

Build America, Buy America: What BABA means for your project

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DEPARTMENT FOR
LOCAL GOVERNMENT



What IS BABA?

BABA is the Build America, Buy America Act. BABA requires any “infrastructure project” funded by any “Federal Financial Assistance” (FFA) apply a domestic content procurement preference, meaning that all iron, steel, manufactured products, and construction materials used in the infrastructure project have been produced in the United States, unless the awarding agency has issued a waiver of this requirement. This is called the “Buy American Preference” (BAP).

The purpose of BABA is to bolster America’s industrial base, protect national security, and support high-paying jobs.

TIMELINE

Program	FY23 Q1	FY23 Q2	FY23 Q3	FY23 Q4	FY24 Q1	FY24 Q2	FY24 Q3	FY24 Q4	FY25 Q1
CDBG Formula Grants	● 11/15/22 Iron and steel						<i>FY24 Obligation Date (Varies) Construction materials – Specifically-Listed</i>	<i>FY25 Obligation Date (Varies) Construction materials – Not Listed Manufactured products</i>	
Healthy Homes*		● 2/22/23 Iron and steel						● 8/23/24 • All construction materials • Manufactured products	
Recovery Housing Program ("RHP") Grants				● 8/23/23 Iron and steel		<i>FY24 Obligation Date (Varies) Construction materials – Specifically-Listed</i>		<i>FY25 Obligation Date (Varies) Construction materials – Not Listed Manufactured products</i>	
All other HUD FFA**						● 2/22/24 Iron and steel		● 8/23/24 • All construction materials • Manufactured products	
HOME***								● 8/23/24 • Iron and steel • All construction materials • Manufactured products	

*Choice Neighborhood, Lead Hazard Reduction, and Healthy Homes Production Grants

**All other HUD FFA except HOME, Housing Trust Fund, and Public Housing FFA used for maintenance projects

***HOME, Housing Trust Fund, and Public Housing FFA used for maintenance projects



What's Included?

Iron & Steel

Items that consist completely or predominantly of iron, steel, or a combination of both. “Predominantly” means the cost of the iron and steel content exceeds 50% of the total cost of all the item’s components.

- All manufacturing processes, starting from the initial melting stage and continuing through the application of coatings, must occur in the United States



What's Included?

Manufactured Products

Manufactured products include articles, materials, or supplies that have either been:

- Processed into a specific form or shape, or
- Combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.

A manufactured product may include components that are construction materials or iron and steel products, unless the manufactured product also meets the definition of iron and steel or construction materials. In such instances, the product should be recategorized in the appropriate category.



What's Included?

Manufactured Products (cont.)

Manufactured products must meet two production requirements. First, the final product must be manufactured in the United States. Second, at least 55% of the cost of the components making up the manufactured product must be associated with components that were mined, produced, or manufactured in the United States.



What's Included?

Construction Materials

Articles, materials, or supplies used for construction activities that consist of only one of the items described below. For the purposes of the HUD Phased Implementation Waiver timeline described below, construction materials are divided into two categories: specifically listed construction materials and not listed construction materials.

Specifically Listed Construction Materials: Items include (1) non-ferrous metals; (2) lumber; and (3) plastic- and polymer-based composite building materials, pipe, and tube.



What's Included?

Construction Materials (cont.)

Not Listed Construction Materials: Items include (1) all other plastic- and polymer-based materials (such as polymers used in fiber optic cables), (2) glass, (3) fiber optic cable, (4) optical fiber, (5) engineered wood, and (6) drywall.

All manufacturing processes for the construction material must occur in the United States.



Can BABA Be Waived?

Yes.

When necessary, agencies may waive Build America, Buy America requirements based on nonavailability, unreasonable cost, or public interest (Project- Specific Waivers).

All waivers must be in writing, published for public comment, and approved judiciously. Waivers should also be limited to specific projects or time periods, targeted to only the products necessary, and when appropriate, conditional, to maximize the use of American-made items.

Contact DLG for questions and/or assistance.





