

**DEPARTMENT OF THE INTERIOR**  
**Bureau of Reclamation**

**General Applicability Public Interest Waiver For  
WaterSMART Programs Impacted by Drought**

Approved: February 15, 2024

For Previously Planned Projects:  
Expires: February 14, 2026

For awards or amendments obligated  
on or after the effective date of this  
waiver:

Expires: February 14, 2025

## 1. Summary

Agency: Department of the Interior, Bureau of Reclamation

Waiver: The Department of the Interior's (DOI) Bureau of Reclamation (Reclamation) is issuing a public interest general applicability waiver of the requirements of section 70914 of the Build America, Buy America Act (Buy America preference) included in the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58) for non-compliant iron, steel, construction materials and manufactured products used in infrastructure projects funded through the Reclamation's WaterSMART (Sustain and Manage America's Resources for Tomorrow) Programs (i.e., Assistance Listing Nos. 15.504, 15.507, and 15.514). DOI is issuing the following two waivers for the WaterSMART Programs:

- a. **Previously Planned Projects**: DOI is waiving the Buy America preference requirements for iron, steel, manufactured products and construction materials for any contracts entered into prior to May 14, 2023, that resulted from solicitations published before May 14, 2022, the implementation date of the Build America, Buy America Act. This waiver is applicable to awards or amendments obligated on or after the effective date of the final waiver and prior to its expiration two (2) years from the date of issue. Any recipient covered by this waiver is under a continuing affirmative duty to provide any future contract modifications to DOI for review and approval consistent with the requirements of 2 CFR § 200.308(h). This waiver from the Buy America preference does not apply to contract modifications that change the scope or the objectives of the project, including additional or new construction, remodeling, or broadband infrastructure development.
- b. DOI is waiving the Buy America preference requirements for manufactured products for awards or amendments obligated on or after the effective date of the waiver. This waiver is applicable to awards or amendments obligated on or after the effective date of the final waiver and prior to its expiration one (1) year from the date of issue. Obligations covered by this waiver will be expected to comply with Buy America preference's Iron, Steel, and construction materials requirements.

For awards and amendments that otherwise meet these criteria but were obligated prior to the effective date of the final waiver, the waiver will only apply to eligible expenditures on or after the effective date of the final waivers. The two waivers will have different durations as they serve distinct purposes. The first waiver provides flexibilities for contracts and solicitations that were planned without knowledge of the Buy America preference and will be effective for two (2) years after the effective date of the final waiver. The second waiver applies to awards and amendments obligated on or after the date of the final waiver will remain in effect for a period of one (1) year from the date of final approval.

As market research develops, Reclamation plans to assess the continued need for the waiver as often as necessary based on material availability or changing drought conditions.

Summary of program: The WaterSMART Program is an essential element in Reclamation's drought response actions. Across the country climate change, drought, population growth and urban development are creating challenges for America's families, businesses, farms, industry, and natural heritage. In 2009, Congress passed the SECURE Water Act directing the DOI to develop a sustainable water management policy, and in 2010, the DOI established the WaterSMART Program, combining existing programs with new initiatives to create a broad framework for wisely managing the nation's water supplies. The WaterSMART program embodies the basin-scale approach to water resource management that is critical for an effective and proactive drought response. WaterSMART implements actions through financial assistance agreements to stretch limited water supplies by improving water conservation, increasing water supply reliability, and helping water-resource managers develop the tools they need to make sound decisions about water use. Reclamation's WaterSMART Program helps ensure the availability of clean water for drinking, agriculture and other economic activities, recreation, and ecosystem health.

Reclamation is committed to the implementation of the Buy America preference while staying mindful of its responsibilities to work with states, tribes, and local entities as they plan for and implement actions to prepare for and mitigate drought and increase water supply reliability. The western United States is currently experiencing unprecedented drought conditions. The National Weather Service is forecasting on-going and persistent drought across the western United States, driving the need for accelerated actions to respond to drought and critical water shortages. WaterSMART projects create new water supplies, decrease water demands, and create environmental benefits, all resulting in drought preparedness. Therefore, it is imperative that these actions be implemented in the quickest and most cost-effective way possible.

