completed.

R = Recommendation resolved with corrective action pending.

U = Recommendation unresolved with resolution efforts in progress.



## ***Details on Iron and Steel Products, Manufactured Products, and Construction Materials***

BABA required the OMB to issue standards to define the term “all manufacturing processes” no later than 180 days after the enactment of BABA. The OMB issued initial guidance before the deadline. However, the OMB did not issue the final guidance on manufactured products until over a year past the deadline when it published [2 C.F.R. part 184](#), Buy America Preferences for Infrastructure Projects. In the final guidance, the OMB defined iron and steel products, manufactured products, and construction materials, as well as standards for how such products are determined to be produced in the United States. That information is below:

***Iron or steel products*** are “articles, materials, or supplies that consist wholly or predominantly of iron or steel or a combination of both.”



Source: EPA OIG image of a manhole cover in Illinois.

For example, a cast iron manhole cover is considered an iron or steel product. “[A]ll manufacturing processes, from the initial melting stage through the application of coatings,” must have occurred in the United States.

**Manufactured products** are:

“(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.

(2) If an item is classified as an iron or steel product, a construction material, or a section 70917(c) material under § 184.4(e) and the definitions set forth in this section, then it is not a manufactured product. However, an article, material, or supply classified as a manufactured product under § 184.4(e) and paragraph (1) of this definition may include components that are construction materials, iron or steel products, or section 70917(c) materials.”



Source: EPA OIG image of a water meter.

For example, a water meter is considered a manufactured product. The water meter must be “manufactured in the United States” and “the cost of the components of the [water meter] that are mined, produced, or manufactured in the United States [must be] greater than 55 percent of the total cost of all components of the manufactured product.”

**Construction materials** are “articles, materials, or supplies that consist of only one of the items listed” below and must be produced in the United States as defined by 2 C.F.R. § 184.6:

(i) Non-ferrous metals: “All manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly,” must occur in the United States.

(ii) Plastic and polymer-based products, including polyvinylchloride, composite building materials, and polymers used in fiber optic cables: “All manufacturing processes, from initial combination of constituent plastic or polymer-based inputs, or, where applicable, constituent composite materials, until the item is in its final form,” must occur in the United States.

(iii) Glass, including optic glass: “All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting,” must occur in the United States.

(iv) Fiber optic cable, including drop cable: “All manufacturing processes, from the initial ribboning (if applicable), through buffering, fiber stranding and jacketing,” must occur in the United States. “All manufacturing processes also include the standards for glass and optical fiber, but not for non-ferrous metals, plastic and polymer-based products, or any others.”

(v) Optical fiber: “All manufacturing processes, from the initial preform fabrication stage through the completion of the draw,” must occur in the United States.

(vi) Lumber: “All manufacturing processes, from initial debarking through treatment and planing,” must occur in the United States.

(vii) Engineered wood: “All manufacturing processes from the initial combination of constituent materials until the wood product is in its final form,” must occur in the United States.

(viii) Drywall: “All manufacturing processes, from initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels,” must occur in the United States.

For example, a polyvinylchloride pipe is considered a construction material. “All manufacturing processes, from initial combination of constituent plastic or polymer-based inputs, or, where applicable, constituent composite materials, until the item is in its final form,” must occur in the United States.



Source: EPA OIG image of a polyvinylchloride product.

## ***The Office of Management and Budget's Guidance on Waivers***

In its guidance to all federal agencies, the OMB outlined certain requirements for waivers. For example, the OMB stated that federal agencies will provide federal financial assistance recipients guidance on “the format, contents, and supporting materials” necessary to make a BABA waiver request. The OMB emphasized that the BABA waivers are meant to be “time-limited,” “targeted,” and “conditional.”<sup>19</sup> The OMB Made in America Office also required that federal agencies submit a draft of the waiver to the OMB for review before approving a waiver. The latter requirement is a new procedural step that was not required for waiving American Iron and Steel requirements.

