November 19, 2022

Federal Highways Administration
Via Portal @ http://www.regulations.gov, Docket: DOT-OST-2022-0124.

RE: Notice of Proposed Waiver of Buy America Requirements for De Minimis Costs, Small Grants, and Minor Components
Docket # DOT-OST- 2022-0123

Dear Sirs:

The above Organizations represent a broad coalition of trails users and small non-profit partners engaged in and supporting trail maintenance efforts from across the Country. Our efforts directly involve application of funding from the Recreational Trails Program("RTP") which is administered through the Federal Highways Administration and was Congressionally created in 1991.[1] Many of our members have actively participated with and served on the Recreational Trails Committee overseeing administration of these funds and are intimately familiar with the hundreds of small projects supported annually by the program in every state in the Country.[2] As a result of the

[1] *See,* Public Law 102-240
[2] A complete database of projects funded through the RTP program is available here: Recreational Trails Program Project Database – Project Database, Image Library, and State Profiles (recreationaltrailsinfo.org)

consistent catalyst that the RTP program provides, our members are able to bring additional funding to these projects and couple that funding with massive volunteer support for trails projects generally. Many of these efforts have become almost programmatic in nature and play an important role in protecting resources on public and private lands and creating major economic benefits to many small communities across the country.

Our members support Buy American- Build American ("BABA") goals and objectives everyday as almost everything we use in the projects funded through RTP is locally obtained and supported by small local businesses in communities that often rely on the recreational access the programs help provide to survive. We vigorously submit that the requested wavier is a major step towards the goals of BABA and numerous other efforts addressing trails, such as President Biden's Executive Order 14008. This wavier would also bring the RTP into alignment with programmatic waivers already issued by the USDA. Without this alignment of standards significant conflicts could result. The impacts of this conflict could extend well beyond the mere grant or project being declined as our efforts rely on a huge amount of volunteer support and effort and loss of this support would have impact well beyond the value of the RTP program and take decades to repair.

Our request is based on many of the same challenges from the implementation of BABA that have been recognized in other agencies already. The Organizations are very concerned that these provisions could cripple a program with decades of demonstrated success in providing high quality recreational opportunities to the public, engaging critically underserved communities, and driving economic growth around trail networks. These successes are contingent upon the public support for the projects and efforts that have resulted from the catalyst of the RTP program that have taken decades to develop but could be easily lost if projects are not completed on the ground. It has also been our experience that while many of the programs and efforts supported by the RTP program are in compliance with BABA requirements, they simply are unable to document that compliance. As a result, we vigorously assert the waiver is a tool to be

used in achieving the long-term goals of the BABA effort and many other goals and objectives outside just the BABA program.

1(a) What is the RTP program?

Our Organizations represent a broad coalition of users of recreational trails and applicants and committee members who have helped administer RTP that is currently funded at $84 million per year. The RTP funds represent a portion of the motor fuel excise tax collected from nonhighway recreational fuel use in each state: fuel used for off-highway recreation by snowmobiles, all-terrain vehicles, off-highway motorcycles, and off-highway light trucks entirely funds the RTP program. Our Organizations can vigorously assert that the RTP program may not be a huge program in terms of funding, but it provides a critical catalyst for a wide range of other efforts that magnify its impacts exponently. The RTP program is probably unique in the FHWA administrative program as this program does not leverage FHWA moneys with other tax revenues but rather uses money generally raised from donations to charitable organizations and then leveraged with significant volunteer support. It has also been our experience that the flexibility of the RTP program funds has been one of its largest strengths in getting projects done on the ground. We are very concerned that this flexibility will be lost with expanded BABA applicability requirements.

The size of the RTP Program is almost non-existent compared to the Federal Highways Administration grants programs which provide more than $700 billion in grants and loans annually. Comparatively meaning the RTP program accounts for .012% of the Federal Highways Budget. When compared to the Infrastructure Bill, the 5 years of RTP funding provided in the infrastructure bill accounts for only .042% of the entire spending package. The exceptionally small scale of the entire program is reflected by the fact that the average RTP grant is around $100,000 per project. The Organizations have no doubt that possible impacts of the BABA provisions of the Infrastructure Bill on the Recreational Trails Program were simply never thought about as the legislation was moving through Congress. Rather the RTP program is the poster child of why the

waiver provisions in the Infrastructure Act were provide for more generally as there was simply no way for legislators to address all impacts in a funding project the size of the Infrastructure Bill.

