

Public Interest General Applicability Waiver from Application of Section 70914(a) of the Build America, Buy America Act to the RESTORE Act, Direct Component Infrastructure Projects That Were in the Funding Pipeline by May 14, 2022

AGENCY: U.S. Department of the Treasury

ACTION: Notice of Final Waiver

1. Summary

The Department of the Treasury (“Treasury”) hereby grants a public interest, general applicability waiver from the requirements of section 70914(a) of the Build America, Buy America Act (“BABAA”) included in the Infrastructure Investment and Jobs Act (“IIJA”), Pub. L. No. 117-58 for eligible infrastructure projects funded through the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act (“RESTORE Act”), Direct Component grants under assistance listing number 21.015, provided from the Gulf Coast Restoration Trust Fund (“Trust Fund”) and administered by the Treasury Office of Gulf Coast Restoration (the “Office”) to eligible states and local governments in the Gulf Coast Region.

This waiver covers any new obligation by Treasury of RESTORE Act, Direct Component funds on or after the effective date of the final waiver, to either (a) make new grants under the RESTORE Act, Direct Component for infrastructure projects or (b) amend existing Direct Component grants with additional funds for infrastructure projects, but only if the proposed infrastructure project in the new grant or the infrastructure project in the amendment to the existing grant was already in the eligible entity’s funding pipeline by May 14, 2022, the effective date of the Buy America Preference requirements. Treasury considers an award or amendment to be covered by this waiver, if, as of May 14, 2022, the eligible entity had already undertaken substantial public engagement as required by Treasury’s implementing regulations, related to the eligible entity’s selection and approval of that particular infrastructure activity for inclusion in the entity’s regulatory-required Multiyear Implementation Plan (MIP); the RESTORE Act, which authorized the Direct Component program established the MIP as a prerequisite for applying for a Direct Component grant. Direct Component eligible entities should have the opportunity to evaluate the cost and feasibility of implementing new domestic preference requirements and likely inform the MIP decision-making process. Therefore, Treasury finds this waiver is in the public interest for activities included in the Direct Component funding pipeline for which this opportunity was unavailable as they were selected through a public process prior to the passage of the IIJA or the determination of BABAA’s applicability to Treasury’s RESTORE Act, Direct Component program.

This waiver will remain in effect for five years from the effective date to waive the application of the Buy America Preference requirements¹. Treasury will review the waiver more frequently, as appropriate. This applies to new grants and amendments to existing grants for infrastructure projects under the Direct Component program that were in the eligible entity's funding pipeline by May 14, 2022, as described above.

2. Background

The Buy America Preference set forth in section 70914(a) of BABAA requires all iron, steel, manufactured products, and construction materials used for infrastructure projects under Federal financial assistance awards to be produced in the United States. BABAA represents a monumental change to how the nation builds its infrastructure, and Treasury understands that bringing back domestic manufacturing and advancing these objectives is in the nation's best interest.

Treasury's RESTORE Act programs were not previously subject to statutory domestic content procurement preference requirements, though Treasury has always included language in the RESTORE Act Financial Assistance Standard and Program-Specific Terms and Conditions encouraging recipients, to the greatest extent practicable, to purchase American-made equipment and products for Direct Component projects, in support of Executive Order 13788 and 2 CFR 200.322 regarding domestic preferences for procurements.

The RESTORE Act, which authorized the Direct Component program established a requirement for eligible states, counties, and parishes to first submit a MIP for Treasury's review and acceptance. The MIP is a prerequisite for receiving Direct Component funding, and any project for which the eligible entity submits a grant application must have first been included in an accepted MIP. Eligible entities may submit amendments to their MIP for Treasury's review and acceptance when they wish to add additional projects to their MIP. In any case, whether for an initial or an amended MIP, Treasury's implementing regulations at 31 CFR §§ 34.303(b)(8) and (b)(9) require entities to go through a lengthy public engagement process to select and approve projects. The length of the public engagement and activity selection process varies by entity and is expanded upon through illustrative examples in Section 4 below. There is no requirement under the RESTORE Act or Treasury's implementing regulations that directs Direct Component eligible entities to submit their MIPs or applications for Direct Component grants within a specified timeframe. As part of this public engagement process, the entity shares information about the relative estimated costs and timeline of each project with the public, as well as the projected outcomes and success metrics, so that the public can direct the entity in prioritizing projects based on need and the relative costs and benefits of the project for Gulf Coast communities. Examples of Direct Component infrastructure projects that have been selected with public input to provide for the long-term health of the ecosystems and economy of this region include building up levees and other flood protection structures; increasing the capacity of