Waiver type: Public interest waiver for programs impacted by drought.

Waiver level: General Applicability Waiver, Recipients of the WaterSMART grant programs (i.e., Assistance Listing Nos. 15.504, 15.507, and 15.514)

Waiver justification summary: The climate crisis and historic drought conditions in the western United States are significantly straining water supplies, affecting public health and safety, food production, hydropower generation, ecosystems, and wildfire management. More than 47 percent of the 17 western United States are experiencing severe to exceptional drought conditions, with some communities running out of water completely. According to the National Oceanic and Atmospheric Administration's National Integrated Drought Information System, 146.2 million people in the United States are currently affected by drought. Such drought conditions cause significant operational challenges for water utilities, including a loss of water supply and water quality degradation, which the WaterSMART programs identified in this waiver directly mitigate and/or address. Given the urgency of the drought conditions addressed by these WaterSMART programs, the public cannot afford any delays to WaterSMART projects.

With the implementation of the Buy America preference in May 2022, financial assistance recipients under the WaterSMART programs have expressed concern of significant delays on projects that have already initiated planning and design due to the need to redesign projects inclusive of product re-assessments, research, sourcing, and the timeline for submission and approval of product specific waivers where needed. Over the past six months, WaterSMART applicants, recipients, and their manufacturing partners have reported concerns sourcing commonly used products domestically. Some manufacturers have reported that they are working to shift manufacturing to domestic products, but it will take several years for such products to be available. Products expected to be covered by Buy America preference requirements include water meter smart-points, vertical turbine pumps, and residential smart water meters. In addition, water recycling project sponsors have identified specific equipment and advanced water treatment technologies for water recycling that include products not able to be sourced in the U.S., with not equally efficient and effective alternatives. Examples of such products and water treatment systems include membranes and membrane bioreactors, ultra-violet treatment, valves and appurtenances, pumps, motors, reverse osmosis system equipment and piping, and ozone treatment.

Based on the urgent need to construct projects that help mitigate drought, a waiver for new awards or amendments obligated in the next two years and funds not yet expended for previous obligations is requested. This waiver will help expedite projects that contribute to mitigating the impacts of drought.

The waiver will cover any project under WaterSMART Programs mitigating drought (i.e., Assistance Listing Nos. 15.504, 15.507, and 15.514) that meet the following eligibility criteria:

- a. DOI is waiving the Buy America preference requirements for iron, steel, manufactured products and construction materials for any contracts entered into prior to May 14, 2023, that resulted from solicitations published before May 14, 2022, the implementation date of the Build America, Buy America Act. These waivers are applicable to awards or amendments obligated on or after the effective date of the final waiver and prior to its expiration two years from the date of issue. Any recipient covered by this waiver is under a continuing affirmative duty to provide any future contract modifications to DOI for review and approval consistent with the requirements of 2 CFR § 200.308(h). This waiver from the Buy America preference does not apply to contract modifications that change the scope or the objectives of the project, including additional or new construction, remodeling, or broadband infrastructure development;
- b. DOI is waiving the Buy America preference requirements for manufactured products for awards or amendments obligated on or after the effective date of the waiver. This waiver is applicable to awards or amendments obligated on or after the effective date of the final waiver and prior to its expiration one year from the date of issue. Obligations covered by this waiver will be expected to comply with the Buy America preference's Iron, Steel and construction materials requirements.

- c. For awards and amendments that otherwise meet these criteria but were obligated prior to the effective date of the final waiver, the waiver will only apply to eligible expenditures on or after the effective date of the final waivers.

Planning and design of water projects, including budgeting and market research, is a lengthy and complex process that generally begins years in advance of applying for federal grants for infrastructure projects. Projects that initiated planning and design prior to the May 14, 2022 effective date of Buy America preference rely on materials that are not domestically sourced. These projects have already completed a significant amount of planning and design, even if they are selected for an award after the waiver's two-year end date. DOI pursued a general applicability adjustment period waiver that waived the Buy America preference for federal assistance obligations including for the WaterSMART program from July 13, 2022 through January 12, 2023. This waiver advances the phased implementation of the Buy America preference for WaterSMART recipients, while providing flexibilities for previously planned projects and water infrastructure projects in communities impacted by drought. Without this waiver, projects that initiated planning or design without knowledge of the Buy America preference would be required to redesign elements of the project, thereby causing substantial delays in project construction and adding to project costs. The waiver will be in effect for the duration of the period of performance of the award.

