

Notice of Proposed Waiver of BABA Requirements for Clean Ports Program

SUBJECT: Proposed General Applicability Public Interest Waiver of Section 70914(a) of P. L. 117-58, Build America, Buy America Act, 2021 for U.S. Environmental Protection Agency Financial Assistance Awards under the Clean Ports Program

Proposed Notice

The U.S. Environmental Protection Agency (EPA) is seeking comment on a proposed limited public interest waiver for certain zero emission (battery electric and hydrogen fuel cell) mobile port equipment to be funded in the \$3 billion Clean Ports Program from the Build America, Buy America Act (BABA) requirements in Section 70914 of the Infrastructure Investment and Jobs Act. Industry input and interagency research indicates that certain zero emission mobile port equipment that are considered eligible technologies under the Clean Ports Program do not meet the BABA requirements for manufactured products. To be considered “produced in the United States” under BABA, manufactured products must be manufactured in the United States, and the cost of the components 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.

The EPA proposes to issue a limited partial general applicability public interest waiver of the BABA requirements for zero emission mobile port equipment as applied to recipients of federal financial assistance under the Clean Ports Program. Specifically, the EPA is proposing:

- 1) The final assembly for certain types of “zero emission mobile port equipment” (defined below in the “Proposed Waiver and Market Analysis” section) must occur in the United States to be considered “produced in the United States” during the waiver period (i.e., waiving the 55 percent domestic content requirement).
- 2) The EPA is also proposing a supplemental de minimis waiver, waiving BABA compliance for ten percent of material costs attributable to zero emission mobile port equipment, that may be used for recipients of Clean Ports Program funding only on zero emission mobile port equipment. The EPA also proposes to exclude the use of de minimis related to the purchase of cranes.

If finalized, this waiver would apply to expenditures incurred on or after the effective date of the final waiver until December 31, 2027, for zero emission mobile port equipment for which the contracted delivery date for the equipment is on or before December 31, 2027, and for which equipment is delivered no later than 6 months after this date.

This public interest waiver is primarily intended to provide time needed for equipment that can utilize domestic battery module or fuel cell component manufacturing capability to meet demand for BABA-compliant components to onshore to the United States. The EPA also recognizes the importance of security considerations for port equipment purchases and will continue to work with our interagency partners regarding best practices and standards for assistance agreements under this program if the waiver is granted. The EPA will continue market research on port infrastructure and supply chain concerns, to better inform the transition to BABA compliance. This waiver is critical to ensure that recipients of the Clean Ports Program federal financial assistance can advance

vital emission reduction initiatives at ports by deploying decarbonization and clean air projects to benefit port-adjacent communities across the country and help meet this Administration’s international climate commitment to reduce greenhouse gas pollution 50-52% by 2030. The waiver also incentivizes companies to invest in the domestic production of zero emission mobile port equipment.

The EPA will consider comments received during the 21-day comment period and adjust the final waiver as appropriate and in response to the comments received by manufacturers, as well as other stakeholders and program participants. The EPA encourages manufacturers to submit data-supported public comments which, to the maximum extent practicable, identify current and planned manufacturing capacity for covered zero emission mobile port equipment (as defined below in the “Proposed Waiver and Market Analysis” section) over the next five years. Manufacturers are also encouraged to share what degree of domestic assembly would be feasible for various types of zero emission mobile port equipment over the next five years. The EPA also encourages port authorities and port / terminal operators to submit data-supported comments that help the agency estimate the volume and type of zero emission mobile port equipment (e.g., cranes, drayage trucks, yard trucks, other cargo handling equipment, locomotives, and vessels) that may be requested under this program.

Additionally, the EPA will also consider, as necessary supplemental information submitted as confidential business information¹ (CBI), to the extent such information provides further detail about or substantiation of the public comments submitted. Comments received after the comment period, but before the Notice of Finding is published, may be considered to the extent practicable.

Please direct comments on this waiver to BABA-OTAQ@epa.gov and use the subject line, “Comment on Proposed Waiver of BABA Requirements for Clean Ports Program”.

