



April 15, 2024

Via Email

The Honorable Michael Regan
Administrator
Environmental Protection Agency
Washington, D.C. 20004

RE: United Steelworkers comments on 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.

Dear Administrator Regan:

I write to you on behalf of the United Steelworkers (USW or Steelworkers). Our union is the largest industrial union in North America, representing workers in steel, aluminum, and other metals; paper; rubber; glass; cement; chemicals; refining; other industrial sectors; and service. We appreciate the opportunity to provide comments on the Environmental Protection Agency's (EPA) proposed public interest waiver for certain zero emission (battery electric and hydrogen fuel cell) mobile port equipment through the Clean Ports Program from the Build America, Buy America (BABA) requirements included in the Infrastructure Investment and Jobs Act (IIJA).

USW appreciates the commitment of the Biden administration to expanding and strengthening the reach and application of domestic content preferences, both in its support for BABA, and in executive actions such as Executive Order 14005, *Ensuring the Future is Made in All of America by All of America's Workers*, among others. We have been happy to partner with the administration in ensuring that the historic infrastructure investments underway will lead to the creation and retention of good, family-supporting jobs throughout the United States.

However, USW urges EPA to significantly revise the proposed public interest waiver of Buy America preferences for port equipment funded by the \$3 billion Clean Ports Program and strongly recommends specific adjustments to be outlined below. Currently, the EPA's proposed waiver fails to provide adequate incentives for companies to invest in U.S. manufacturing capacity or employment, neglects to

consider domestic supply chains for component content, and introduces potential loopholes in Buy America provisions.

Points of Concern

Without necessary modifications, the EPA's proposed waiver misses an opportunity to align with the Biden administration's goals of promoting emissions reductions and supporting domestic manufacturing. Below are specific examples of how the proposal falls short:

- EPA's proposal regarding "final assembly" lacks clarity and could allow foreign companies to exploit minimal assembly requirements in the United States, resulting in limited job creation.
- The proposal to eliminate the statutory 55 percent domestic content requirement for components may lead to reliance on foreign producers for 100 percent of component content.
- EPA's reliance on an outdated *de minimis* waiver policy, based on overall project costs rather than material costs, contradicts the 2023 Final Guidance from the Office of Management and Budget (OMB).¹
- The introduction of a "supplemental *de minimis*" waiver creates a new loophole, allowing for an additional 10 percent of port equipment purchases to bypass Buy America requirements.
- EPA's indication of additional project-specific waivers if the proposed policy proves inadequate further weakens Buy America provisions.
- EPA's lengthy waiver until June 2028, which is after the \$3 billion in funding has been spent and deliveries have been completed, ultimately deprives American manufacturing and workers of the opportunity to supply any components.
- EPA's waiver risks furthering China's dominance in crucial U.S. port equipment sectors, raising concerns outlined in a Section 301 petition regarding unfair practices and the devastation of domestic industries.

Overall, these sweeping waiver policies undermine Buy America requirements, potentially leading to significant use of foreign-produced equipment with the allocated \$3 billion in funding. A restructuring of the proposed waiver is essential to address loopholes, shorten its duration, and refine coverage with narrower waivers that

¹ [U.S. Federal Register](#), "Guidance for Grants and Agreements", August 23, 2023.

consider the unique supply chain dynamics of eligible technologies under the Clean Ports Program.

Recommendations for Improvement

Below are specific recommendations on how EPA can address the major concerns outlined above:

EPA Should Adopt a Tailored Approach

USW acknowledges EPA's efforts in gathering industry insights and conducting interagency research to assess U.S. productive capacity for various port equipment categories eligible under the Clean Ports Program.^{2,3} It's unsurprising that current domestic production capabilities don't meet the BABA requirements for manufactured products. Decades of flawed industrial policies have incentivized offshore production, resulting in a weakened U.S. manufacturing sector. Rebuilding domestic industries and fostering innovation requires sustained commitment and strategic investment to secure long-term economic prosperity.

However, the lack of domestic capacity is not a sufficient justification for a broad "one-size-fits-all" waiver that removes incentives for companies to invest in U.S. production. It is crucial to develop a Buy America waiver framework that addresses the unique challenges and opportunities of each equipment category.

EPA's blanket waiver policy overlooks the diverse supply chain constraints and opportunities within each equipment category eligible for the waiver. USW questions the rationale behind applying an identical waiver policy across vastly different equipment categories without considering their individual components. Also, EPA's waiver justification – which is focused specifically on a lack of capacity for domestic battery module or fuel cell component manufacturing – is misaligned with the issuance of its sweeping general applicability public interest waiver, and undermines Buy America application for all component content until the middle of 2028.