Summary of items covered in the waiver: Reclamation is issuing a waiver to cover certain categories of items as described above, for infrastructure projects funded through Reclamation's WaterSMART programs. This waiver will expedite projects that respond to current and forecasted future drought conditions. It is expected more targeted and time-limited waivers will follow this initial request.

Over the past six months WaterSMART applicants, recipients, and their manufacturing partners have reported concerns sourcing commonly used products domestically. Examples of products expected to be covered by the Buy America preferences include but are not limited to water meter smart-points, vertical turbine pumps, and residential smart water meters. In addition, water recycling project sponsors have identified specific equipment and advanced water treatment technologies for water recycling that include products not able to be sourced in the U.S., with no equally efficient and effective alternatives. Examples of such products and water treatment systems include membranes and membrane bioreactors, ultra-violet treatment, valves and appurtenances, pumps, motors, reverse osmosis system equipment and piping, and ozone treatment.

## **2. Background**

The Buy America preference set forth in section 70914 of the Buy America preference included in the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58), requires all iron, steel, manufactured products, and construction materials used for infrastructure projects under Federal financial assistance awards be produced in the United States.

Under section 70914(b), the Department of the Interior may waive the application of the Buy America preference, in any case in which it finds that: applying the domestic content

procurement preference would be inconsistent with the public interest; types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality; or the inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent. All waivers must have a written explanation for the proposed determination; provide a period of not less than 15 calendar days for public comment on the waiver; and submit the waiver to the Office of Management and Budget's (OMB) Made in America Office for review to determine if the waiver is consistent with policy.

Reclamation is committed to its efforts in implementing Buy America preference and will continue to support domestic manufacturing through funding projects that utilize American-made products and materials. During the period of this general applicability waiver, Reclamation will continue to add the Buy America preference term to agreements and conduct outreach events with applicants, recipients, and stakeholders to educate the financial assistance community on the Build America Buy America requirements. Implementation of Buy America preference will, however, require time and flexibility as American manufacturers build their domestic manufacturing capability. During this time of perilous drought, flexibility in Buy America preference implementation is imperative to America's public and economic health.

The Bureau of Reclamation's mission is to "manage, develop, and protect water and related resources in an environmentally and economically sound manner in the interest of the American public". In these extenuating drought circumstances, it would best fit Reclamation's mission to maintain all flexibilities when working with stakeholders to implement drought resiliency actions in the interest of the American public.

### **3. Description of Programs**

Federal Financial Assistance Listings: The total amount in Bipartisan Infrastructure Law funding available for 15.504, 15.507, and 15.514 is \$850 million. The total amount available for these programs in FY 2023 appropriations is approximately \$155 million.

- **15.504 WaterSMART Title XVI Water Reclamation and Reuse**: Water recycling and desalination programs provide financial assistance for reclamation, recycling, and reuse of municipal, industrial, domestic, and agricultural wastewater and to naturally impaired ground and surface waters. Through this program, Reclamation funds feasibility studies, water reclamation and reuse research, and full-scale construction of facilities to deliver and/or treat wastewater or impaired ground or surface water for reuse applications. This program disburses \$50-60 million in grant funding each fiscal year, resulting in approximately 10 new awards and 30 releases of funding on currently open awards.
- **15.507 WaterSMART Grants**: WaterSMART grants provide financial assistance to projects that 1) save water; increase the use of renewable energy; and accomplish other sustainability benefits; 2) develop water marketing strategies that will help prevent water conflicts and will contribute to water supply sustainability; and 3) implement small-scale water efficiency projects that have been identified through previous planning efforts to

conserve and use water more efficiently; mitigate conflict risk in areas at a high risk of future water conflict; and accomplish other benefits that contribute to water supply reliability in the western United States; and 4) projects focused on environmental benefits and that have been developed as part of a collaborative process to help carry out an established strategy to increase the reliability of water resources. This competitive grant program disburses \$45-55 million in grant funding each fiscal year, resulting in approximately 140 new awards and 160 release of funding on currently open awards.