General Waivers

Exigent Circumstances

- This public interest general waiver is effective through November 23, 2027, for projects that must be completed immediately to protect life, ensure safety, or prevent the destruction of property

Examples: A HOME-funded multi-family rental development is damaged by a burst hot water pipe in the middle of winter. Repairs to the damaged structure must be completed immediately to protect the life, safety, and property of the residents of the housing development.

Following a tornado, CDBG funds are used to repair public facilities made structurally unsound during the disaster. Stabilizing these buildings is critical to prevent further destruction of property



HUD General Waivers

De Minimis and Small Grants

- This public interest general waiver is effective through November 23, 2027, for projects whose total cost (from all sources) does not exceed the simplified acquisition threshold value (\$250,000), OR If covered BAP materials for a portion of the project comprise no more than 5 percent of the total cost of covered materials used in a project (not to exceed \$1 million), the BAP can be waived for that portion of the project.



HUD General Waivers

De Minimis and Small Grants (cont.)

Examples: A homeless service provider is rehabilitating an emergency shelter to update bathroom facilities. The provider is using \$100,000 in ESG funding for the project and a State grant is contributing an additional \$100,000. Because the total project cost does not exceed \$250,000, the BAP does not apply.

A city is using CDBG funds for construction of a playground. The total cost of materials used in the project is \$1 million. The city can source domestic materials for nearly all the items needed for the playground but cannot find a domestically produced equivalent of a particular slide. The slide costs \$20,000. Because this is less than 5% of the total cost of materials used in the project, the city can use the De Minimis Waiver to waive the BAP for the slide. The other materials used in the project still must comply with the BAP.

BABA and CDBG

The BAP will apply on or after the date HUD obligates new funds for the following:





Additional Information on BABA

❖ <https://HUD.gov/BABA>

❖ <https://DLG.KY.gov>



Questions?

If you think of something after the session,
please email me @ Christy.Ritchie@ky.gov

Build America, Buy America Act

Natalie Lile, KIA



Introduction

The Build America, Buy America Act (BABA) requires that Kentucky's Clean Water and Drinking Water State Revolving Fund Programs (SRF) that are funded in whole or in part by the federal government (and designated as "equivalency projects", if applicable), comply with domestic preference requirements for iron and steel, manufactured products and construction materials. Absent a waiver, all iron, steel, manufactured products and construction materials permanently incorporated into an infrastructure project subject to the BABA requirements must be produced in the United States.



Who does BABA apply to?

Equivalency Projects – Identified in the IUP by KIA / EEC

Lead Service Line Replacement Projects

Emerging Contaminants Projects



BABA EQUIVALENCY:

GRANT REQUIREMENTS

- BABA is a cap grant requirement and only applies to projects funded with the federal grant
- Does not apply to projects funded with state match or repayment dollars

PROGRAM REQUIREMENTS

- Applies to all SRF funded projects – no matter state, federal, or repayment source
- Examples
 - American Iron and Steel
 - MBE/WBE/DBE
 - Davis Bacon
 - SERP

BABA REQUIREMENTS:

IRON AND STEEL

- All iron and steel items used in SRF projects must be produced in the United States.
- This means all manufacturing processes, from the initial melting stage through the application of coatings, occur in the United States
- A partial list of products likely made “primarily” of iron and steel and classified as Iron and Steel under BABA can be found in the handbook.

MANUFACTURED PRODUCTS

- All manufactured products used in SRF projects are to be produced in the United States.
- This means the manufactured product was 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 is greater than 55% of the total cost of all components of the manufactured product
- A partial list of manufactured products covered by BABA can be found in the handbook.