EPA should reconsider its "one-size-fits-all" approach, and allow recipients to request waivers tailored to their specific projects or products. This aligns with Congress's intent for Buy America to be applied narrowly, and incentivize investment in U.S. production and workers within each equipment category covered by the program. EPA should collaborate with labor and industry stakeholders to issue transparent, time-limited, and narrowly focused non-availability waivers where necessary. USW also urges EPA to make its market research publicly available. Providing this information to the public allows for informed commentary, and enhances transparency in the decision-making process.

² [U.S. Regulations.gov](https://www.ecfr.gov/current/title-40/chapter-I/subchapter-C/part-261/subpart-261.100/section-261.100-1), "Docket ID EPA-HQ-OAR-2022-0874", Accessed April 15, 2024.

³ [U.S. Regulations.gov](https://www.ecfr.gov/current/title-40/chapter-I/subchapter-C/part-261/subpart-261.100/section-261.100-1), "Docket ID EPA-HQ-OAR-2023-0216-0001", May 8, 2023.

Implement Finite Waiver Periods and Transparent Processes

While waivers are necessary to address short-term market limitations, they should not discourage investments in U.S. manufacturing. EPA should adhere to the IIJA mandate for time-limited waivers and ensure transparency in the waiver process. Timely reporting through the authorized central database, [MadeInAmerica.gov](https://www.madeinamerica.gov), will enable domestic manufacturers to identify opportunities and make informed investment decisions to bolster production capabilities. By aligning with IIJA provisions and fostering transparency, EPA can mitigate concerns regarding misuse of waiver authority and support long-term growth in domestic manufacturing.

Extend Buy America to Component Content

EPA's broad waiver overlooks domestic producers and workers capable of supplying Buy America-compliant components and materials. We are concerned that EPA didn't suggest a more targeted non-availability waiver with a narrower scope to address short-term market limitations related specifically to battery and fuel cell components. By opting for a general applicability public interest waiver based on the unavailability of a single component, EPA overlooks other component content for which domestic capacity exists, and for which waivers are unnecessary. By bypassing the traditional waiver process, where applications are submitted on an as-needed basis, EPA risks being unaware of existing and future market capabilities for all components beyond batteries and fuel cells.

The BABA content threshold for manufactured products is only 55 percent. While battery and fuel cell component content may represent a significant portion of a product's cost in this context, there are numerous other inputs that could help surpass the threshold. Instead of completely waiving the 55 percent content requirement, EPA should consider utilizing its authority to establish tiered thresholds for component content, gradually increasing over time until market participants can meet the statutory threshold of 55 percent. Similar approaches have been proposed by other departments and agencies, such as the Federal Highway Administration (FHWA).⁴

Require U.S. Melted Iron and Steel

Requiring U.S.-melted iron and steel for significant components – such as shells, chassis, and frames – in equipment purchases within the Clean Ports Program would align with the goals of Buy America and support domestic production. Despite substantially idled and underutilized U.S. production capacity for iron and steel, current year-to-date capacity utilization for domestic raw steel production stands at just 76.4 percent.⁵

⁴ [U.S. Federal Register](#), “Waiver of Buy America Requirements for Electric Vehicle Chargers”, February 21, 2023.

⁵ [American Iron and Steel Institute](#), “Industry Data – This Week’s Raw Steel Production (April 6, 2024)”, Accessed April 15, 2024.

Therefore, EPA should mandate compliance with the "all manufacturing processes" requirement outlined in BABA for iron and steel components of mobile port equipment. FHWA took this approach, and demanded U.S.-melted iron and steel for enclosures and housing of electric vehicle (EV) chargers in their BABA implementing policy.⁶

Clarify "Final Assembly" Standards

USW is concerned that EPA's proposed "final assembly" requirement for zero emission mobile port equipment under the Clean Ports Program may not align with the clear mandate of BABA law. The term "final assembly" lacks a precise definition, potentially allowing foreign-sourced end products to benefit from Buy America preferences.

USW urges EPA to adopt a robust and clear standard for defining "manufacture" to avoid weak origin standards like "final assembly". Insignificant assembly operations may not encourage domestic manufacturing of critical infrastructure inputs, and could hinder compliance with BABA origin standards. The basic test appears to be whether the materials or components subject to "manufacturing" have undergone a process fundamentally changing its character. "If the operations performed on the foreign item create a basically new material or result in a substantial change in physical character, the item becomes ...manufactured in the United States."⁷ Processes that do not fundamentally change the nature of products – such as refurbishment, painting, and packaging – should not be considered manufacturing for Buy America purposes, aligning with established legal precedents.

Apply Foreign Countries of Concern Restrictions Consistently

As it stands, the proposed waiver could inadvertently incentivize Chinese state-owned and subsidized companies to establish assembly facilities in the U.S., relying entirely on imported Chinese content. This scenario risks crowding out legitimate U.S. firms and foreign direct investment (FDI) from entities subject to market forces. Similar situations have occurred in U.S. transit markets for electric buses and railcars, leading to the enactment of the 2019 Transit Infrastructure Vehicle Security Act (TIVSA) to exclude such entities, like Build Your Dream (BYD) and CRRC, from federal assistance transit projects.