- **15.514 WaterSMART Drought Resiliency Projects:** The WaterSMART Drought Resiliency Projects grant program provides financial assistance to projects that will help communities build long-term resiliency to drought by diversifying water supplies, increasing water supply reliability, and improving water management. This competitive grant program disburses up to \$40 million in grant funding each fiscal year, resulting in approximately 30 new awards and 87 releases of funding on currently open awards.

#### **4. Waiver Justification**

Losses of water supply due to drought pose significant threats to public health, the economy, and the environment. For the identified WaterSMART programs, any delay to their projects could bring hardship to communities already experiencing adverse impacts from drought, and even initial implementation of Buy America preference will create delays to the projects necessary to mitigate and/or address drought across the country. This public interest waiver will preserve existing timelines for the implementation of drought resilient activities needed to mitigate drought impacts, preserve water supplies, and reduce the need for emergency management.

Current Drought Conditions and Reclamation's Role: According to the U.S. Drought Monitor, as of October 25, 2022, more than 62 percent of the United States is currently experiencing at least moderate drought. Over 96 percent of the 17 western United States is experiencing drought or abnormally dry conditions, with more than 50 percent of the 17 western United States experiencing severe to exceptional drought conditions. Due to the severity of drought conditions throughout the west, a majority of Reclamation's reservoirs are far below historical averages, some being at their lowest levels since their initial fillings. For example, the Colorado River Basin is in the 23<sup>rd</sup> year of a historic drought. Lake Mead and Lake Powell, two of the largest reservoirs in the United States, have a combined storage capacity of 26 percent as of October 25, 2022. Elephant Butte Reservoir in New Mexico is at a meager 7% capacity, and New Melones and Shasta Lake, the two major reservoirs for the Central Valley Project have a combined storage capacity of 28 percent.

In response to the drought crisis, Reclamation is making real-time emergency operational decisions in every basin across the western United States, including massive reductions in water allocations. In some instances, municipalities are only receiving enough water to meet critical public and health and safety needs and irrigators have received zero water. Projects funded under WaterSMART play an important role in helping communities develop local, drought-resistant sources of water supply by turning currently unusable water sources into a new source of water supply that is less vulnerable to drought and climate change, conserving water to reduce the demand for water, improve the efficiency of its use, and reduce losses and waste, providing

access to new supplies through infrastructure improvements, and protecting the environment. WaterSMART Grants that have been selected over the years are expected to result in 1 million acre-feet of water savings annually, and in 2021, water reuse projects constructed with funding from the Title XVI Program reported actual deliveries of more than 440,000 acre-feet (i.e., approximately 143 billion gallons) of recycled water. WaterSMART helps water management agencies stretch existing drinking water supplies, ensuring public health and safety needs are met, and increases irrigation efficiencies in the production of food and fiber.

With the growing and serious challenges related to drought and water supply shortages, it is critical that Reclamation take innovative, proactive measures to address the effects throughout the west to respond to urgent conditions and to build drought resiliency as quickly as possible. This waiver will help protect project timelines that directly contribute to mitigation of drought impacts by stretching limited water supplies and increasing water supply reliability.

Lack of Product Availability: The Buy America preference implemented in 2022 are the first domestic content procurement requirements that Reclamation award recipients have experienced. The manufacturing industry supporting drought mitigation projects is just beginning to understand these new requirements and their impacts. Reclamation staff and WaterSMART award recipients have been on the front lines translating these requirements for manufacturers so that they may identify whether their manufactured products meet the 55% domestic cost sourcing requirements. As the Buy America preferences apply to any construction material and manufactured product for an infrastructure project, award recipients are reviewing the sourcing of all project components including large critical items (e.g., advanced water treatment systems, water meters, water management devices such as headgates, storage tanks, and conveyance systems). Some manufacturers have reported that they are working to shift manufacturing to domestic products, but it will take several years for such products to be available. Examples of specific U.S. manufacturing localization challenges include U.S. iron foundry capacity and plastic molding capacity.