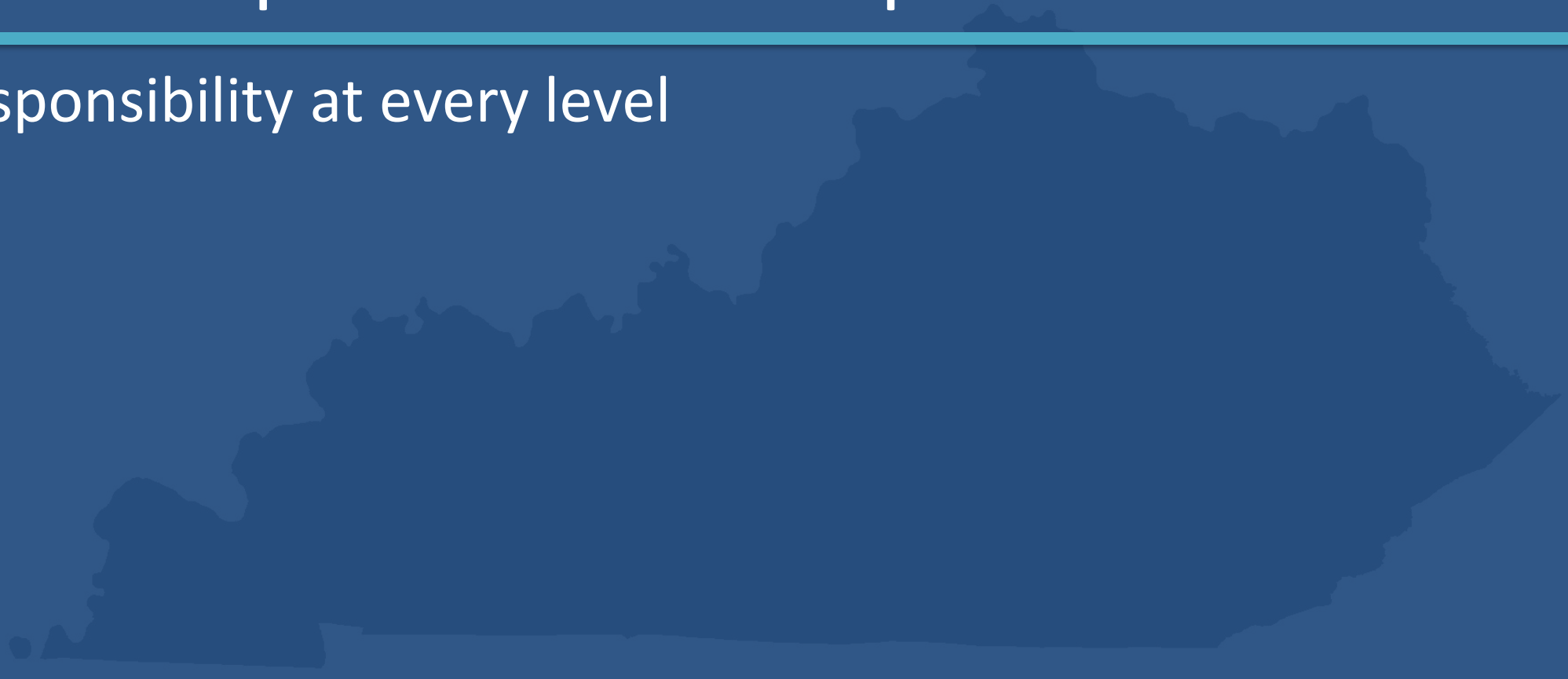
BABA REQUIREMENTS (cont'd):

CONSTRUCTION MATERIALS

- All construction materials used in SRF projects must be manufactured in the United States.
- This means that all manufacturing processes for the construction material must occur in the United States.
- Construction Materials include an article, material, or supply—other than an item of primarily iron or steel; a manufactured product; cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives—that is or consists primarily of: non-ferrous metals; plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables); glass (including optic glass); lumber; or drywall.

Who is responsible for compliance with BABA?

- Responsibility at every level



Compliance Team



Manufacturers

Manufacturers have the responsibility to provide adequate and accurate documentation of the products manufactured.



Suppliers and Distributors

If suppliers and distributors are involved, they are responsible for passing along compliance documentation for products supplied to projects that are subject to the BABA requirements.



