



Transportation Trades Department, AFL-CIO

April 15, 2024

Michael Regan
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue N.W.
Washington, DC 20004

RE: 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

Administrator Regan:

On behalf of the Transportation Trades Department, AFL-CIO (TTD), I am pleased to respond to the Environmental Protection Agency's (EPA) request for comments on a proposed limited public interest waiver for certain zero emission 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. TTD consists of 37 affiliated unions, including those representing longshore workers and workers in construction and manufacturing who will be directly impacted by this potential waiver.¹ We therefore respectfully request that the EPA take our input on this matter into consideration.

The EPA proposes a public interest waiver on the grounds that BABA will stand in the way of emission reduction initiatives. However, it appears that this waiver will come at the expense of companies and their workers in the supply chain for components. The EPA states "the United States does not yet have sufficient production capacity for batteries or fuel cells for heavy duty vehicles." If this is the sole justification for the waiver, then we strongly encourage the EPA to narrow the waiver coverage to specific battery and fuel cell components and content. Any other components that require waivers should be covered by specific waivers that boost transparency and encourage domestic investment through a shorter duration.

TTD and our affiliated unions recognize the serious impacts from climate change and the severe consequences we face if we fail to respond with responsible measures that reduce our carbon footprint. It is for that reason that we urge the EPA to reconsider this proposed waiver. The waiver as proposed would apply to "expenditures incurred on or after the effective date of the final waiver

¹ Attached is a complete list of TTD's affiliated unions.

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.”² However, according to the EPA’s webpage on the Clean Ports Program, the agency anticipates making funding awards in December of 2024. Given this timeline, and the fact that the program funding itself does not expire until 2027, we request that the EPA consider breaking the funding into multiple tranches and specifically tailoring any potential BABA waivers to each tranche based on domestic availability and manufacturing capacity for the equipment and components.

Additionally, rather than waiving the 55% content requirement entirely until the end of 2027, we request that the EPA consider establishing benchmarks for domestic content that increase over time. The EPA’s proposed “final assembly” standard is not derived from the BABA statutory origin standard for “manufactured products.” And, that the EPA fails to define this term, they are inviting malfeasance and avoidance of even the limited application of Buy America proposed by this Notice. Without clear requirements stipulating what activities must occur in the United States to meet the EPA’s proposed “final assembly” standard, it is questionable whether there will be any incentive whatsoever for companies to make capital investments in the United States or hire workers to perform these tasks.

It is alarming that the EPA continues to adhere to a de minimis general waiver policy that is calculated as a percentage of total costs rather than materials costs. The Office of Management and Budget’s (OMB) Final Guidance for BABA clearly states that “applicable project costs are defined as material costs subject to the Buy America preference.” All other departments have revised this policy to ensure that the de minimis allowance is not inflated by irrelevant project costs, such as overhead. Furthermore, the 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 “total cost of the materials used in and incorporated into a project.” The EPA should align its de minimis policy with OMB guidance and its own AIS laws to ensure consistency and effectiveness.

Moreover, we are concerned about the EPA’s proposed supplemental de minimis waiver, which would allow 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.

² <https://www.epa.gov/system/files/documents/2024-03/clean-ports-baba-requiremts-proposed-waiver-notice-2024-03.pdf>

Finally, we urge the EPA to update its Notice of Funding Opportunity 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. 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.

We have consistently argued for strong Buy America policies and a high threshold for the issuance of waivers that narrow Buy America coverage.³ For too long, waivers and loopholes have been overused – often in defiance of federal laws – and have stifled investments in U.S. domestic capacity and good jobs. Further, we must stress that funding through the Clean Ports Program is intended to be human-operated and human-maintained. According to the EPA’s own FAQ on the program, this means that the equipment is not fully automated.⁴ We urge the EPA to continue to uphold this standard.

We appreciate the opportunity to comment on this Buy America waiver request and look forward to working with the EPA in the future.

Sincerely,



Greg Regan
President

³ <https://ttd.org/policy/require-made-in-america-content-for-all-federal-infrastructure-grants/>

⁴ <https://www.epa.gov/system/files/documents/2024-04/2024-clean-ports-faq-2024-04-02.pdf>