Competing Public Interests: The intersection of Buy America preference and Reclamation's WaterSMART programs necessitates a particularly important assessment of relative public interest needs in the country. Reclamation's WaterSMART program directly supports drought mitigation across the country, so it addresses necessary public health and safety needs that are currently urgent, whereas the Buy America preference may still meet its public interest goals of increasing domestic production and jobs even with this waiver in place, and with these programs in the future.

Indeed, WaterSMART supports another administration priority, Executive Order (EO) 14008, Tackling the Climate Crisis at Home and Abroad (2021), which emphasizes the need to prioritize and take robust actions to reduce climate pollution, increase resilience to the impacts of climate change, protect public health, and conserve our lands, waters, oceans, and biodiversity. EO 14008 states, "The United States will also move quickly to build resilience, both at home and abroad, against the impacts of climate change that are already manifest and will continue to intensify according to current trajectories." Water recycling and reuse projects are integral to building climate change and drought resilience and protecting public health through increased water supplies and water quality improvements. In addition, the Justice40 initiative, a

requirement of EO 14008, is a government effort to deliver at least 40% of the overall benefits of certain government investments to disadvantaged communities that are marginalized, underserved, and overburdened by pollution. As a program that develops critical clean water infrastructure and conservation, Reclamation's WaterSMART Programs are part of the Justice40 initiative.

Reclamation determined it is in the public interest to issue this waiver for the WaterSMART programs based on drought conditions, the immediate need for water supplies to serve these communities, and avoid construction delays.

Anticipated impact if no waiver is issued: If no waiver is issued, WaterSMART will see a delay in project implementation due to project redesigns for domestically made products, or lack of products availability. Delayed implementation will bring hardship to communities already experiencing adverse impacts from drought. It would also delay Reclamation's ability to expeditiously implement actions to meet the EO 14008 directive of building drought and climate resiliency.

Planning and development of water projects, including budgeting and market research, is a lengthy and complex process that generally begins years in advance of applying for federal grants for infrastructure projects. Absent a waiver, awards obligated during the two-year time frame that initiated design planning without knowledge of the Buy America requirements would be required to redesign elements of the project, investigate potential domestic alternative products, revise engineering drawings and bid specifications, and resubmit plans and specifications for approval, thereby substantially delaying the initiation of construction and adding to the cost of the project. In addition, incorporating new requirements would require project sponsors to perform costly reassessments of project design and implementations. This would cause years of delays in project construction and implementation.

Considering the urgent drought conditions, Reclamation posits that grant recipients with projects mitigating the drought under Assistance Listing Nos. 15.504, 15.507, and 15.514 merit an exception to the Buy America preference, based on the pressing public interest served by these programs.

Expectation for the agency, award recipients, and industry at the conclusion of the waiver: Reclamation anticipates continuing to work with grant recipients throughout the waiver period on outreach and education concerning the Buy America preference, to encourage market research and compliance wherever possible. Reclamation will continue to collect information from recipients on materials that can't be sourced domestically in order to encourage compliance amongst manufacturers. As time progresses, Reclamation anticipates that materials commonly used in water projects will be manufactured domestically. As market research develops, Reclamation plans to reevaluate the need for the waiver as often as necessary, based on material availability or changing drought conditions.

On an ongoing basis, Reclamation will review the correspondence with recipients of awards under 15.504, 15.507, and 15.514 regarding materials difficult to source domestically. Reclamation is and will continue to investigate the domestic sourcing possibilities of



manufactured products, construction materials, and iron/steel-based products frequently used in these projects. This includes collaborating with other Federal agencies, including the National Drought Resiliency Partnership, with similar funded projects and coordinating to complete market research efforts. Where Reclamation identifies a need for a product specific waiver based on market conditions, such waiver will be pursued. During Reclamation's annual reevaluation period, these product specific waivers, the market conditions, and project needs will be reviewed to identify whether this general applicability waiver is still merited.

Reclamation does and will continue to collaborate with the National Oceanic Atmospheric Administration's National Drought Information System (NIDIS) to monitor drought conditions. The NIDIS drought monitor is updated on a weekly basis, providing Reclamation with real-time detailed information on drought conditions throughout the western United States. During the annual reevaluation period, Reclamation will also identify whether drought conditions have abated to the point that this general applicability waiver is no longer justified.

