

**GENERAL APPLICABILITY WAIVER OF *BUILD AMERICA, BUY AMERICA*
PROVISIONS TO GULF COAST ECOSYSTEM RESTORATION COUNCIL FEDERAL
FINANCIAL ASSISTANCE AWARDS**

AGENCY: Gulf Coast Ecosystem Restoration Council (Council)

ACTION: Issuance of Waiver under the *Build America, Buy America Act*
(P.L. 117-58 §§ 70901-70927) (BABAA)

DATE: August 10, 2022

SUMMARY: In accordance with BABAA and after consulting with the Office of Management and Budget (OMB), the Council hereby issues this general applicability adjustment period waiver of six (6) months, beginning on the date set forth above (“Effective Date”), of the BABAA domestic content procurement preference provisions as applied to federal financial assistance awards made by the Council pursuant to the *Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012* (33 U.S.C. § 1321(t) and *note*) (RESTORE Act).

The Council has determined that this adjustment period waiver is in the public interest in order to enable the Council to (a) align the requirements of BABAA with the Council-Selected Restoration Component (§ 1321(t)(2)) and the Spill Impact Component (§ 1321(t)(3)) of the RESTORE Act, both of which components are funded and administered by the Council; and (b) avoid immediate delays and disruptions to critically-important Council-funded infrastructure projects in the Gulf Coast region. Specifically, the adjustment period is needed in order for the Council to (i) determine if and how BABAA applies to its RESTORE Act projects and programs (collectively, “activities”); (ii) establish the administrative processes, documentation and capacity necessary for compliance with BABAA requirements for the long term, as appropriate; (iii) ensure that the Council maintains the continuity of its recipients’ activities; and (iv) closely coordinate among the six federal agencies and five states comprising the Council and, as appropriate, engage Council stakeholders, subrecipients, and the general public regarding BABAA. The Council is using this waiver as an important tool to enable compliance with

BABAA, which promotes investment in our domestic manufacturing base, strengthens critical supply chains, and positions U.S. workers and businesses to compete and lead globally in the 21st century.

Subject to the Effective Date, the waiver applies to Council funding approvals for infrastructure activities under the Council-Selected Restoration Component and Spill Impact Component of the RESTORE Act occurring on and after May 14, 2022; BABAA will not retroactively apply to funding approvals occurring before that date.

FOR FURTHER INFORMATION: Please submit requests for further information to restorecouncil@restorethegulf.gov.

SUPPLEMENTARY INFORMATION:

I. Build America, Buy America

The *Build America, Buy America Act* was enacted on November 15, 2021 as part of the *Infrastructure Investment and Jobs Act* (Pub. L. 117-58) (IIJA). BABAA establishes a domestic content procurement preference for federal financial assistance awards for infrastructure. Section 70914(a) of BABAA establishes that no later than 180 days after the date of enactment, none of the financial assistance funds made available for infrastructure projects may be obligated unless the iron, steel, manufactured products, and construction materials used in a project are produced in the United States. Section 70912 of BABAA further defines a “project” to include “the construction, alteration, maintenance, or repair of infrastructure in the United States” and includes within the definition of “infrastructure” those items customarily included, along with buildings and real property. The Council does not currently possess detailed information about materials to be used in future activities that may be subject to BABAA requirements. Thus the Council does not currently possess information regarding the extent, if any, to which any such materials might be in the six critical supply chains identified in Executive Order 14017 and Fact Sheet (February 24, 2021).

II. The Gulf Coast Ecosystem Restoration Council

In response to the *Deepwater Horizon* oil spill, the RESTORE Act was signed into law in July of 2012. The RESTORE Act established the Council as an independent federal agency composed of the governors of the States of Alabama, Florida, Louisiana, Mississippi and Texas, the Secretaries of the U.S. Departments of Agriculture, the Army, Commerce, Homeland Security and the Interior, and the Administrator of the U.S. Environmental Protection Agency (EPA). The EPA is currently the chair of the Council.

Pursuant to the RESTORE Act, the Council is responsible for expending and administering a portion of the civil and administrative penalties paid by responsible parties in connection with the oil spill. Funds administered by the Council are derived chiefly from annual payments made into the Gulf Coast Restoration Trust Fund (established by the RESTORE Act) by BP over 15 years, with the final payment due in 2031. The RESTORE Act authorizes specific uses for the funds administered by the Council, which are divided equally into two components. One, the Council-Selected Restoration Component, is used for Gulf ecosystem restoration and protection activities identified and approved by the Council. The other, the Spill Impact Component, is used for Gulf ecosystem restoration, economic recovery, and tourism promotion identified by designated Gulf state member entities, subject to approval by the chair on behalf of the Council.