Introduction

The EPA is committed to implementing BABA to cultivate the domestic manufacturing base for a range of products, consistent with Executive Order 14005.² This waiver will allow Clean Ports Program grant recipients to efficiently introduce a wide variety of commercially available zero emission technologies in port-related freight and passenger operations as the market for these same technologies grows in the U.S. Based on market analysis conducted by the EPA and the DOE,

¹ CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this proposed waiver contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this proposal, it is important that you clearly designate the submitted comments as CBI. Pursuant to 40 CFR Part 2, you may ask EPA to give confidential treatment to information you give to the Agency by taking the following steps: (1) Mark each page of the original document submission containing CBI as “Confidential”; (2) send EPA, along with the original document, a second copy of the original document with the CBI deleted; and (3) explain why the information you are submitting is CBI. Unless you are notified otherwise, EPA will treat such marked submissions as confidential under the FOIA. Submissions containing CBI should be sent to Dennis Johnson via email at johnson.dennis@epa.gov or to Dennis Johnson, U.S. EPA, Room: WJC North 5512DD, Mail Code: 6406A, 1200 Pennsylvania Avenue, NW, Washington, DC 20460.

² Executive Order 14005: Ensuring the Future is Made in All of America by All of America’s Workers, Section 70914 of Infrastructure Investment and Jobs Act establishes government-wide Buy America conditions on public infrastructure projects funded by federal financial assistance awards obligated on or after May 14, 2022.

certain currently-available zero emission mobile port equipment does not meet BABA's manufacturing requirements. Specifically, while many types of mobile equipment are manufactured in the United States, the United States does not yet have sufficient production capacity for batteries or fuel cells for heavy duty vehicles. DOE analysis indicates the sufficient domestic battery manufacturing for heavy duty highway vehicles should be available starting in 2027.

For the purposes of this general applicability waiver, therefore, the EPA is proposing to issue a targeted, time-limited partial waiver for certain zero emission mobile port equipment funded through EPA's Clean Ports Program.

Proposed Waiver and Market Analysis

The Office of Management and Budget's (OMB) October 25, 2023, M-24-02 memorandum, "Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure" provides guidance to agencies to consider whether it is in the public interest to waive application of a Buy America preference "where an agency determines that other important policy goals cannot be achieved consistent with the Buy America requirements established by BABA and the proposed waiver would not meet the requirements for a nonavailability or unreasonable cost waiver." This proposed waiver is in the public interest to ensure Clean Ports Program grant recipients can effectively carry out the EPA-funded activity in a timely manner, support existing domestic manufacturers as battery and fuel cell production comes online, accelerate emissions reductions in the communities near ports, and to build the foundation for port decarbonization while promoting domestic port equipment manufacturing. Market research conducted by the EPA and Department of Energy (DOE) indicates that manufacturers for certain types of mobile port equipment do not currently meet the BABA requirement that equipment is manufactured in the United States and/or that the cost of the components mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components, nor are manufacturers presently able to manufacture enough zero emission port equipment in the United States to meet the demand of the Clean Ports Program.

Ports are a vital part of the United States economy, serving as gateways for moving freight and passengers across the country and around the world. Ports are also places with high concentrations of complex mobile source equipment, including drayage trucks, locomotives, cargo-handling equipment, and marine vessels. Today, this equipment is largely powered by diesel and other fossil fuels and contributes to significant emissions of criteria air pollutants and greenhouse gases. Ports also operate older medium- and heavy-duty equipment that emits significant amounts of air pollution, which negatively impacts human health and the environment, especially in port-adjacent communities.

The EPA's Clean Ports Program was established by the Inflation Reduction Act of 2022 (Section 60102) to fund zero emission port equipment and infrastructure to reduce mobile source emissions of criteria pollutants, air toxics, and/or greenhouse gases at U.S. ports. Zero-emission equipment funded under this program includes electric and hydrogen fuel-cell powered equipment and related infrastructure only. This new funding program builds on EPA's Ports Initiative, an ongoing program that helps our nation's ports, a critical part of our infrastructure and supply chain, address near-term public health and environmental impacts to surrounding communities. The Clean Ports Program will award grants with a four-year period of performance.