Pursuant to Section 70914(b) of BABA and 2 C.F.R. § 184.7, a federal agency may waive the BABA requirements if the agency finds that (1) “[a]pplying the Buy America preference would be inconsistent with the public interest (a “public interest waiver”); (2) “[t]ypes of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of satisfactory quality (a “nonavailability waiver”); and (3) including “iron, steel, manufactured products, or other construction materials produced in the United States will increase the cost of the overall project by more than 25 percent (an “unreasonable cost waiver”).”<sup>20</sup>

Federal agencies have the responsibility to process and approve waiver requests. Before approving a waiver, federal agencies must make proposed waivers available to the public for review and comment for at least 15 days for project-specific waivers and 30 days for modifying or renewing general applicability waivers, which apply across multiple federal awards. Federal agencies should notify and consult with the OMB Made in America Office in advance of posting an award- or project-level proposed waiver for public comment. Second, federal agencies must conduct due diligence regarding consistency with BABA and any other applicable Buy American laws. Lastly, federal agencies must submit proposed waivers to the OMB Made in America Office after the public comment period has closed. These proposed waivers should include the waiver type; federal awarding agency organizational information; the infrastructure project description and location; the total estimated infrastructure expenditures; market research; a list of iron or steel items, manufactured products, and construction materials; and other information.

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<sup>19</sup> OMB, Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure (2023).

<sup>20</sup> *Id.*

## ***Additional Information on Scope and Methodology***

We selected nine state SRF programs that received small, medium, and large amounts of IJA funds through fiscal year 2022. We also included some state SRF programs that reported concerns regarding the Office of Water's BABA guidance in OIG Report No. [24-E-0022](#), *Perspectives on Capacity: Managing Drinking Water State Revolving Fund Infrastructure Investment and Jobs Act Funding*. Finally, we included state SRF programs from different geographic regions. Specifically, we selected programs from the West, Midwest, Northeast, and Southeast.

We interviewed administrators in the nine selected state SRF programs and employees in the seven EPA regional offices that oversee these state SRF programs. We asked open-ended questions to understand:

- The employees' familiarity with BABA.
- If and how the employees are implementing or preparing to implement the BABA requirements.
- The sufficiency of the Office of Water's guidance.
- The challenges with developing guidance.
- Further actions that the Office of Water could take to improve its guidance.

We also interviewed Office of Water employees. Further, we requested an interview with the OMB; we received written answers from the OMB through email.

### **Analysis:**

To evaluate the sufficiency of the Office of Water's guidance, we reviewed guidance and analyzed interview responses. We identified the types of guidance issued by the Office of Water, what the guidance covered, and how the Office of Water communicated with state SRF programs. During interviews with state SRF program administrators and EPA employees, we asked whether the Office of Water's guidance was sufficient for state SRF programs to implement BABA requirements. For example, we asked whether the Office of Water issued guidance in a timely manner and whether the guidance was useful to state SRF program administrators. We reviewed interview responses to identify gaps in guidance and to inform whether the Office of Water needs to provide additional support or make changes to improve its guidance. In addition, we identified the extent to which state SRF program administrators reported negative effects on their operations because of insufficient guidance, and we identified approaches that SRF programs took to overcome any insufficient guidance. Lastly, we quantified the frequently discussed topics from our interviews.

## Agency Response to the Draft Report



OFFICE OF WATER  
WASHINGTON, D.C. 20460

December 13, 2024

### MEMORANDUM

**SUBJECT:** Response to Office of Inspector General Draft Report: *The EPA Needs to Issue Additional Guidance to State Revolving Fund Programs for Implementing the Build America, Buy America Act Requirements*, OSRE-FY23-0096, November 5, 2024

**FROM:** Bruno Pigott, Principal Deputy Assistant Administrator **For:** Best-Wong, Benita

**TO:** Sean W. O'Donnell  
Inspector General

Digitally signed by Best-Wong, Benita  
Date: 2024.12.13  
21:15:34 -05'00'

Thank you for the opportunity to review and respond to the Office of Inspector General's draft report titled, *The EPA Needs to Issue Additional Guidance to State Revolving Fund Programs for Implementing the Build America, Buy America Act Requirements*, Project No. OSRE-FY23-0096, dated November 5, 2024.