The RTP program functions in all 50 states and represents all recreational interests as the funding is allocated on a ratio of 30% for motorized interests, 30% for non-motorized interests and 40% allocated towards diverse trails based recreational interests. In some states, the RTP program provides the only funding for certain categories of recreational activity. Far more commonly, the direct RTP funds are matched with significant funds raised through a wide range of sources on projects. As an example, the State of Colorado only receives about $1.5 million in funding annually from the RTP program. As a result of this catalyst, State lottery funds provide another million dollars annually in funding and the motorized communities voluntarily self-taxed to provide another $6 million annually. The catalyst provided by the RTP program results in a direct funding match of more than $ 8 million dollars and thousands of volunteer hours annually to support projects. This matching effort has only resulted from the long-term availability of RTP funds that can easily be used and applied for projects.

Many states RTP funding is overwhelmingly used for maintenance on federal or state and local public lands and in some situations this funding is the only funding for some types of maintenance and infrastructure even available. The consistency and ease of usage of the RTP funds and match funds has allowed partners with the State Programs allocating RTP funds to explore the use of these funds to create Permanent Seasonal staffing positions in these land management offices. These permanent seasonal positions with the management agencies make crew jobs with the agency far more desirable to applicants and the agency as staff can be trained and retained by the agencies. These positions are the types of gateway positions that a critical to staff development with in the agencies long term. These types of long-term benefits are at risk if the catalyst of the RTP program is lost.

The catalyst of the RTP program allows significant amounts of highly flexible RTP funding to be directed towards the efforts of National Youth and Conservation Corp efforts as well. This

funding allows youth or conservation corps members to work on public lands for hundreds of weeks a year, which is a massive resource for land managers. These Corp efforts allow thousands of members of underserved communities to work outside for the summer and earn money for college. These are opportunities that many members of these communities would never be able to obtain without the funding from these programs that are driven by the RTP catalyst. These programs also support general educational efforts such as the Stay the Trail Program, development of the Colorado Trail Explorer App and supporting the Colorado Avalanche Information Center. The Organizations submit that understanding these are goals and objectives that must be addressed in the waiver process as they are directly recognized in the BABA requirements and many other statutory requirements.

Not only is the RTP funding reasonably easy to use it provides visible on the ground benefits that the public rallies to support and this type of effort only results from decades of success. Even a small hiccup in the RTP program could take years to address as it has taken years to build. The benefits and contributions of these programs were recently recognized by the US Forest Service leadership as part of the Sustainable Trails effort as follows:

> "The engagement and efforts of motorized groups have improved the condition of trails across National Forest System lands and we look forward to continued engagement with the motorized community as part of the Trail Challenge…. During phase one, I welcome collaboration to adequately track, monitor, and acknowledge accomplishments by the motorized community while identifying lessons learned to incorporate into future phases of the Trail Challenge."[3]

While these funding streams may be small by FHWA standards, the immense public benefit that flows from the Program is critical to understanding the basis for the request. The Organizations believe these are programs and issues that Federal Highways managers simply will have no

[3] A copy of this correspondence is included as Exhibit "1" of these comments.

background experience with and as a result we are attempting to provide that understanding with this portion of our comments.

1(b) What does an RTP funded project even look like?

The Organizations believe a brief summary of what commonly RTP funded projects look like will help FHWA understand why we are concerned and why we are asserting that the requested waiver is critical in achieving the goals of the BABA program and many other programs and objectives identified by the Biden Administration. It is important for FHWA representatives to understand the RTP grant is only a small portion of the entire project or effort, but it plays a critical catalyst to these efforts. A general outline of common projects funded by RTP beyond staffing for federal and state offices would include:

i. Informational Kiosks and signage. RTP grants are commonly used to install informational kiosks in remote or difficult locations to access where basic information such as maps, bear awareness, and behavior guidance is critical to the basic safety of users. Often these grants are bundled through a volunteer group where the group coordinates locations and materials to be displayed at multiple locations on a Forest or Field Office and then apply for a grant. The use of contractors for this type of project is often cost prohibitive and often the managers simply don't have the staff to support these kinds of projects. Once funded the volunteers obtain whatever materials are necessary from their local Lowes or Home Depot, ranging from lumber, screws, hinges, bolts, metal roofing and plexi-glass. The Lowes or Home Depot is simply not going to be able to provide any documentation to support a BABA type requirement and any assertion they might be able to provide this information would be misguided.