Under the RESTORE Act only the eleven Council members can receive funding (including a consortium of Florida counties bordering the Gulf of Mexico). The Council expends funds for member-led activities to implement a comprehensive ecosystem restoration plan developed by the Council in accordance with criteria in the RESTORE Act. Activities in the first component referenced above are selected by the Council through an affirmative vote of at least three states and the federal chair, following a period of extensive Council development and review and a formal public comment period. Activities in the second component, funded in amounts established by a statutorily-determined formula, are selected and developed by the individual state members following formal public and Council review periods, also subject to final approval by the chair. The funds for both components are disbursed to Council recipients by means of federal financial assistance awards, as established by the Department of the Treasury implementing regulations for the RESTORE Act set forth at 31 CFR Part 34.

II. Gulf Coast Ecosystem Restoration Council Progress in Complying with the *Build America, Buy America Act*

As discussed above, Council funding approvals and policy decisions involve six federal agencies and the five Gulf states. The Council is committed to aligning the public interest priorities set forth in both BABAA and the RESTORE Act. Policies and procedures developed by the Council to address BABAA must undergo an internal process among the Council members to ensure that these priorities are adopted in a way that complies with both BABAA and the RESTORE Act. The Council is considering guidance set forth in OMB Memorandum M-22-11 (April 18, 2022), which provided further clarification of “post disaster or emergency response expenditures,” in order to determine whether BABAA provisions exempting such expenditures from BABAA requirements apply to the two funding components of the RESTORE Act under the Council’s purview. The Council is now engaged in discussions among its members to determine how to most effectively comply with this important law. Given the complexity of the Council governance structure and the unique requirements of the RESTORE Act funding processes, the Council needs time to develop the appropriate internal policies and procedures to address BABAA requirements. These challenges are discussed below. It should be noted that the Council continues to implement 2 C.F.R. § 200.322, which encourages a preference by award recipients for the purchase, acquisition and use of domestically-produced products and materials to the greatest extent practicable.

III. Waivers

Under Section 70914(b) of BABAA, the Council has the authority to waive the application of a domestic content procurement preference when (1) application of the preference would be contrary to the public interest, (2) 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, or (3) inclusion of domestically produced materials and products would increase the cost of the overall project by more than 25 percent. Section 70914(c) provides that a waiver under 70914(b) must be published by the agency with a detailed written explanation for the proposed determination and provide a public comment period of not less than 15 days. Additional

information on this waiver and BABAA may be found at the webpage at this link:

<https://www.restorethegulf.gov/build-america-buy-america>

IV. Public Interest in a General Applicability Waiver of Buy America Provisions

BABAA represents an important change to how the nation builds things with Made in America products. The Council understands that bringing back domestic manufacturing is in the nation's best interest and that BABAA advances this important goal. The Council is authorized under the RESTORE Act to support recovery from the *Deepwater Horizon* oil spill, a significant ecological and economic disaster for the nation. During the waiver period, the Council will endeavor to address and align these two laws, and believes that success will be achieved through collaboration with its member agencies.

Council expenditures under the RESTORE Act fund a wide array of activities intended to help Gulf of Mexico ecosystems and communities recover from the significant environmental and economic damage caused by the *Deepwater Horizon* oil spill, and to help promote greater community resilience to ongoing threats associated with sea level rise, flooding, hurricanes, and environmental degradation. Council members and interested stakeholders have consistently emphasized the need to expedite these important activities. The Council must determine how to align its statutory mission with the public interest in domestic manufacturing as manifested by BABAA. During the waiver period the Council will address a number of key issues, as discussed below.

Pursuant to the RESTORE Act, Council-Selected Restoration Component and Spill Impact Component funding is approved by the Council for specific activities before starting the financial assistance award processes for disbursement of the funds. Expenditure of funds for activities in the Council-Selected Restoration Component must be approved by a Council vote after extensive Council development and review, including formal public review and input. Expenditure of funds for activities in the Spill Impact Component is authorized after public review and input, Council member review for compliance with the RESTORE Act, and Council chair approval.

At the Council funding approval stage for both components, the scope, budget, location, recipient, objectives, and other essential elements of the activities are established. The subsequent award process for approved activities ensures sound fiscal management, but is otherwise ministerial; the award process does not determine whether funding is committed for a given activity, nor the recipient, budget, scope or any other of those essential elements. Any proposed material change to a project or program's budget or scope at the award stage invokes a new, extensive approval process, including further public review and Council review and approval, before an award can be issued.