The U.S. Environmental Protection Agency appreciates that the OIG acknowledged the Office of Water's noteworthy role in developing early BABA implementation assistance for its stakeholders, prior to the Office of Management and Budget's final codified guidance at 2 CFR 184, as well as OW's assistance to OMB in developing the Memorandum M-24-02. The EPA also thanks the OIG for noting our early outreach efforts. The EPA highlights in this memo how OW has provided numerous trainings since the effective date of BABA, in addition to the dozens of conference presentations and individual meetings with stakeholders. Additionally, OW continues its robust and increased outreach efforts.

However, the EPA does not concur with multiple OIG findings and statements presented in the draft report. The EPA has concerns with the overarching premise that the agency's State Revolving Fund program can issue guidance for the BABA requirements that apply to multiple federal programs, when that is the responsibility of OMB. In addition, there are several mischaracterizations and inaccuracies in the report as well as a propensity to inflate single incidents into wide-spread issues. The EPA also has

concerns that the report is outdated and no longer applicable with regards to the Amended Design Planning waiver, which no longer impacts new projects that are likely receiving fiscal year 2024 funding. Specific details about these concerns regarding information in the draft report are outlined below.

#### BABA Guidance vs Implementation Assistance

The EPA has concerns with the mischaracterization of the OW Implementation Procedures Memo as “guidance.” The federal government-wide BABA guidance was issued by and is the responsibility of OMB; therefore, OW cannot alter or change OMB’s guidance. The OIG repeatedly points out that OW did not issue further “guidance” once OMB issued their final guidance in October 2023. OW acknowledges that its implementation assistance documents (i.e., the OW Implementation Procedures Memo and supplemental Q&As) may need to be revised to align with the most recent OMB guidance. OW is evaluating this next step, while recognizing that the State Revolving Fund program must coordinate across the EPA. At present, more than 70 federal financial assistance programs in the EPA are potentially subject to the BABA requirements, with as many as 34 of those programs in OW.

Following the publication of the 2 CFR updates on August 23, 2023, OW immediately began reaching out to all relevant key stakeholders regarding the OMB guidance. Over the next several months, OW met with hundreds of manufacturers, assistance recipients, states, Regions, and other key stakeholders to assess their understanding and concerns with the OMB guidance. The EPA held webinars, listening sessions, and many meetings with stakeholders to determine their concerns and level of understanding of issues specifically relating to the manufactured products component cost test, product categorization, waiver application and processing, compliance issues, in addition to other areas of implementation relevant to the new OMB guidance. OW asserts that this extensive and important work should be reflected in the report.

An overarching conclusion that OW can draw from all these many substantive interactions after the publication of OMB’s guidance is that most stakeholders are simply seeking confirmation of what OMB wrote in (or excluded from) their extensive guidance. OW has found one of the most effective tools that it can provide is to act as a sounding board for stakeholders to ask questions and to respond by addressing these with reference to the relevant, pertinent sections of the OMB guidance. Many stakeholders (especially manufacturers) are seeking the EPA’s “guidance,” but OW is finding that actual, additional language (written or otherwise) may not be necessary. Rather, what OW observes is that stakeholders are seeking assistance from the agency to simplify and/or highlight key excerpts from the OMB guidance.

For example, many stakeholders, including most manufacturers approaching OW, read 2 CFR 184.5 and ask the EPA to confirm what is stated in 2 CFR 184.5(b). 2 CFR 184.5(b) states, “[c]ost of components does not include any costs associated with the manufacture of the manufactured product.” Many manufacturers simply want to receive confirmation that the labor and overhead of their factory operations are not included in the component cost test, unless “associated with the manufacture of [a] component,” as further stated in 2 CFR 184.5(b). Other stakeholders approach the EPA to request a review of their interpretation of 2 CFR 184 as it may apply to their specific manufacturing processes.



OW has offered this assistance to hundreds of manufacturers and many dozens have accepted OW's offer and requested direct technical assistance either through virtual discussions, in-person meetings, and/or on-site factory visits. These discussions are often unique to each manufacturer, or involve proprietary information, and therefore, would not be appropriate to include in general assistance documents. The EPA has received feedback from many stakeholders that this type of assistance is critical to the manufacturing community, and OW intends to continue with this significant and important assistance.