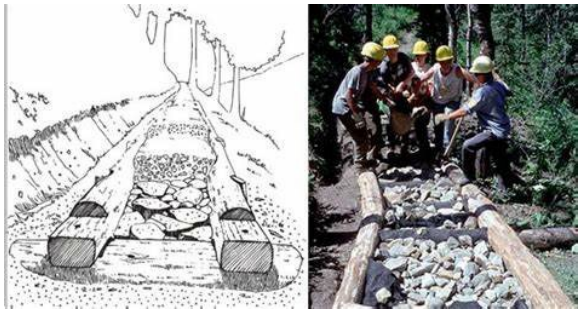
These materials are then transported by the volunteers to the various locations to be assembled by the volunteers. Often transportation of materials to these locations is simply not available at all from sources other than volunteers as the projects are either too small or too remote to be of interest for contractors. The volunteers them assemble the kiosk on site in partnership with land

managers oversight as part of a workday that might include cooking hot dogs after completion, trail maintenance efforts in the area and possibly a ride afterward. These volunteer days may be repeated 20-30 times that season on the forest under the grant. These partnerships continue well after the kiosks are constructed, as often the same volunteers are maintaining the kiosks for the land managers by providing updated informational materials, restocking maps, removing debris or replacing plexi-glass that may be damaged for a variety of reasons. Often the value of these efforts would far exceed the cost of the kiosk construction funded by the grant if the agency performed these services or they were contracted. Without a waiver, this type of project simply could not be viable for funding under RTP.

ii. Maintenance of existing equipment. This type of grant has been rapidly increasing for funding due to rapidly increasing equipment costs and limited availability of equipment to even purchase. Compounding the need to maintain existing equipment is the fact that many of the manufacturers of this equipment are not able to document compliance with BABA. These grants have ranged from funding to bring equipment to the dealer for periodic maintenance as the equipment is highly specialized. This may include flushing all fluids in the equipment, replacing filters, updating software, setting hydraulic pump pressures, replacing worn or old hydraulic lines and other consumables etc. In instances where the equipment may not be able to be cost effectively transported to the dealer, this maintenance is done with volunteers or local experts. We simply have no idea how this type of project would be funded under RTP simply due to documentation of materials used, as we have no idea the source of many materials used, despite the fact this is probably exactly the type of project the BABA requirements were designed to facilitate and promote.

iii. Trail maintenance. Another common project to be funded with RTP grants is the basic maintenance of existing trails and far too frequently these efforts are now occurring in response to catastrophic wildfire impacts in an attempt to protect resources in the burn scar and recreational opportunities. Sometimes these efforts are through a local Youth or Conservation Corp, funding the hiring of seasonal staff with land managers or the use of contractors depending

on the scope of the maintenance effort undertaken. Frequently this type of maintenance is performed by turnpiking the trail and often this is occurring in remote or difficult to reach locations which prohibits the transport of bulk-produced materials to the areas, and crew are using materials obtained on site to reduce costs. Sometimes large-scale relocation of commercially available materials to trail sites is prohibited by Congress, such as maintenance efforts in Wilderness Areas. Logs are cut on site and rocks or other materials are also obtained on site as almost every other form of maintenance is prohibited. The following represents an example of a trail turnpike project:



Often the use of materials for a turnpiking effort are obtained on sight for improvement so naturalness of area is maintained and costs area reduced. While the Organizations support these goals this poses the problem of how would these resources would be documented for BABA compliance.

Trail maintenance often extends well beyond turnpike efforts as the crews frequently build miles of buck and rail fence by accessing local materials such as logs for construction. Again, local natural resources are frequently used for the construction of these types of management tools due to costs and the desire to maintain naturalness of the areas, which is reflected in the following photo.

While everyone agrees these logs and rocks are made in America, we are very concerned that documenting these materials will be almost impossible. This could have further trickledown impacts as justifying a crew will be difficult without identifying materials they worked with, even if the materials are locally sourced.

iv. Portable toilets. The Organizations are aware of a rapidly growing demand for toilet facilities in remote or difficult to reach locations subsequent to the spikes in visitation to public lands and other recreational facilities in 2020. Often the only viable response to this issue is the use of portable chemical type toilets that would be periodically pumped and this is the type of project that would commonly be the basis for an RTP grant. Again, this is a project where the scope of BABA would be horribly unclear and need significant resolution before the grant could move forward. We think the building would be subject to BABA but would the chemical solution, which is really what we are seeking to obtain be required to be BABA certified. How would the maintenance be dealt with for BABA purposes? The Organizations would be concerned that having to resolve this many questions before the grant could be moved forward would simply result in the grant application not being made. Even for multiple sites, these projects are not particularly expensive but have been hugely effective in protecting resources, providing a quality recreational resource and protecting human health and safety.