In May 2023, the EPA issued a Request for Information (RFI) to gather more information on the availability of zero-emission technologies in the heavy-duty vehicle and port sectors, receiving over 100 unique comments.³ The comments received on technology availability and domestic manufacturing indicated that the current and near-term supply of BABA compliant domestic, zero emission, mobile port equipment is limited and insufficient to meet the anticipated demands of the grant program. Many respondents identified batteries or fuel cells as the main challenge with respect to meeting BABA requirements, but some respondents also noted the current use of domestic iron and steel in manufacturing this equipment. To further support domestic supply chains for the production of zero emission mobile port equipment, the EPA requests comment on whether it would be appropriate to add a requirement to use domestic iron and steel components in addition to requiring domestic assembly.

In addition, the DOE conducted market analysis in February 2024 on the current state of manufacturing of zero emission port technologies. The DOE has a substantial history of working with ports, freight stakeholders, and technology manufacturers related to low and zero emission freight vehicles and equipment through its Vehicle Technologies Office and its Clean Cities and Communities partnership. The DOE has issued multiple grants to help develop and demonstrate zero emission port equipment. Recent DOE research evaluated the market availability of Class 7 & 8 on-road battery electric and hydrogen fuel cell drayage trucks, battery electric and fuel cell electric specialty terminal tractors for on port terminal operation, and cargo handling equipment. Research was conducted through market analysis by the National Renewable Energy Lab (NREL) and by directly contacting equipment and truck manufacturers.

The DOE found that most electric drayage trucks, zero emission terminal tractors, and zero emission cargo handling equipment do not currently meet BABA requirements for 55 percent domestic content for manufactured products. The analysis indicated that drayage truck manufacturers would likely start to meet BABA content requirement starting in 2027 but other equipment, such as terminal tractors and cargo handling equipment may not have battery production until 2030. An analysis of battery cells shows that a significant share of current battery manufacturing in the U.S. is for light-duty original equipment manufacturers, and these batteries are largely not available to drayage truck and cargo handling equipment manufacturers. The first U.S. medium- and heavy-duty specific battery cell plant is scheduled to start production in 2027.⁴

Based on this market research, the EPA is proposing a partial, time-limited waiver of the 55 percent domestic content requirement for manufactured products for certain zero emission mobile port equipment eligible to be funded under the Clean Ports Program. The final assembly for zero emission mobile port equipment funded under the Clean Ports Program must occur in the United States. For the purposes of this proposed waiver, “zero emission mobile port equipment” is defined as the following:

- Zero emission cranes including:
 - Rubber tire gantry cranes
 - Mobile harbor cranes
 - Rail-mounted gantry cranes
 - Automatic stacking cranes
 - Ship-to-shore cranes

³ <https://www.regulations.gov/document/EPA-HQ-OAR-2023-0216-0001>

⁴ [A \\$2-3 billion battery factory for electric trucks is headed to Mississippi \(electrek.co\)](#)

- Zero emission class 3-8 vehicles, including:
 - Drayage trucks
 - Yard trucks
- Other zero emission cargo handling equipment including:
 - Bulk cargo handling equipment
 - Containerized cargo handling equipment
 - Straddle Carriers
- Zero emission locomotives, including:
 - Switch locomotives
- Zero emission vessels, including:
 - Tugboats
 - Push boats
 - Pull boats
 - Ferries

The EPA would appreciate comments detailing whether other types of zero emission mobile port equipment could be funded by this program and therefore should be added to this list above.

In support of this proposed waiver, the EPA proposes that it is in the public interest to issue a targeted and limited waiver to support the transition of Buy America preference requirements for certain zero emission mobile port equipment in the Clean Ports Program. The Waiver is intended to provide time needed for domestic manufacturing capability to meet demand for BABA-compliant fuel cell and/or battery manufacturing to come online.