### Misaligned Roles and Responsibilities

The draft report mischaracterizes the responsibilities of the EPA, in addition to the authority to issue guidance as discussed above. Product categorization and compliance determination is ultimately up to the manufacturer, as it is the manufacturer's responsibility to decide whether to certify that, their products meet the component cost test for manufactured products under the BABA requirements. This determination is not at the sole discretion of the EPA, OW, or the state SRF program administrators.

OW has repeatedly referred stakeholders to the clear delineation of roles and responsibilities, the same successful framework that the EPA has used for the American Iron and Steel program for the past decade, as explained in the OW Implementation Procedures Memo. However, to provide implementation assistance, OW met with over 600 manufacturers whose products most likely fall under the BABA category of manufactured products (see outreach efforts outlined above). This effort was to help manufacturers determine whether their products meet the component cost test as described in 2 CFR 184, but it is ultimately their responsibility. In addition, to assist manufacturers, the OW Implementation Procedures Memo did identify types of water infrastructure products that would fall under the respective BABA product categories for manufactured products and iron and steel products.

Another role inaccurately attributed to the EPA is noncompliance. States, as the recipient of federal funds, are required to make certain that loan and grant recipients comply with all the requirements of the State Revolving Fund program. Beginning with American Recovery and Reinvestment Act of 2009, and through the decade long implementation of the American Iron and Steel requirement, the EPA has worked with states on a variety of noncompliance issues and will continue in this capacity for BABA. Ultimately, addressing noncompliance is largely at the discretion of the state. The EPA does not need to issue guidance on addressing noncompliance. States are responsible for making certain that all project-level State Revolving Fund requirements are followed for projects for which they provide grants or loans. OW has already provided significant information for key stakeholders on a wide range of compliance topics, including noncompliance in Section 5 of the OW Implementation Procedures Memo.

### Inflated and Unrelated Reference to American Iron and Steel

Although the draft report is primarily regarding BABA guidance, the EPA is concerned that it refers to a single, unique circumstance regarding the related but different American Iron and Steel requirement and implies it is a larger issue. The OW has had a decade long, successful implementation of the American Iron and Steel requirements and this is one of the few, if only, incidents where a project was delayed into the next construction season. The draft report does not present all the facts regarding the circumstances of this waiver (e.g., that neither the assistance recipient nor the manufacturer provided accurate and timely information for OW to process this request). Furthermore, the draft report incorrectly conflates this single waiver request into a common occurrence, which it is not.

### Amended Design Planning Waiver Applicability

State Revolving Fund projects receiving funding today are likely no longer covered by the Amended Design Planning waiver, therefore, some of the concerns in the draft report are outdated and no longer relevant. The draft report also does not acknowledge the extensive outreach that OW conducted after the waiver was amended. Immediately following the amendment of this waiver, the EPA set out to provide direct technical assistance to states and the EPA Regions. The EPA provided in-person, in-depth trainings to the EPA Regions and states which included detailed discussions, training, and case studies on proper implementation of the amended waiver. The EPA also continued providing direct, project-specific technical assistance to assistance recipients for implementation of the waiver, fielding hundreds of inquiries from the EPA Regions, states, and individual projects.

OW acknowledges that the amendment has been difficult for states and assistance recipients to implement. But, as the OIG is aware, federal agencies must consult with the OMB for proposed waivers with broader applicability (such as a general applicability waiver) before posting them for public comment (see M-24-02). Federal agencies must submit to the Made in America Office a draft of the waiver for review after the public comment period has concluded. MIAO will review the draft waiver to determine if it is consistent with applicable law and policy and then will notify the federal agency of its determination. In this instance, MIAO required the EPA to narrow the waiver by fiscal year funding during this review process. However, to address issues with the amended Design Planning waiver, OW has worked extensively with multiple states and with MIAO to find resolution for projects that were adversely affected by the amended waiver, including pursuing project based public interest waivers.

OW agrees with Recommendations 1 and 4 and is providing suggested corrective actions for your consideration. However, OW disagrees with Recommendations 2 and 3. The EPA has attached extensive technical comments on the draft report.

### **AGENCY RESPONSE TO RECOMMENDATIONS**

OIG Recommendation 1: Develop and issue guidance that clarifies how to determine whether an item should be classified as a manufactured product and how to determine the cost of manufactured product components. The guidance should include other resources, such as job aids, examples, or flow charts.