Borrowers and their contractors

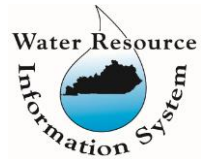
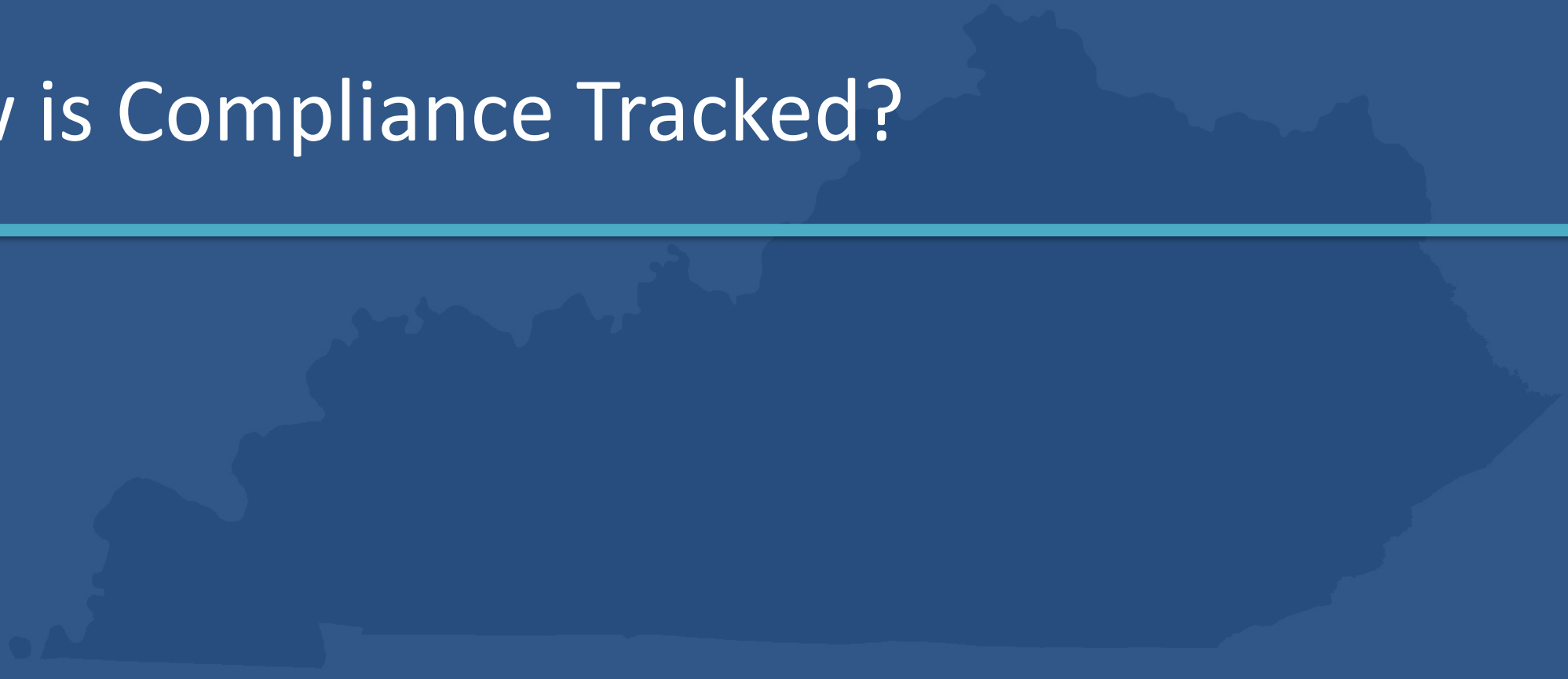
Borrowers are primarily responsible for ensuring the documentation collected for products used on the project is sufficient to document compliance with the BABA requirements.



KIA

The Kentucky Infrastructure Authority is responsible for providing oversight and guidance as needed to ensure the proper implementation of the requirements.

How is Compliance Tracked?



BABA COMPLIANCE:

ASSISTANCE AGREEMENTS

- Will require that borrowers comply with all federal requirements applicable to the assistance received (including the new BABA requirements) and comply with all record keeping and reporting requirements.
- Will state that (i) each contract and subcontract related to the Project is subject to audit by appropriate federal and state entities and (ii) failure to comply with the applicable legal requirements and this Agreement may result in a default that results in a required repayment of the loan in advance of the maturity date.