The Organizations are very concerned that the development of guidance materials for the wide range of projects undertaken by the RTP program could take years to develop. Even with

developed guidance materials a huge number of projects would still have to be addressed on a case-by-case basis. This management model simply is not viable and will result in projects not being done or being funded in a different manner and significant damage to the good will of the RTP program that is critical to its success. While negative impacts to so many other goals and objectives would be significant, the benefits to the BABA effort would be almost unidentifiable as these projects are simply tiny. These are situations and impacts that must be avoided and the programmatic waiver provides the most efficient and effective manner to do this.

1(c) RTP projects rarely exceed the Simplified Acquisition threshold required for Federal Highways Projects.

The Organizations believe the scale of the projects we are involved with is critical to our request as our projects are exceptionally small in size, even if they are highly valuable to the economic benefit to local communities. It has been our experience that the average RTP grant funded project is around $100,000. This average may fluctuate somewhat annually but the fluctuations are not significant in value. Currently, the simplified acquisition threshold provided for in the Federal Highways Administration is a $250,000 project. A $250,000 RTP project would be large to almost unprecedented in nature and we believe the fact that the average RTP grant is less than 50% of the existing Simplified Acquisition Threshold standard is highly relevant to our need for the waiver simply based on undue burden.

As an example of the exceptionally small size of the common RTP grant, the State of Pennsylvania was provided a waiver in 2017 for the purchase of a John Deere 640R loader. The cost to purchase this loader is still less than $80,000 but the benefit achieved for recreation and local communities from the ability to maintain recreational opportunities is incalculable. No other waivers for the RTP program have been issued or requested as often the waiver process simply outweighs the benefits of the project as the projects are so small.

The 2107 Pennsylvania loader waiver causes us more concern about the RTP program in general as grants to state agencies are unusual under the RTP program. Many of the grants are pursued

by nonprofit partners resulting from grants created by volunteers to reduce overhead and make their grant more competitive for funding purposes. The Organizations would be very concerned that the need for a waiver would almost be a permanent barrier to the effort being funded as volunteers simply are unwilling to perform huge amounts of paperwork. Volunteers simply want to complete projects on the ground. Paid employees may be available to pursue waivers as a result of directions from supervisors but volunteers are simply not. Prior to the current rulemaking we simply were not aware this de minimis exception even existed for management purposes or we would have asked about a wavier applying this standard many years ago.

1(d) Even with the waiver recreational activities provide a significant net support for the long-term goals of the BABA requirements.

Our support for the Buy American-Build American Program extends beyond just the funded portions of the RTP program embraces the "user-pay/user-benefit" philosophy of the Highway Trust Fund. Recent congressionally mandated research concluded activities identified as sources of RTP funding collected more than $300 million per year in motor fuel excise tax from nonhighway recreational fuel use.[4] Our ask is for a waiver on only the approximately 30% of the money that is estimated to be expended by the use of off-highway motorized vehicles. We are proud that the remaining 70% of our funds that are not being returned through RTP will continue to support American Businesses through the BABA effort administration.

2(a) President Biden's Executive Order 14008 mandating agencies must improve recreational access must also be addressed.

The basis for the requested waiver extends beyond the strict application of the BABA requirements as the RTP program also involves achieving goals and objectives required in recent Executive Orders and other efforts/issues that we doubt Federal Highways is even aware of.

[4] A complete copy of this research is available here: CRT-FHWA-Study-News-Release-7.30.2021.pdf (assets-servd.host)

These are goals targeting improved sustainable recreational opportunities and the economic benefits that flow from these activities to communities. The recent issuance of Executive Order # 14008 by President Biden on January 27, 2021 would be an example of a decision. EO #14008 is highly relevant as it was issued 2 days after EO #14005 which is discussed in great detail in the scoping request. President Biden's Executive Order 14008 provides specific goals of improving recreational access to public lands and revitalizing local economies with recreational revenue five different times. The Organizations vigorously assert that the issuance of the waiver we are requesting is about the only way the BABA provisions and the Recreational Trails Program can be reconciled.

§214 of the EO starts with the following clear and direct statement of public policies that are to be furthered by the EO implementation:

> "Sec. 214. Policy. It is the policy of my Administration to put a new generation of Americans to work conserving our public lands and waters. The Federal Government must protect America's natural treasures, increase reforestation, improve access to recreation, and increase resilience to wildfires and storms, while creating well-paying union jobs for more Americans, including more opportunities for women and people of color in occupations where they are underrepresented."