#### EPA Response to Recommendation 1 – Agree

OW agrees to provide further implementation assistance and resources to reflect the definition of manufactured products and the component cost test, as included in 2 CFR 184, and include job aids.

#### Proposed Corrective Actions

1. The EPA will update the existing OW Implementation Memo by December 31, 2025.
2. The EPA will provide additional supplemental Q&As by December 31, 2025.

OIG Recommendation 2: Develop and issue guidance for documenting compliance with the Build America, Buy America Act requirements. The guidance should provide more detail on the potential consequences for noncompliance and include real world scenarios and other job aids or resources.

#### EPA Response to Recommendation 2 - Disagree

OW has already provided significant direction and resources for stakeholders regarding compliance in Section 5 of the OW Implementation Procedures Memo. Additional guidance from the EPA would usurp state responsibilities and create implementation problems. As previously noted, states are responsible for making certain that all project-level State Revolving Fund requirements are followed for projects for which they provide grants or loans. OW will continue to work with states in an advisory capacity to assist them with addressing situations of non-compliance.

OIG Recommendation 3: Develop and issue guidance that explains how the adjustment period waiver impacts multiyear projects.

#### EPA Response to Recommendation 3 – Disagree

OW has already provided extensive outreach, training, and direct assistance to regions, states, and assistance recipients on implementation of the amended adjustment period waiver. OW will continue to provide individual technical assistance to affected projects that may still have concerns about the waiver and project eligibility. These projects are often unique situations and therefore, it would not be appropriate to develop and issue guidance.

OIG Recommendation 4: Develop and issue clarifying guidance on the Build America, Buy America Act waiver request and determination process. The guidance should include job aids.

#### EPA Response to Recommendation 4 – Agree

OW agrees to provide further implementation assistance and resources to clarify the waiver request process, including job aids.

#### Proposed Corrective Actions

1. The EPA will provide additional supplemental Q&As by December 31, 2025.

2. The EPA will update outreach resources (such as trainings and presentations) by December 31, 2025.

Thank you for highlighting these important concerns in your draft report. We look forward to working together to maintain these programs' records of success. If you have any questions or would like to discuss this response in greater detail, please contact me or your staff may contact the Office of Water's Audit Follow-Up Coordinator, Carla Hagerman, at [Hagerman.Carla@epa.gov](mailto:Hagerman.Carla@epa.gov).

#### ATTACHMENT

1. Technical comments on OIG Draft Report, OSRE-FY23-0096

cc: Charles Brunton, OIG  
Paul Bergstrand, OIG  
Erin Barnes-Weaver, OIG  
Lindsay Clarke Brubaker, OIG  
Kayleigh Karlovits, OIG  
Benita Best-Wong, OW/DAA  
Macara Lousberg, OW/IO  
Janita Aguirre, OW/IO  
Nancy Grantham, OW/IO  
Carla Hagerman, OW AFC  
Jennifer McLain, OW/OGWDW  
Yu-Ting Guilaran, OW/OGWDW  
Andrew Sawyers, OW/OWM  
Wynne Miller, OW/OWM  
Anita Thompkins, OW/OGWDW  
Michael Plastino, OW/OGWDW  
Raffael Stein OW/OWM  
Veronica Blette OW/OWM  
Kiri Anderer, OW/OGWDW  
Karen Wirth, OW/OGWDW  
Michael Deane OW/OWM  
Katherine Stebe, OW/OWM  
Faisal Amin, OCFO  
Sue Perkins, OCFO  
Andrew LeBlanc, OCFO

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## Whistleblower Protection

U.S. Environmental Protection Agency

*The whistleblower protection coordinator's role is to educate Agency employees about prohibitions against retaliation for protected disclosures and the rights and remedies against retaliation. For more information, please visit the OIG's whistleblower protection [webpage](#).*

### Contact us:



**Congressional Inquiries:** [OIG.CongressionalAffairs@epa.gov](mailto:OIG.CongressionalAffairs@epa.gov)



**Media Inquiries:** [OIG.PublicAffairs@epa.gov](mailto:OIG.PublicAffairs@epa.gov)



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