This statutorily-driven funding process for both components requires careful consideration when determining how to apply BABAA requirements to Council activities. The Council needs to carefully review this issue to preserve the public interest in activities that are already in the funding and implementation "pipeline," while establishing effective policies and procedures for applying BABAA requirements, as appropriate, to funding approvals occurring on and after May 14, 2022.

The Council also requires time to determine which of the specific projects and programs it funds are potentially covered by BABAA. The Council funds a broad range of ecosystem restoration and protection activities in both components, as well as flood risk reduction, tourism, and economic development projects in the Spill Impact Component. A subset of Council activities may include infrastructure, while some do not (e.g., habitat protection and restoration involving no infrastructure). There are also Council-funded activities which warrant further review to determine whether BABAA applies.

The Council requires this waiver period in order to assess and establish its expectations for industry with respect to Council activities at the conclusion of the waiver. The Council has not yet determined which outside interest groups would be impacted by the waiver, and will also use the waiver period to identify such groups and engage with them as appropriate. The Council invites interested parties to comment on this proposed waiver.

Additional time is needed for the Council to determine how to address critical administrative tasks associated with supporting the important goal of effective BABAA compliance, without delaying or disrupting ongoing Council activities. The Council is a small agency, with a staff of 24 FTEs and limited contractor support; the RESTORE Act includes a provision that limits the amount of administrative funds available to the Council. At the same time, the Council is a relatively complex agency, comprising six federal agencies and the five Gulf states. Council policies and procedures are established through a collaborative decision-making process among these members, and under the RESTORE Act all significant Council actions require the agreement of at least three state members as well as the federal chair. The small staff size, complex Council membership and governance, and the volume and range of Council-funded activities currently in process all add to the challenge of establishing the needed administrative processes to efficiently and effectively administer this important new law. These administrative tasks could include:

- Assessing additional workload and staffing requirements associated with BABAA;
- Developing agency operational procedures and information technology systems updates needed to implement BABAA, including development of instructions to recipients and agency monitoring procedures;
- Examining whether additional general and/or activity-specific waivers are warranted and if so, developing such waivers;
- Providing technical assistance and training to Council members and eligible state entities (including subrecipients) under the Spill Impact Component regarding how to include BABAA requirements in award applications, submitting waiver requests, conducting and documenting market research, etc.; and
- Developing Council-specific federal financial assistance award conditions to incorporate BABAA requirements, where applicable, into Council awards.

Finally, the adjustment period waiver is necessary in order for Council members themselves to comply with BABAA and to adjust planning and budgeting estimates for activities covered by this law. This includes building individual member staff capacity around compliance; assisting the Council in determining categories of materials that could require specific waivers; and

providing the time necessary for recipients to educate subrecipients and prospective contractors about BABAA requirements.

V. Assessment of Cost Advantage of a Foreign-Sourced Product

Under OMB Memorandum M-22-11, “Memorandum for Heads of Executive Departments and Agencies,” published on April 18, 2022, 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 public interest waiver. The Council has concluded that this assessment is not applicable to this proposed waiver, as this waiver is not based on the cost of foreign-sourced products.

VI. Limited Duration of the Waiver

This waiver is effective as of the Effective Date and will remain in effect for six (6) months thereafter, with respect to all Council activities under the Council-Selected Restoration Component and the Spill Impact Component of the RESTORE Act. During this waiver period the Council may consider extending the waiver and/or proposing additional general applicability and/or project-specific waivers.

VII. Solicitation of Comments

As required under Section 70914 of BABAA, the Council released the proposed adjustment period waiver for public review for fifteen days beginning June 9, 2022. The Council received eight comments during this period. Four comments with similar language opposed the waiver and raised other issues unrelated to BABAA. These commenters disagreed with the Council’s position that it needs time to address the challenges discussed in the waiver in order to ensure effective compliance with BABAA. Two commenters expressed support for the Council’s proposed waiver, with one emphasizing “that the implementation and ongoing application of the

expanded Buy America requirements will be a significant undertaking for federal agencies.” Another commenter raised concerns about increased costs associated with BABAA. Another commenter expressed general support for BABAA and urged the Council to comply with this law. Having considered the comments received, the Council has determined that the waiver is in the public interest to allow for consideration of significant matters. The Council’s adjustment period waiver specifically details the key issues and challenges that the Council must consider in order to address BABAA.

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