As we discuss in greater detail of these comments, the RTP program further every single objective of this EO clear and direct statement of the public policy goals sought to be advanced. The Organizations would also vigorously assert that without a waiver being issued, this program would become exactly the type of issue that was prohibited by EO 14008.

§214 of EO 14008 clearly mandates improved recreational access to public lands through management as follows:

> "It is the policy of my Administration to put a new generation of Americans to work conserving our public lands and waters. The Federal Government must protect America's natural treasures, increase reforestation, ***improve access to recreation***, and increase resilience to wildfires and storms, while creating well-paying union jobs for more Americans, including more opportunities for women and people of color in occupations where they are underrepresented."

The clear and concise mandate of the EO to improve recreational access to public lands is again repeated in §215 of the EO as follows:

> "The initiative shall aim to conserve and restore public lands and waters, bolster community resilience, increase reforestation, increase carbon sequestration in the agricultural sector, protect biodiversity***, improve access to recreation***, and address the changing climate."

§217 of EO 14008 also clearly requires improvement of economic contributions from recreation on public lands as follows:

> "Plugging leaks in oil and gas wells and reclaiming abandoned mine land can create well-paying union jobs in coal, oil, and gas communities while restoring natural assets, ***revitalizing recreation economies***, and curbing methane emissions."

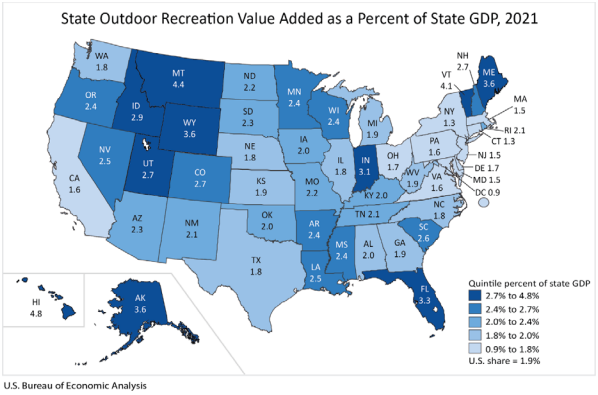
The Organizations vigorously assert that the direct and clear statement of the public policy of expanding recreational access provided in EO 14008 is sufficient to grant the waiver we are requesting for the RTP program. The EO then specifies five different times that recreational access must be improved and that the economic benefits to communities from recreation must be improved as well. This weighs heavily in favor of waiver we are requesting.

2(b) US Department of Commerce Bureau of Economic Analysis reports demonstrate the huge economic benefit that results from RTP program.

The immense range of benefits that stem from activities supported and facilitated by the RTP program cannot be overstated. This economic sector provides a huge amount of jobs for American employees and tax revenues for State and Local governments that the RTP helps to support already. The Department of Commerce recently released its 2021's outdoor recreation economy's gross economic output for outdoor recreation was a colossal $862 billion. Here are a couple of highlights from the BEA's news release:[5]

- Outdoor recreation economy accounted for 1.9 percent ($454.0 billion) of current-dollar gross domestic product (GDP) for the nation in 2021.
- 4.5 million people found employment in the outdoor recreation industry, an increase of 13.1 percent from 2020. Employment in the outdoor recreation industry increased in ALL 50 states in 2021.
- Boating/fishing was the largest conventional activity for the nation at $27.3 billion in current-dollar value

Not only is the recreational economy that the RTP program helps support immense in total spending it is a major economic driver of State level Gross Domestic Products as well. The BEA represents these contributions as follows:



[5] Outdoor Recreation Satellite Account, U.S. and States, 2021 | U.S. Bureau of Economic Analysis (BEA)

When the RTP program is compared to the massive tax revenues that are generated for State and Local economies, this program is a massive revenue generator and provides critical tax revenues for services such as basic road maintenance like plowing, police, fire and school operations. Without the tax revenues generated by these efforts, these activities would not occur in many communities who have lost more traditional revenue streams such as mineral extraction and logging. Not the only source of funding but the Program has become a critical catalyst for a lot of other efforts around recreation. These are goals and benefits that can only be achieved in the long term with the issuance of the waiver as significant damage to these benefits could result without the waiver. Here the benefits of the RTP program already in place and the intent of the BABA program almost completely overlap.