The Department of Interior coordinated with the Environmental Protection Agency (EPA) on a *Request for Information Regarding Products and Categories of Products Used in Water Infrastructure Programs* that was published in the Federal Register November 20, 2023 requesting input from the public by December 20, 2023. Reclamation will work with the EPA over the coming months to review the information gathered through this posting and ensure it informs more targeted and time-limited waivers in future years on the basis of product nonavailability.

As time progresses, Reclamation anticipates that fewer projects will need to fall under the scope of this waiver since, as previously mentioned, more materials commonly used in water projects will be domestically manufactured or covered under a product specific waiver, as appropriate. During this period, applicants will be encouraged to consider Reclamation's focus on advancing the objectives of using American-made products and materials and building domestic manufacturing when initiating the planning and design of projects. As a result, at the conclusion of this waiver period, Reclamation expects the domestic supply of critical drought mitigation materials to improve to the point that full Buy America implementation is achievable.

## **5. Assessment of Cost Advantage of a Foreign-Sourced Product**

Under OMB Memorandum M-24-02, Implementation Guidance on Application of Buy America preference in Federal Financial Programs for Infrastructure, agencies are requested 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. DOI'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.

## **6. Summary of Comments**

Waiver: This notice was posted on May 24, 2023, to satisfy the requirement under section 70914 of BABA to publish any proposed BABA waiver and provide the public with a reasonable period

of time for notice and comment. The Department of the Interior sought public and industry comment from all interested parties and received a total of six (6) public comments in response to the proposed waiver. This notice closed for comments on June 8, 2023. A summary of the public comments received are as follows:

- Four (4) entities expressed support for the waiver and requested DOI expand the waiver to include projects whose feasibility studies were approved prior to May 14, 2022.
- One (1) entity expressed support for the waiver and requested DOI consider supply chain challenges when designing future Buy America waivers focused on specific products.
- One (1) entity disagreed with the waiver going into effect indicating the waiver is contrary to the Act and the Administration's policy goals of maximizing the use of domestically produced goods in federally funded infrastructure and might allow for the use of too many non-domestic materials in DOI infrastructure projects.

In our response to all (6) entities, DOI stated that the General Applicability Public Interest Waiver for WaterSMART Programs Impacted By Drought promotes a phased implementation of the Buy America preference for WaterSMART recipients, while providing flexibilities for previously planned projects and water infrastructure projects in communities impacted by drought.

In our response to the four (4) entities that supported the waiver and requested an expansion of the waiver to include projects whose feasibility studies were approved prior to May 14, 2022, DOI believes it is in the public interest to issue the waiver as more targeted than proposed, and is unable to expand the eligibility criteria for the waiver as requested.

In our response to the one (1) entity that supported the waiver and requested DOI consider supply chain challenges when designing future Buy America waivers focused on specific products, DOI acknowledged the helpful feedback and will take into consideration the information gathered through the 2023 *Request for Information Regarding Products and Categories of Products Used in Water Infrastructure Programs*.

In our response to the one (1) entity that found the waiver contrary to the Act, DOI disagreed with the comment that the waiver does not find support in the Buy America statutory requirements, or in regulations and guidance from the OMB, nor did the comment address any specific capacities that would help mitigate the shortage of domestic supply of relevant components, such as those listed in the waiver. DOI also noted that the Buy America statutory requirement expressly allows waivers of the domestic procurement preference if doing so would be in the public interest citing the Infrastructure Investment and Jobs Act, P.L. 117-58, § 70914 (b)(1). Finally, DOI invited the entity to address any specific capacities relevant to WaterSMART projects, to assist with the phasing approach of this waiver.

After reviewing and responding to these comments, DOI is issuing the waiver with a reduced scope to ensure the waiver is appropriately targeted and conditional. DOI will review the waiver as often as necessary to evaluate its continued need.

For more information on the Buy America preference, please reference [www.doi.gov/grants/buyamerica](http://www.doi.gov/grants/buyamerica) or [MadeinAmerica.gov](http://MadeinAmerica.gov).