¹ Treasury will review this waiver within five years of the date on which the waiver was issued, February 17, 2023, or sooner as appropriate, and publish in the Federal Register a determination on whether to continue or discontinue the general applicability waiver, per IJJA, § 70914(d)(1) & (2).

stormwater systems and constructing retention ponds to handle increased runoff; building workforce development centers; and constructing cultural and ecotourism sites.

Under BABAA, Treasury may waive the application of the Buy America Preference requirements in any case in which it finds that applying these requirements would be inconsistent with the public interest. Treasury believes that increasing domestic supply for infrastructure projects is in the long-term public interest; Treasury has already seen how supply chain disruptions have negatively impacted construction projects' schedules and budgets.

However, in the near term, immediate application of the BABAA requirements to infrastructure projects for which substantial regulatory-required public engagement for the eligible entity's selection and approval of infrastructure projects had already occurred on or before May 14, 2022, the effective date of the Buy America Preference requirements, is not in the public interest. The public engagement process may have resulted in the entity's selection of different projects in its MIP had the public known that statutory Buy America Preference requirements would apply and could potentially result in project delays, cost increases, or different design considerations. As projects funded under the Direct Component program have not previously been required to use products or materials produced in the United States, Treasury finds this waiver is necessary so that the MIP decision-making process may be informed by these new domestic content procurement preference requirements, which was not possible for activities selected by the public prior to the passage of the IJA or the determination of BABAA's applicability to Treasury's RESTORE Act, Direct Component program.

For more information on Treasury's application of the Buy America Preference to the RESTORE Act, Direct Component program, please visit the [RESTORE Act – Buy America Preference](#) website.

3. Description of the Program

On April 20, 2010, an explosion on the Deepwater Horizon oil rig drilling in the Gulf of Mexico caused the largest offshore oil spill in the United States, exacerbating the effects of previous natural disasters. Before the well was capped, millions of barrels of crude oil were released, closing tens of thousands of square miles of Gulf of Mexico waters to fishing and causing extensive damage to marine and wildlife habitats, and tourism.

On July 6, 2012, the President signed into law the RESTORE Act that established the Trust Fund. The RESTORE Act authorized five grant programs to fund programs, projects, and activities that restore and protect the environment and economy of the Gulf Coast region with funds from the Trust Fund. The Office administers two of the five grant programs, the Direct Component and Centers of Excellence Research Grants Programs. The Trust Fund is funded by the administrative and civil penalties paid by the responsible parties for the Deepwater Horizon oil spill pursuant to a court order, negotiated settlement, or other instrument under section 311 of the Federal Water Pollution Control Act. The final payment to the Trust Fund is expected to be deposited in 2031.

The Direct Component makes its 35 percent allocation of the funds from the Trust Fund available to four Gulf Coast states, 23 Florida counties, and 20 Louisiana parishes. Grant recipients under the Direct Component must comply with the RESTORE Act, Treasury’s implementing regulations at 31 CFR Part 34, other applicable executive orders, statutes, regulations, Treasury’s grant policies, and the terms and conditions of their grant agreements. Activities, programs, and projects that are eligible for funding under Direct Component grants include 11 eligible activities, including infrastructure projects benefitting the economy or ecological resources. As of October 1, 2022, of the gross allocations available in the Trust Fund for the Direct Component, more than \$ 460 million has been obligated for Direct Component grants and approximately \$454 million of net allocations are available. The Estimated Trust Fund Gross Allocations Cumulative by the date of final deposit (in 2031) is estimated to be \$1.86 billion. Since the first deposit was made to the Trust Fund in 2015, the Office has obligated funds for more than 170 grants under the Direct Component. Of the total awards made to date under the Direct Component, more than one hundred were made for construction activities, including for “infrastructure” as defined in BABAA. Infrastructure awards range between grants as small as \$35K to make improvements to a Florida County’s chamber of commerce building, to roughly \$30M awarded to a state for upgrades to their port facilities. Roughly fifty percent of all obligations are for award amounts less than \$500,000.