3. Programmatic challenges from Buy American Steel requirements.

The Organizations are intimately familiar with the challenges the Buy American Steel Provisions have created in the allocation of funding from the Recreational Trails Program. We have really struggled as many times projects we are involved with simply are too small to be able to track steel sources for materials used in projects. Rather than a project involving decades of design and procurement efforts that are supporting massive highway projects, our projects are often infinitely small and sometimes very time sensitive. The inherent limitations of the smaller projects we are undertaking significantly alters our negotiation position. Rather than being able to specify standards in the development process our efforts are often closer to take it or leave it for materials. There is often no negotiation on our projects.

When compared to the more traditional decade long highways project for bridges or other infrastructure, RTP projects often involve purchasing a prefabricated bridge from our local supplier. Rather than being able to specify sources of materials and resources in the engineering and design process our bridges are premade to general specification and then dozens of these predesigned bridges are offered on a take it or leave it basis as there is no alteration. Altering

this model makes a resource such as this entirely cost prohibitive. While the model proves to be difficult to document compliance with BABA for, often these bridges are being built in the communities they are being installed in and are using local materials. This is exactly the type of project that the BABA requirements are designed to advance.

Another example of the difference between RTP projects and more traditional FHWA projects is provided by the fact that RTP funds are also commonly used for the grooming of winter snowmobile route. These efforts provide tens of thousands of miles of groomed routes free of charge to the public across the country that allow them to safely traverse the winter backcountry. The following picture represents the usage of the equipment we are referring to:

The Organizations would be remiss not to address the alignment of this issue and challenge with the conditions facing the Federal Transit Authority around the use of transit busses and vans.[6] The grooming equipment performing this service is highly specialized in nature and available in highly limited quantities and when compared to the FTA waiver our situation is significantly more compelling as the number of groomers on the North American Continent as a whole could be only a few thousand. Unlike more commonly available equipment, which can be very difficult to document BABA compliance for, grooming equipment is exponently harder as globally there are

[6] A copy of the most recent petition from Federal Transit Authority is available here: 2022-23198.pdf (govinfo.gov)

only three manufacturers of grooming equipment and two are not based in the United States. [7] There is one manufacturer of grooming equipment in the United States that is unwilling or unable to provide a Buy America Certificate to allow us to use RTP monies for purchasing this equipment.[8] The one American based manufacturer has questions around the origin of their steel used in production and this company also uses powertrain equipment such as Cummins in their equipment but those manufacturers are unable to certify their equipment precluding the end manufacturer from being able to address this question at all. While these efforts have provided an economic lifeline to thousands of small communities across the country, we have also struggled as none of the equipment can be certified as built in the United States. We are concerned that this type of problem will greatly expand with the increased standards being applied under BABA.

It is unfortunate that the inability to certify the source of materials for equipment extends well beyond snow grooming equipment, as there are numerous other highly trail maintenance specific pieces of equipment that cannot be certified for made in America Purposes. For these types of equipment, there is only two manufacturers globally and neither can document BABA compliance due to the inability to identify where steel is sourced. This situation is going to be compounded by the expanded scope of BABA/ The following pictures would represent that type of equipment.

[7] Examples of the internationally produced equipment are available here: PistenBully - Snow groomers - PistenBully and Snow Groomers Prinoth Corporate Groomers

[8] Examples of the lone American producer is available here Tucker Sno-Cat® Snow Machines, Groomers, People & Equipment Haulers, Agricultural - Tucker Sno-Cat®

We are unable to believe these units could ever achieve the heightened requirements of BABA as these producers are already unwilling or unable to document compliance with buy American steel requirements. The basis of need for the waiver is greatly expanded as a grant recipient to purchase a Polaris ATV recently failed as Polaris could not be certified as made in America compliant. This is a unit that was going to be primarily used for trail maintenance but also would be available so supplement search and rescue efforts in the area and other emergency response efforts. This are highly specialized pieces of equipment and unlike many resources substitute equipment or resources simply are not available no matter how far investigations cover.

4(a) Congressional waiver authority for the BABA program.

The Organizations are thrilled that the waiver program has restarted, after far too long a hiatus, and this is a major step in addressing a wide range of issues we have been facing. We have faced significant challenges around implementing the existing Buy American Steel provisions in RTP program without the waiver program. Far too much of what we are involved is exceptionally small in size or uses exceptionally specialized equipment. The Organizations are very concerned that the existing challenges of the Buy American Steel efforts will greatly expand from the change mandated in the Infrastructure Bill. The mere fact the waiver program is moving again is a major step forward. Unfortunately, the waiver program does not address our concerns as a case-by-case basis will not move the public policies furthered by RTP forward as a case-by-case analysis is a major barrier to efforts simply due to the size of our efforts. We see the issuance of a programmatic waiver as a major step towards achieving the goals of the BABA program and many other goals and objectives rather than a barrier to achieving those goals.

