



NATIONAL STONE, SAND
& GRAVEL ASSOCIATION

House Transportation and Infrastructure Subcommittee on
Highways and Transit

Thursday, February 15, 2024, 10:00 AM EST Rayburn House Office
Building Room 2167

Hearing on

*“Implementation of Buy America Provisions: Stakeholder
Perspectives.”*

National Stone, Sand & Gravel Association

Testimony for the Record



The National Stone, Sand & Gravel Association (NSSGA) appreciates the opportunity to provide comments on the House Transportation and Infrastructure Highways and Transit Subcommittee’s oversight hearing on the “Implementation of Buy America Provisions: Stakeholder Perspectives.”

NSSGA members consist of stone, sand and gravel producers; industrial sand suppliers; and the equipment manufacturers and service providers who support them. With upwards of 9,000 locations, the aggregates industry produces 2.5 billion tons of materials used annually in the United States. Aggregates are the building blocks of our modern society and are needed to construct and maintain communities, roads, railways, bridges, tunnels, our water supply, sewers, electrical grids and telecommunications.

Section 70917 (c) Materials

The NSSGA worked with Members of Congress, including on this Committee, in 2023 to ensure section § 70917(c) of the Build America, Buy America Act Part 1 (BABAA) of the Infrastructure Investment and Jobs Act (IIJA), Pub. L. No. 117-58, was correctly implemented in the Office of Management and Budget’s (OMB) proposed BABAA guidance and amendment to 2 CFR 184 and 200.

Section 70917(c)(1) established an important limitation to the term “construction materials” as the term is used in BABAA. The limitation excludes “cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives” from the term “construction materials” as used in BABAA, and thus does not establish a domestic content procurement preference for these items.

Section 70917(c)(2) prohibits the same construction materials from being included as “inputs” in “all manufacturing processes” producing “construction materials.” OMB is required to “issue standards” defining the term “all manufacturing processes” for construction materials to which BABAA does apply a domestic content procurement preference. Because Section 70917(c)(2) prohibits the definition of “all manufacturing processes” from including the listed items as inputs, the combination of the listed items as concrete or asphalt mix are not a construction material for which BABAA establishes a domestic content procurement preference.

With support from Members of Congress, NSSGA was successful in seeing the OMB final guidance and 2 CFR amendments correctly recognize the intent of Congress concerning Section 70197(c).

Post-OMB Guidance Implementation Issues

The OMB’s final guidance was issued Aug. 28, 2023, and became applicable 60 days later. While the guidance in many ways remained consistent with the OMB’s April 2022



initial guidance memorandum, the August guidance did make changes to BABAA implementation and failed to address gradual implementation issues. BABAA implementation at the State DOT level and below remains challenging.

For example, Sec. 70914 requires procurements with federal financial assistance meet BABAA's domestic content procurement preference. The BABAA law, however, does not provide detailed instruction on how a compliant procurement is certified. OMB's August final guidance and rule implementing the BABAA law is similarly silent on detailed compliance certification. State DOTs have thus developed their own "BABAA Compliance Certifications" without instruction or guidance. States' BABAA compliance forms and processes vary state-to-state, and are often confusing and, or insufficiently reflect BABAA's compliance requirements for manufactured products, listed construction materials and exempt construction materials. The Federal Highway Administration (FHWA) needs to issue guidance on BABAA compliance certification forms and processes to remove confusion and delay.

Many State DOTs have added BABAA compliance as an additional feature of their "approved product lists" (APL) or "qualified products lists" (QPL). These lists predate BABAA, and their purpose is to confirm compliance of product input or component specification with a DOT's procurement specification. Often, however, an item on an APL/QPL may not be procured by the DOT for individual use. Instead, the item may be a component of a manufactured product. An item itself may be deemed not BABAA compliant individually but can be a component of a BABAA compliant manufactured product. FHWA guidance clarifying BABAA compliance at the APL/QPLs level is needed to avoid confusion, delay and potential false shortages of certain compliant products or construction materials.

In its final guidance, OMB stated its intention to regularly convene "inter-agency workgroups" to ensure "that federal agencies implement BABAA in a consistent, uniform, efficient and transparent manner. OMB should include State procurement authorities like State DOTs in these "workgroups" to bring front line experience and reality to the workgroup's efforts.

The FHWA had a waiver for manufactured products for many years. Section 70914 (d) of BABAA requires any pre-BABAA waiver to be reviewed. As of this date, the FHWA Manufactured Waiver has not been officially reviewed. This delay and lack of communication from FHWA on the status of the waiver contributes to confusion among procurers and suppliers as to the applicability of the waiver today, and whether or when it will be updated and made available for public comment.

As discussed above, BABAA Section 70917 (c) excludes "cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives" from BABAA's domestic content procurement preferences. This exclusion also applies to wet concrete and asphalt. These excluded materials are, in some cases,



not adequately recognized in state DOT BABAA compliance certification forms and processes. The FHWA should provide guidance to clarify that excluded construction materials are not subject to BABAA compliance certification.

BABAA itself and OMB's final implementing guidance devotes much attention to product classification analysis for manufactured products and listed construction materials. In its final guidance, OMB provides an extensive narrative on classification processes, but only addresses a limited number of fact specific scenarios as examples of "correct" classification. These classification issues within the FHWA jurisdiction could be ameliorated with FHWA guidance for product classification analysis scenarios specific to road construction.

In conclusion, the practical reality of BABAA implementation will require ongoing guidance and direction to procuring authorities. Successful BABAA implementation will require at least some agency specific guidance to address implementation issues unique to each agency. This is certainly true with the FHWA and, as discussed above, prompt guidance from FHWA on those issues will be a positive step towards achieving the investment goals of the IIJA.