Under the RESTORE Act, as a prerequisite for receiving Direct Component funding, eligible states, counties, and parishes must “develop and submit a multiyear implementation plan for the use of such amounts, which may include milestones, projected completion of each activity, and a mechanism to evaluate the success of each activity in helping to restore and protect the Gulf Coast region impacted by the Deepwater Horizon oil spill (section 311(t)(1)(E)(iv) of the Federal Water Pollution Control Act (31 U.S.C. 1321(t)(1)(E)(iv)).” Under Treasury’s implementing regulations at 31 CFR §§ 34.303, this multiyear implementation plan (the “MIP”) must be the culmination of an extensive, broad-based public engagement process to select and approve projects for Treasury’s acceptance (see 31 CFR 34.303(a) and (b)). The MIP describes each “activity” (i.e., project) for which the entity seeks funding under the Direct Component and includes at a minimum, the project budget, milestones, estimated completion date, the status of any cost share from other sources, the activity description and site location, outcomes, and success metrics. An entity must make its initial or amended MIP available for “public review and comment for a minimum of 45 days in a manner calculated to obtain broad-based participation from individuals, businesses, Indian tribes, and non-profit organizations” and demonstrate that “each activity in the plan was approved after consideration of meaningful input from the public” (31 CFR §§ 34.303(b)(8) and (b)(9)). As described in greater detail in Section 5, *Waiver Justification*, most Direct Component-eligible entities go well beyond the minimum public comment requirement in order to comply with the spirit of the requirement for “broad-based participation” and to achieve public buy-in of each activity included on the MIP, as required by the law.

4. Waiver Scope

This waiver will apply to Treasury’s RESTORE Act, Direct Component projects which were already in the funding pipeline by May 14, 2022 (the effective date of the Buy America Preference requirements), as evidenced by (a) submittal of the project to Treasury in a MIP prior to May 14, 2022 (subject to subsequent Treasury acceptance of the MIP), or (b) documentation indicating that substantial regulatory-required public engagement for the eligible entity’s selection and approval of that particular infrastructure project for inclusion in the entity’s MIP had already occurred on or before May 14, 2022. As projects funded under the Direct Component have not previously been required to use products or materials produced in the United States, Treasury finds this waiver is necessary so that the MIP decision-making process may be informed by these new domestic content procurement preference requirements, which was not possible for activities selected by the public prior to the passage of the IIJA or the determination of BABAA’s applicability to the RESTORE Act Direct Component program. It is important to note that the public engagement process may have resulted in the eligible entity’s selection and approval of different projects had the public known that statutory Buy America Preference requirements would apply and could potentially result in project delays or cost increases. For purposes of this waiver, “substantial regulatory-required public engagement” means efforts made by Direct Component-eligible entities to obtain broad-based participation to select projects for inclusion in an initial or amended MIP on the basis of relevant factors such as cost, project completion date, and outcomes.

Examples of efforts to obtain broad-based participation in the project selection process include, but are not limited to, holding public meetings related to the project selection, publishing a public notice related to project selection, asking the public to ‘vote’ or submit comments via an online platform or via email or letter, or voting at a Board meeting to approve an activity for inclusion in a draft or final MIP. As documentation of these efforts, eligible entities may provide to Treasury copies of public meeting minutes, public notices, or Board resolutions; recordings or presentations from public meetings or workshops; copies of public comments received, with a date stamp or other indication of when it was received; articles in the press describing the public engagement that has occurred; or equivalent documentation.

Conditional Nature of Waiver

The waiver is conditional and only applies to new obligations by Treasury on or after the effective date of the final waiver or Direct Component grants and amendments to existing Direct Component grants for infrastructure projects which were already in the project funding pipeline by May 14, 2022, as evidenced by (a) submittal of the project to Treasury in a MIP prior to May 14, 2022 (subject to subsequent Treasury acceptance of the MIP), or (b) documentation indicating that substantial regulatory-required public engagement for the eligible entity’s selection and approval of that particular infrastructure project for inclusion in the entity’s MIP had already occurred on or before May 14, 2022. Any proposed infrastructure projects for new grants or infrastructure projects in amendment to existing grants for which Direct Component-eligible entities had not begun “substantial regulatory-required public engagement” by May 14, 2022, would not be covered by this waiver. Treasury did not obligate any funds under its Direct

Component program for infrastructure projects between January 13, 2023, and the effective date of this waiver, February 17, 2023.