The issuance of waivers of the Buy American Requirements are provided for in §70914(b) of the Infrastructure Bill. Waivers may be issued for three general categories of issues which the statute outlines as follows:

"(b) WAIVER. —The head of a Federal agency that applies a domestic content procurement preference under this section may waive the application of that preference in any case in which the head of the Federal agency finds that—

(1) applying the domestic content procurement preference would be inconsistent with the public interest;

(2) 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

(3) 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."

President Biden has already recognized the compelling public interest in expanding recreational access to public lands and related benefits from that flow from expanding recreational access with EO 14008. This alone is a critical step towards satisfying the statutory requirement of a compelling public interest as the basis for waivers. The Organizations are also intimately aware this is a tiny program within FHWA as our average grant is less than 50% of the Simplified Acquisition Thresholds currently in place. The small nature of the grants results in the model of obtaining waivers on a case-by-case basis will functionally stop the RTP from operating entirely. From the applicant perspective, the cost benefit analysis of the application and documentation process for grants is simply badly out of balance once a waiver is introduced into the requirements. We are seeking a waiver for the RTP program based on the applicability of the public interest basis and cost increases.

4(b) A programmatic RTP waiver would align with the decisions on waivers recently made by the USDA.

The Organizations believe the requested programmatic waiver would align the RTP program with the decision issued by the USDA on September 13, 2022 providing indefinite waivers for small projects and efforts. Alignment across these agencies is a major concern as in many states the

RTP funds are a major funding source for ongoing projects and efforts on USDA managed lands. The Organizations would vigorously like to avoid the immediate and totally unnecessary conflict that could result from projects that would be the subject of a waiver for USDA purposes[9] being declined from funding via an RTP grant as the project could not comply with FWHA guidelines. That conflict is unnecessary and would impede the goals and objectives of the USDA waivers, which are defined by the USDA as follows:

> "USDA is proposing this waiver not as an ***alternative*** to increasing domestic production, but as an important ***tool*** to implement the Buy American provisions in the most efficient manner in order to promote investment in our domestic manufacturing base, strengthen critical supply chains, and position United States workers and businesses to compete and lead globally in the 21st century…. The waivers will assist USDA's 29 agencies and staff offices keep projects moving, prevent immediate delays to critically important projects, continue to provide economic opportunity through innovation, help rural America to thrive, to promote agriculture production that better nourishes Americans while also help feed others throughout the world, preserve our Nation's natural resources through conservation, restored forests, improved watersheds, and healthy private working lands."

The Organizations basis for requesting this programmatic waiver for the RTP program could not mirror the landscape level USDA concerns and basis for their waiver more completely. The Organizations would further direct FHWA managers to the specific project concerns raised by USDA about possible impacts from administrative barriers in programs that USDA identified as follows: [10]

> "Agencies and staff offices expressed the following concerns absent these waivers:

[9] A complete copy of the Department of Agriculture Decision Memo on this issue is attached as Exhibit "2" to these comments. (Hereinafter referred to as the "USDA decision memo").
[10] See, USDA decision memo at pg. 6.

- Increased burden for grant recipients, which have limited capacity to handle nuances of grants management.
- Projects will be completed at a slower rate as individual waivers will need to be submitted and processed. USDA agencies will have to devote more staff time to this process. Additional time will need to be spent for both USDA agencies and the grantees and additional training will also need to be provided to recipients. USDA agencies would also need to become aware of market conditions of the availability of domestic construction materials.
- There could be project delays, burden to the project and Agency, and small projects/small communities may withdraw from using the program."

Again, the Organizations could not agree more that these types of possible impacts to project level concerns as were expressed by the USDA managers and recognized in the issuance of the waiver by the USDA for BABA requirements. This alignment is also mandated by the multiple provisions of EO 14008 that require land managers to improve recreational access to federal lands and economic benefits to communities that follow from that recreation.

4(c) Our waiver request for RTP mirrors waiver being provided by other agencies and parallel to the Federal Transit Authority waiver that has been in place since 2016.

While the Organizations have discussed the USDA decision with a high level of detail, the USDA actions are by no means isolated or an anomaly as a large number of other agencies are in the midst of finalizing similar waivers. Numerous agencies are rapidly providing a large number of programmatic waivers for BABA requirements.[11] Other agencies are rapidly working to reissue existing programmatic waivers already in place. The Organizations would note that our concerns on many issues and concerns almost perfectly parallel the Federal Transit Authority waiver that

[11] As example, the US Treasury waiver program is outlined here: Build America, Buy America (BABA) Waivers | U.S. Department of the Treasury; The EPA wavier program is available here: EPA - OW - Final Waiver - Adjustment Period September 2022 - Signed.pdf.

has been in place since 2016 and is currently the basis of another rulemaking to extend again after the passage of the infrastructure bill.