In the Notice of Funding Opportunity (NOFO) for the Clean Ports Program, EPA prohibits 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,

⁶ [U.S. Federal Register](#), "Waiver of Buy America Requirements for Electric Vehicle Chargers", February 21, 2023.

⁷ See *A. Hirsh, Inc. v. U.S.A.* 1991 WL 102984 (E.D. Pa. 1991). See also *United States v. Rule Indus., Inc.*, 878 F.2d 535 (1st Cir. 1989).

or to entities that are headquartered in a foreign country of concern. However, this limitation doesn't extend to other equipment covered by the waiver, such as drayage trucks, yard trucks, cargo handling equipment, locomotives, vessels, and more.

USW strongly urges EPA to update its NOFO to prohibit the use of program funds for purchasing any equipment manufactured by entities owned, controlled, or directed by governments of foreign countries of concern, or by entities headquartered in such countries. Using U.S. tax dollars to buy port equipment from countries like China, Iran, North Korea, and Russia raises significant concerns.

In early March 2024, our union filed a Section 301 petition regarding China's strategy to dominate global maritime logistics networks and commercial shipbuilding sectors.⁸ This petition is currently pending review by the Biden administration. Based on our petition, it is clear that failing to extend limitations on "foreign countries of concern" to all equipment purchases could jeopardize U.S. economic and national security interests.

Harmonize BABA De Minimis Policy

USW expresses concern over EPA's adherence to a BABA *de minimis* waiver policy calculated as a percentage of total project costs rather than as a percentage of materials costs. EPA's BABA *de minimis* waiver yields the preference requirement for materials up to 5 percent of "total project costs".⁹ Meanwhile, the OMB's final guidance for BABA clearly states that "applicable project costs are defined as material costs subject to the Buy America preference".¹⁰

USW does not oppose a reasonable *de minimis* exception, however, we urge EPA to reconsider its method. Tying the *de minimis* waiver to total project costs risks exempting an excessive and disproportionate share of U.S.-produced materials. BABA specifically applies to tangible materials, not services like construction labor or overhead. Therefore, a *de minimis* waiver should exclude these project costs. Additionally, EPA's application of *de minimis* exceptions under its American Iron and Steel (AIS) law for water projects sets a prudent precedent, where waivers are based on "the total cost of the materials used in and incorporated into a project".¹¹ EPA should align its *de minimis* policy with OMB guidance and its own AIS laws to ensure consistency and effectiveness.

⁸ [U.S. Trade Representative](#), "Enforcement – Section 301 Investigations – Section 301 Petition: China, Maritime, Logistics, and Shipbuilding Sector", Accessed April 15, 2024.

⁹ [U.S. Environmental Protection Agency](#), "Decision Memorandum – Subject – Public Interest: *De Minimis* General Applicability Waiver of Section 70914(a) of P.L. 117-58, Build America, Buy America, 2021 for U.S. Environmental Protection Agency Financial Assistance Awards and Procurements", October 21, 2022.

¹⁰ [U.S. Federal Register](#), "Guidance for Grants and Agreements", August 23, 2023.

¹¹ [U.S. Environmental Protection Agency](#), "Decision Memorandum – Subject – De Minimis Waiver of Section 436 of P.L. 113-76, Consolidated Appropriations Act (CAA), 2014", April 15, 2014.

Eliminate the "Supplemental De Minimis" Loophole

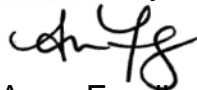
USW strongly opposes EPA's introduction of a "supplemental *de minimis*" waiver, which appears to be a significant Buy America loophole that expands the already lenient *de minimis* allowance for non-compliant content. EPA is suggesting a "supplemental *de minimis*" waiver, allowing an additional 10 percent of port equipment purchases to be exempt from Buy America requirements. USW understands that this 10 percent supplement will be combined with the existing 5 percent *de minimis* waiver, creating a 15 percent *de minimis* waiver. This would effectively allow recipients to use up to 15 percent of funding to purchase equipment for which both "final assembly" and all component content is not compliant with BABA.

This proposed loophole is unprecedented and has not been suggested by any other department or agency. USW urges EPA to withdraw the "supplemental *de minimis*" waiver proposal.

Conclusion

USW strongly urges EPA to reconsider its proposed waiver for the Clean Ports Program, and make necessary adjustments to better support American manufacturing and job creation. By addressing the concerns outlined above and implementing recommendations for improvement, EPA can ensure that federal programs promote domestic industries and contribute to long-term economic growth and national security. Thank you.

Sincerely,



Anna Fendley

Director of Regulatory and State Policy