5. Waiver Justification

Treasury finds that it would be inconsistent with the public interest to apply Buy America Preference requirements to projects already in the project pipeline, which have already undergone a significant public engagement process, and may have resulted in the eligible entity's selection and approval of different projects had the public known that statutory Buy America Preference requirements would apply.

As noted above, prior to May 14, 2022, eligible entities estimated all costs and project completion dates on the assumption that statutory Buy America Preference requirements do not apply to their project. It would be onerous and contrary to the public interest to have eligible entities go through the expense and effort of re-estimating these costs and redesigning their projects in light of new statutory Buy America Preference requirements.

Furthermore, requiring entities to re-start the public engagement process to take into account these new BABAA requirements would erode the public's faith in the integrity of the public comment process and could result in very substantial delays, including delays in the completion of critical infrastructure and climate resiliency projects, as described in more detail below.

Anticipated Conflict with the RESTORE Act Absent a Waiver

Failure to Grant a Waiver Would Undermine Regulatory-Required Broad-based Public Participation in the MIP Preparation Process

Activities selected by the public and approved to be eligible for Direct Component funding must undergo a robust selection and approval process. Direct Component eligible entities expend a tremendous amount of effort in ensuring broad-based public participation in the MIP preparation process prior to submitting detailed applications to Treasury for Direct Component grants. This process involves preliminary project planning and siting, cost estimations, development of selection criteria, stakeholder engagement and solicitation of public comment and consideration of public input. The MIP preparation process typically includes development of the activity scope, outcomes, costs, and schedule to evaluate alternatives; estimates of cost and project completion dates are influenced by the expected availability of supplies, materials, manufactured products, equipment, and siting options. Preparation of the MIP involves complex decisions that include legal review and evaluation of procurement alternatives.

Significantly, soliciting proposals and selecting programs, activities, and projects for inclusion in an MIP necessitates input from the public and coordination with other agencies, jurisdictions, and partners prior to approval. For example, the agency responsible for administering the program for the state of Texas conducted an 18-month competitive MIP preparation process to solicit and prioritize activities. The process involved subject matter experts from four state agencies and the Governor's office who evaluated proposals based on robust selection criteria. The state solicited and considered public input at several points in the process, including on the

priorities document used to evaluate applications; through four in-person listening sessions at locations along the coast; by soliciting applications directly from the public; during three grant submission workshops; and by posting a draft list of applications for public review and comment. Each of the seven activities selected for inclusion on Texas' MIP were evaluated against more than 200 proposals and the state agency considered over 1,400 public comments. The list was finalized after this nearly two-year process concluded, and it was at this point the state-approved MIP was submitted to Treasury for review and acceptance.

Louisiana prioritized projects for RESTORE Act, Direct Component funding that help restore the coastal ecosystem and mitigate the impacts of flooding on coastal communities and engaged in a multi-year process of vetting four critical coastal restoration and flood protection projects and programs for inclusion in the MIP. The state engaged in the process early, starting with public outreach specific to RESTORE Act, Direct Component funding in November 2012, to ensure effective governmental planning and coordination to maximize investments that provide the most benefit to Louisiana communities and ecosystems. In 2015, the State of Louisiana was the first state to have its MIP accepted by Treasury, and this MIP included the four critical ecosystem restoration and protection projects and programs. In 2015, once an alternative source of Federal funds for three of the four projects became available, the State amended its MIP, through the public process, so that all of the available RESTORE Act, Direct Component funding would be allocated to the remaining project, a single, critically-important ecosystem restoration project in Southwest Louisiana to protect a vital shipping channel, prevent the conversion of marsh to open water, and protect flood-prone communities. This ecosystem restoration project will be carried out in stages as more funding becomes available in the state's Trust Fund allocation, which will require periodically amending the award to request that additional funds be added to this critically important project needed to reduce the conversion of land to open water lowering the risk associated with sea level rise, subsidence, and tropical events along the coast will also improve the long-term economic health of the region. Retroactively applying BABAA requirements after this critical infrastructure project was selected through the public engagement process would likely cause significant delays to the project and would not be in the public interest.