PAYMENT REQUESTS

- All payment requests must include the following language: “By signing payment application and recommending payment, Contractor certifies they have reviewed documentation for all products and materials submitted for payment, and the documentation is sufficient to demonstrate compliance with Build America, Buy America Act requirements.”

BABA COMPLIANCE (cont'd):

SELF-CERTIFICATION LETTERS

- What is the product? (List product(s) delivered to the project site)
- Where was it made? (Location(s) of the foundry/mill/factory where the product was manufactured (City and State))
- Who was it delivered to? (Name of the project and/or jurisdiction delivered)
- Signature of company representative. (Certifying official on company letterhead)
- Reference to the BABA requirements. (it is OK if the certification lists more (USDA, DOT, FHA, etc.), but BABA is required).

ADDITIONAL CONSIDERATIONS

- In addition to compliance documentation, borrowers should also conduct a visual inspection of the product when it arrives to the project site, especially for iron and steel products which are often stamped with the country of origin. (Note: A country of origin stamp alone is not sufficient verification of compliance with BABA.)
- Compliance is assessed where the domestic product is used (or installed) at the project site. Proper compliance documentation, whether it is a BABA certification letter or a waiver, should accompany a product prior to its “use.”
- EPA does not require a specified format for tracking or documenting compliance. Borrowers are free to develop any system for tracking items used on the project and the accompanying compliance documentation.

EXAMPLE CERTIFICATION LETTER



MINAS MORGUL

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

Material Certification

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

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

<u>QUANTITY</u>	<u>DESCRIPTION</u>
30	8550350 66-S VLV BOX 26T 35B 1.5 WTR

Dear Valued Partner:

We hereby certify that the iron used to make the construction castings manufactured by MMS for the above referenced project is in full compliance with ASTM A43, Class 35B and AASHTO M105 for gray iron castings and ASTM A536, Grade 70-50-05 for ductile iron castings. Thank you for specifying and using products manufactured by Minas Morgul Steel, Inc.

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

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

Meriadoc Brandybuck

Product Quality Manager
Minas Morgul Steel, Inc.

Key Elements:

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



TEAM
KENTUCKY



Waivers!

Requirements of the Build America, Buy America Act may be waived on the basis of

- (1) nonavailability,
- (2) unreasonable cost, or
- (3) public interest.

BABA WAIVERS:

NONAVAILABILITY

- A Buy America Preference may be waived if one or more iron or steel items, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality (a “nonavailability waiver”).

UNREASONABLE COST

- A Buy America Preference may be waived if the inclusion of one or more iron or steel items, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent (an “unreasonable cost waiver”).
- As part of the cost waiver request, the borrower must demonstrate that implementation of the BABA requirements will increase the overall project cost more than 25 percent. Documentation to justify the cost waiver can vary but may include itemized cost estimates or bid tabulations comparing project costs with and without BABA implementation. Borrowers should begin assessing the potential cost impacts of the BABA requirements during the design phase of a project.

BABA WAIVERS (cont'd):

PUBLIC INTEREST

- A Buy America Preference may be waived if applying the domestic content procurement preference for one or more iron or steel items, manufactured products, or construction materials would be inconsistent with the public interest (a “public interest waiver”).

General “Public Interest” Waivers

* Borrowers must show that their projects qualify

DE MINIMIS WAIVER

- Products that qualify for a de minimis waiver cumulatively may comprise no more than a total of five percent of the total project cost.
- This waiver is not additive with the existing American Iron and Steel national de minimis waiver.
- The EPA will review this waiver every five years after the date on which the waiver is issued.

SMALL PROJECT WAIVER

- Small projects, where assistance agreements or subawards under assistance agreements are less than \$250,000 may be able to waive the BABA requirements.
- The EPA will review this waiver every five years after the date on which the waiver is issued.

MINOR (FERROUS) COMPONENTS WAIVER

- Up to five percent of the total material cost of a product may include non-domestically produced miscellaneous minor iron or steel components without further need for a product-specific waiver.
- This waiver will reduce administrative burden on manufacturers that may have small iron or steel components within their product that are nondomestic or of unknown origin.