In addition, the EPA is also proposing a supplemental de minimis waiver waiving BABA requirements (i.e., domestic content requirement for manufactured products and domestic assembly requirement) on ten percent of material costs associated with the purchase of mobile equipment that may be used for recipients of the Clean Ports Program only on mobile port equipment. The EPA proposes to exclude the use of this supplemental de minimis waiver for the purchase of cranes. The Biden-Harris Administration recently issued an Executive Order to bolster the security of the nation’s ports and a commitment to invest through the Bipartisan Infrastructure Law and the Inflation Reduction Act over \$20 billion into U.S. port infrastructure.⁵ As noted in the announcement, PACECO Corp., a U.S.-based subsidiary of Mitsui E&S Co., Ltd (Japan), is planning to onshore U.S. manufacturing capacity for its crane production in the near-term.

The EPA believes this waiver is necessary to ensure that the existing manufacturing base can be supported while manufacturing capacity for batteries and fuel cells come online. It will also support recipients of Clean Ports Program technology grants to advance critical emission reduction initiatives at ports by deploying decarbonization and clean air projects to benefit port-adjacent communities across the country as soon as possible and help meet this Administration’s international climate commitment to reduce greenhouse gas pollution 50-52% by 2030. The waiver also incentivizes companies to invest in the domestic production of zero emission port equipment.

EPA’s existing Public Interest De Minimis waiver allows up to 5 percent of total project cost to be used on items that are not required to demonstrate compliance with BABA requirements; this existing 5 percent waiver will remain applicable to the Clean Ports Program. Through this notice,

⁵ <https://www.whitehouse.gov/briefing-room/statements-releases/2024/02/21/fact-sheet-biden-harris-administration-announces-initiative-to-bolster-cybersecurity-of-u-s-ports/>

the EPA is also proposing a supplemental de minimis waiver for zero emission mobile port equipment that may be used for recipients of the Clean Ports Program. Specifically, the EPA is proposing to waive BABA requirements for an additional 10 percent of the total material costs associated with zero emission mobile port equipment, that recipients may only use to purchase zero emission mobile port equipment (other than cranes) that do not meet domestic manufacturing requirements proposed in this waiver (i.e., are not domestically assembled and do not meet domestic content requirements for manufactured products).

As an illustrative hypothetical example, for a \$100M grant where \$60M is to be spent on mobile equipment, the EPA's existing de minimis waiver could be used to waive \$5M for de minimis infrastructure or mobile equipment items, and the proposed supplemental waiver could be used to waive an additional \$6M in non-domestic zero emission mobile port equipment (other than cranes), for a total of \$11M in items for this project that would not be required to demonstrate compliance with BABA domestic content requirements. Depending on how much of the existing agency-wide De Minimis waiver is used to waive items for fixed infrastructure, the other \$49M in mobile equipment would be required to meet the domestic manufacturing requirements proposed in this waiver (i.e., must be domestically assembled).

The EPA is committed to working with the Departments of Energy and Transportation, equipment manufacturers, U.S. ports, and other stakeholders regarding long-term efforts to establish domestic mobile port equipment manufacturing.

The purpose of this waiver is to ensure Clean Ports Program grant recipients can effectively carry out the EPA-funded activity in a timely manner, support existing domestic manufacturers as battery and fuel cell production comes online, accelerate emissions reductions in the communities near ports, and build the foundation for port decarbonization while promoting domestic port equipment manufacturing. The EPA believes that the limited duration of this proposed waiver provides an incentive to manufacturers to invest in increasing domestic capacity, while the waiver itself ensures a sufficient supply of mobile port equipment available for Clean Ports Program projects in the near-term. Project-level waivers remain an option for grant recipients should the provisions established by this waiver prove inadequate.