As these examples illustrate, the Direct Component project pipeline begins when an entity initiates the MIP process and commits to its stakeholders that amounts from the Trust Fund will be used to pay for a proposed activity. To facilitate broad-based public engagement, Santa Rosa County, one of the Florida counties disproportionately impacted by the oil spill, established by resolution a local RESTORE council with 11 representatives that include district representatives, city administrators, and a chamber of commerce director. They led a 16-month MIP preparation process that included project priority identification, evaluation by the Council, public input discussions, and Board review and formal approval. The public was invited and encouraged to participate at every step — as evidenced by the support received from more than 170 individuals and several non-profit organizations.

As these examples illustrate, public engagement in the Direct Component funding pipeline involves carefully choreographed and interdependent processes. Imposing new legal requirements after consideration of meaningful public input could compromise eligible entities' ability to obtain broad-based participation in the future.

Failure to Grant a Waiver Could Lead to the Need for Costly Redesign of Projects Already in the Pipeline, Reducing the Impact of RESTORE Act Investments

For some projects currently in the Direct Component funding pipeline, redesign could result in increases in planning, design, and construction costs. As an example, Mississippi's MIP preparation process includes a review of the dollar amount being requested for the activity to be sure the estimate is sufficient, and it undertakes a feasibility and constructability analysis at the draft MIP stage to be sure the scope of work and proposed budget align with one another. Requiring projects that have passed a feasibility review to undergo a re-evaluation of their plans and to then require compliance with the BABAA requirements at this stage may lead to significant cost and schedule increases for priority infrastructure projects.

For projects that would require redesign due to insufficient funds to complete the full scope of work, the entities with approved permits would be required to resubmit the revised plans and specifications to the relevant local, state, or federal agencies. For example, Alabama recently experienced a significant cost overrun after the initial bid stage on an infrastructure project that had previously cleared the permitting stage but had to be re-bid due to extenuating circumstances. In the timespan of just 30 days the lowest bids increased by \$1 million, a total value of roughly 25% of the total project costs. When costs escalate by this degree, regardless of the reason, Direct Component eligible entities are left with few options, and each carry a consequence as outlined below:

1. Shrink the project to stay on-budget → *results in fewer benefits to the Gulf Coast Region*
2. Do not complete the project → *undermines the public project selection and prioritization process required under the RESTORE Act, Treasury's implementing regulations, and undermines trust in the program*
3. Obligate additional Direct Component funds to complete project as scoped → *reduces the availability of Trust Fund amounts for other projects selected through the public engagement process, and potentially resulting in some of these projects not being completed at all*
4. Recipient or subrecipient must come up with the difference → *shifts cost burden onto small entities and already economically-disadvantaged communities, pulling resources away from other critical local government priorities that cannot be funded by Federal funds*

Considering the complex calculations to prioritize, select, and complete projects, entities foresee scenarios where they have expended substantial funds for engineering and design but have insufficient Trust Fund amounts to finish the project without compromising the budgets for other activities in the Direct Component funding pipeline. This may leave entities in the difficult position where they must prioritize resources and expend their allocation from the Trust Fund in a way that reduces benefits to the Gulf Coast Region.

Failure to Grant a Waiver Could Result in Time Delays in Implementation of Critical Infrastructure and Climate Resiliency Projects

The Gulf Coast Region faces unique challenges given its vulnerability to hurricanes and extreme weather. Examples of eligible Direct Component activities that build resilience and promote

disaster preparedness include building up flood protection structures; increasing the capacity of stormwater systems and retention ponds to handle increased stormwater runoff; upgrading aging wastewater systems and replacing outdated septic tanks that are vulnerable to flooding events; and rebuilding or strengthening protective infrastructure like bulkheads that may be damaged by recent natural disasters but can play an important role in mitigating the impact of future disasters.