General “Public Interest” Waivers

* Borrowers must show that their projects qualify

ORIGINAL ADJUSTMENT PERIOD WAIVER

- Any SRF projects that initiated project design planning prior to May 14, 2022, may have obtained a waiver if the award was obligated before November 13, 2023.

NEW ADJUSTMENT PERIOD WAIVER

- For FY22 and FY23 previously planned water infrastructure projects subject to SRF requirements only, the iron and steel requirements of BABA are also waived for such projects not already subject to the American Iron and Steel requirements. For all other eligible projects, a reasonable expectation existed that the American Iron and Steel requirements would apply to the SRF project, and no exceptions to those long-standing requirements are provided through this waiver.
- SRF programs and/or the EPA project officers shall ensure that all projects subject to the conditions of this waiver provide evidence of initiating design that qualifies the project for this waiver and shall maintain this evidence with project files per applicable state and/or federal requirements or for three years after completion of the project, whichever is greater.

How to qualify for an Adjustment Period Waiver

DOCUMENTATION NEEDED (ONE OR MORE OF THE FOLLOWING):

- Submitted preliminary engineering report, or equivalent (to the state or to the assistance recipient) prior to May 14, 2022.
- Issued a Request for Proposal or execution of a contract for design or engineering services (regardless of funding source) prior to May 14, 2022.
- Execution of an assistance agreement – that includes design provided that the documentation demonstrates commencement of the project prior to May 14, 2022.
- For project designed by assistance recipient, documentation of design initiation (such as completed preliminary engineering report) prior to May 14, 2022.



How to qualify for an Adjustment Period Waiver (cont'd)

DOCUMENTATION NEEDED (ONE OR MORE OF THE FOLLOWING):

- Solicitation of construction contract bids prior to May 14, 2022.
- Submitted plans and specifications (do not need to be complete) to a state and/or federal funding authority prior to May 14, 2022.
- Public referendum or public meeting held prior to May 14, 2022 regarding proposed project.
- Evidence of new bonds passed, or other new funding backing secured for project prior to May 14, 2022.

Adjustment Period Waiver after FY23????

CASE BY CASE BASIS – CALL US EARLY AND OFTEN



KIA / EEC Responsibilities regarding Adjustment Period Waivers

- SRF programs shall update the SRF Data System with the appropriate fields (new field(s) will be added) for projects qualifying for this waiver.
- Project data must be entered by the end of the quarter in which the assistance agreement was signed.
- For other programs subject to the SRF requirements, the EPA project officer will maintain data for projects qualifying for this waiver in their respective project files.
- SRF programs shall maintain a list of all projects qualifying under the conditions of this waiver and provide this list to the EPA upon request (no sooner than November 13, 2022, and no more frequently than twice per year).
- For other programs subject to the SRF requirements, the EPA project officers shall maintain a list of all projects qualifying under the conditions of this waiver, including the following information relating to each project subject to the conditions of this waiver: a. Project name, b. Assistance agreement identification number, c. Description of significant manufactured products or construction materials likely subject to the waiver, and d. Date of initiated and documented design activity qualifying project for waiver.



Project – Specific Waiver Request

PROJECT-SPECIFIC WAIVER REQUESTS SHOULD GENERALLY INCLUDE:

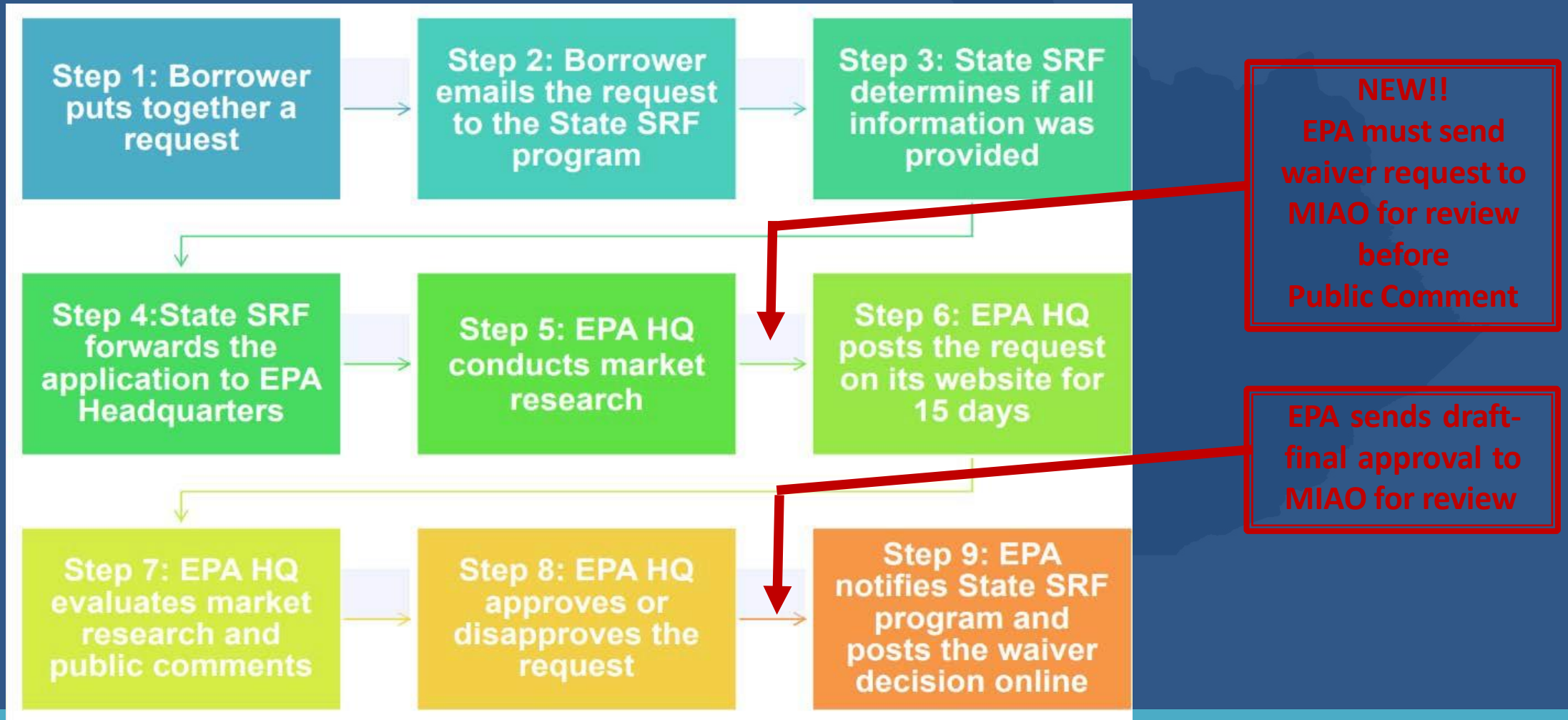
- a brief summary of the project,
- a description and explanation of the need for the waiver for the product(s) in question,
- a brief summary of the due diligence conducted in search of domestic alternatives (which could include correspondence between borrower and supplier/distributors),
- the quantity and materials of the product(s) in question,

Project – Specific Waiver Request (cont'd)

PROJECT –SPECIFIC WAIVER REQUESTS SHOULD GENERALLY INCLUDE:

- all engineering specifications and project design considerations relevant to the product(s) in question,
- the approximate unit cost of items (both foreign and domestic) in addition to an estimated cost of the materials and overall project,
- the date any products will be needed on site in order to avoid significant project schedule disruptions, and
- any other pertinent information relevant to EPA's consideration of the waiver (e.g., if relevant for SRF projects: whether the project is designated as an equivalency project, the date the plans and specifications were submitted to the state, the date of construction initiation, expected date of project completion, any special considerations such as local zoning and building ordinances, seismic requirements, or noise or odor control requirements).

Waiver Process



Thank You

- Natalie Lile
- Natalie.lile@ky.gov