If finalized, this waiver would apply only to expenditures incurred on or after the effective date of the final waiver until December 31, 2027, for zero emission mobile port equipment for which the contracted delivery date for the equipment is on or before December 31, 2027, and for which equipment is delivered no later than 6 months after this date. This zero emission mobile port equipment waiver would not apply to any fixed infrastructure, including but not limited to charging or hydrogen fueling infrastructure for zero emission port equipment, such as electric vehicle charging equipment and shore power technology. In addition, as further discussed in the Notice of Funding Opportunity for the Clean Ports Program, recipients may not use program funds to purchase cranes manufactured by entities owned by, controlled by, or subject to the direction of a government of a foreign country of concern, or to entities that are headquartered in a foreign country of concern, as determined by EPA.

Anticipated Program Impacts Absent a Waiver

Build America, Buy America covers more than 70 EPA programs. The agency is committed to robust implementation of the Act's Buy America Preference in an efficient and effective manner. Based on market research, conducted by the EPA through a Request for Information and research

done by DOE, the EPA proposes to determine that applying the BABA requirements for manufactured products to the specific zero emission mobile port equipment listed in this waiver would be inconsistent with the public interest.

Failure to issue this waiver would delay significant emissions reductions in near-port communities facing health consequences from air pollution. This waiver also takes into consideration the impact of and overlap in demand for equipment and components from other BIL and IRA programs that fund battery electric and hydrogen fuel cell equipment. Heavy duty commercial trucks for various applications are frequently built on a common chassis which is then modified by a separate company that builds the rest of the vehicle. Zero emission port equipment, including drayage trucks, terminal tractors, and other types of cargo handling equipment will share the limited supply of heavy-duty battery packs and control systems with other zero-emitting heavy-duty vehicles. As the domestic supply of these heavy-duty components, such as battery packs and EV drivetrains, grows it will be shared across vehicle types and is more likely to first serve the demand from higher volume on-road heavy-duty vehicles and require more time to meet the demand for specialty zero emission port equipment.

Assessment of Cost Advantage of a Foreign-Sourced Product

Under section 70921(b)(2) of the IJA and OMB Memorandum M-22-11, agencies are expected to assess “whether a significant portion of any cost advantage of a foreign-sourced product is the result of the use of dumped steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products” as appropriate before granting a waiver. The EPA’s analysis has concluded that this assessment is not applicable to this waiver, as this waiver is not based on the cost of foreign-sourced products. The EPA will perform additional market research as it implements the Clean Ports Program to better understand the market and to limit the use of waivers caused by dumping of foreign-sourced products.

Stakeholder Engagement

The EPA will continue to engage with partners and other stakeholders in coordination with the Made in America Office, the Department of Energy, Department of Transportation, and other federal agencies regarding the progress of the domestic port equipment manufacturing industry. The EPA is setting up a supplier scouting request with the National Institute of Standards and Technology’s Manufacturing Extension Partnership to provide continuous market research through their national network of domestic manufacturers and suppliers.

PROPOSED WAIVER DECISION

Section 70914(b)(2) of the *Infrastructure Investment and Jobs Act* authorizes the Administrator to waive the requirements of BABA if implementation is inconsistent with the public interest and market research indicates the materials and products subject to the preference are not produced in the United States at a sufficient and reasonably available quantity or satisfactory quality. The EPA proposes to issue a time-limited waiver for specific mobile port equipment in the Clean Ports Program. This waiver would apply to all awards obligated on or after the effective date of this waiver under the Clean Ports Program. If finalized, this waiver would apply to expenditures incurred on or after the effective date of the final waiver until December 31, 2027, for zero emission mobile port equipment for which the contracted delivery date for the equipment is on or before December 31, 2027, and for which equipment is delivered no later than 6 months after this date.

The EPA reserves the right to modify, shorten the duration of, or discontinue the final waiver if it obtains information indicating that U.S.-made mobile ports equipment is available in sufficient quantity to meet the demands of Clean Ports Program funding recipients. The EPA will coordinate with the Department of Transportation to assess the state of the port equipment manufacturing industry and any pertinent information received from manufacturer engagement efforts.

Questions about this memorandum or comments during the public comment period should be directed to BABA-OTAQ@epa.gov. For comments, please use the subject line, "Comment on Proposed Waiver of BABA Requirements for Clean Ports Program".