As described in the sections above, increased costs may require that entities scale back the scope of these critical infrastructure projects. Not only would the reduction in scope reduce their effectiveness, but redesigning projects can cause significant time delays. Under the RESTORE Act and Treasury's implementing regulations at 31 CFR 34.303(c), a material modification to a MIP is required when there is a change to the scope or size of the project that affects outcomes and/or outputs. Therefore, a reduction in project scope would require a Direct Component eligible entity to initiate an MIP amendment process: revise the project description and outcomes and re-initiate and complete the public input process, ultimately further delaying implementation by months or longer. Recently, a Direct Component-funded infrastructure project in Southwest Florida that required a minor re-scoping following the initial design and permitting stage required the County take more than six months to draft the modification to the MIP and solicit and consider meaningful input of the amended plan from the public.

Given the critical nature of Direct Component projects, and the unique vulnerability of the Gulf Coast Region, Treasury finds it is not in the public interest to further delay infrastructure projects previously selected by the public and in the Direct Component funding pipeline by having them be subject to the new BABAA requirements.

Expectation for Agency and Award Recipients at the Conclusion of the Waiver

Initially, many infrastructure projects funded by RESTORE Act, Direct Component will be covered by this waiver, because for these projects, substantial regulatory-required public engagement occurred on or before May 14, 2022. However, as time goes on, the number of infrastructure projects covered by this waiver will substantially and rapidly decrease. While it is impossible to estimate the number of awards or amendments that might be covered by this waiver--since the length of the public engagement and activity selection process varies by entity (see Section 4) and there is no requirement under the RESTORE Act or Treasury's implementing regulations that directs Direct Component eligible entities to submit their MIPs or applications for Direct Component grants within a specified timeframe—Treasury experts believe that the majority of Direct Components infrastructure projects will not be covered by this waiver after three years. Therefore, Treasury is committed to reviewing the applicability of the waiver more frequently than the five years required by the Act.

This waiver provides RESTORE Act, Direct Component eligible entities sufficient time to incorporate statutory Buy America Preference requirements into their cost estimation and feasibility and constructability analyses to inform future public engagement for the purposes of developing an MIP; as the GSA-administered database of BABAA waivers grows, eligible entities be able to draw on this knowledge base to more accurately determine the availability and cost of domestic sources for the iron, steel, manufactured goods, and construction materials

necessary for the projects under consideration for inclusion in an MIP and to better communicate to the public the opportunities, constraints, and cost implications of BABAA on potential projects.

In parallel, Treasury will work to develop technical assistance resources for Direct Component eligible entities regarding how to incorporate BABAA requirements into the public engagement and project evaluation and selection processes.

6. Solicitation of Comments

All waivers must have a written explanation for the proposed determination; provide a period of not less than 30 days for public comment on the proposed waiver; and be submitted to the Office of Management and Budget Made in America Office (MIAO) for review to determine if the waiver is consistent with applicable law and policy. Treasury has completed the required submission of the proposed waiver to MIAO for review on November 17, 2022, and the initial MIAO review was concluded on December 21, 2022.

The public notice posted on December 21, 2022, and closed on January 20, 2023, has satisfied the requirement to publish any proposed Buy America Preference waiver and provide the public with a reasonable period of time for notice and comment. The notice was posted to the [RESTORE Act - Buy America Preference website](#) and pursuant to sections 70914(c) and 70937 of the Act, the waiver was cross-posted to the centralized waiver transparency website managed by GSA, [MadeInAmerica.gov](#). Treasury received six comments from Direct Component eligible entities in support of the waiver and one non-supportive comment from a member of industry. As a result of a comment received from a Direct Component eligible state entity, the section *Waiver Scope* was modified to clarify the criteria for a project to be covered under the waiver and the associated documentation that may be submitted as evidence to Treasury that a project meets the waiver criteria. To address the concerns of the industry commentor, Treasury has added language emphasizing that the waiver will be reviewed more frequently than the five-year requirement stipulated in the Act. A complete summary and Treasury's response to comments will be made available for inspection and download at the [RESTORE Act - Buy America Preference website](#).

The MIAO Director's review of the final waiver was concluded on February 17, 2023, and the final determination concluded the waiver is consistent with the policy in E.O. 14005 and OMB Memorandum M-22-11.

Effective date of the waiver: February 17, 2023

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