Again, the Organizations would note that many of the challenges that were clearly identified in the recent public notice to extend the Federal Transit Administration wavier would be almost perfectly aligned with our concerns about challenges we have already experienced with the Buy American Steel Provisions in place for the RTP[12]. These challenges would include challenges with manufacturers being able to certify BABA provisions stated in the notice as follows:

> "In response to multiple individual requests for a Buy America nonavailability waiver for non-ADAaccessible vans or minivans that can be used in federally funded vanpool programs, and because the Federal Transit Administration (FTA) has been unable to identify any manufacturer of non-ADA-accessible vans or minivans that fully comply with Buy America, FTA is issuing a partial, time-limited, general nonavailability waiver from the requirements of Buy America as described in this notice." [13]

Further alignment with our concerns and the challenges and those sought to be addressed in the FTA waiver is exemplified around challenges from the limited number of vehicles powerplants. This is again stated in the FTA notice for commuter vans as follows:

> "Today, final assembly for some mass produced, unmodified non-ADA accessible van and minivan models occurs in the United States. However, these models either do not comply with FTA's domestic content requirement or FTA recipients cannot verify the domestic content because their manufacturers are unwilling to

[12] A complete copy of this proposal is available here: DEPARTMENT OF TRANSPORTATION; Federal Transit Administration [Docket No. FTA–2022–0013] Notice of Partial Buy America Waiver for Vans and Minivans64534 Federal Register / Vol. 87, No. 205 / Tuesday, October 25, 2022 / Notices

[13] At Federal Register pg. 64534

sign the required Buy America certification regarding minimum domestic content or submit to FTA's pre-award and post-delivery audit requirements."

Our manufacturers are also unable to identify source of component parts being assembled, such as engines was again provided, as the basis for extending the existing FTA waiver after the Infrastructure Bill. It has been our experience that even manufacturers commonly identified as American manufacturer are not able to document BABA or Buy American Steel requirements. Our concerns are even more heightened as for many pieces of equipment critical to our efforts to support recreational access, manufacturers are not able to provide any BABA compliant resources and there is no possibility of these resources being provided in the future.

5. Our request.

The Organizations are seeking a programmatic waiver of the BABA provisions for the RTP program based on the compelling public interest the program serves and the significant barrier that BAB provisions will result. These are issues that the Infrastructure Bill specifically provides the issuance of waivers to address. The basis of our request is further supported by the de minimis nature of the entire RTP program for federal highways purposes. The above Organizations represent a broad coalition of trails users and small non-profit partners engaged in and supporting trail maintenance efforts from across the Country. Our efforts directly involve application of funding from the Recreational Trails Program("RTP") which is administered through the Federal Highways Administration and was Congressionally created in 1991. Many of our members have actively participated with and served on the Recreational Trails Committee overseeing administration of these funds and are intimately familiar with the hundreds of small projects supported annually by the program in every state in the Country.[14] As a result of the consistent catalyst that the RTP program provides, our members are able to bring additional funding to these projects and couple that funding with massive volunteer support for trails projects generally. Many of these efforts have become almost programmatic in nature and play

[14] A complete database of projects funded through the RTP program is available here: Recreational Trails Program Project Database – Project Database, Image Library, and State Profiles (recreationaltrailsinfo.org)

an important role in protecting resources on public and private lands and creating major economic benefits to many small communities across the country.

Our members support Buy American- Build American ("BABA") goals and objectives everyday as almost everything we use in the projects funded through RTP is locally obtained and supported by small local businesses in communities that often rely on the recreational access the programs help provide to survive. We vigorously submit that the requested wavier is a major step towards the goals of BABA and numerous other efforts addressing trails, such as President Biden's Executive Order 14008. This wavier would also bring the RTP into alignment with programmatic waivers already issued by the USDA. Without this alignment of standards significant conflicts could result. The impacts of this conflict could extend well beyond the mere grant or project being declined as our efforts rely on a huge amount of volunteer support and effort and loss of this support would have impact well beyond the value of the RTP program and take decades to repair.

Our request is based on many of the same challenges from the implementation of BABA that have been recognized in other agencies already. The Organizations are very concerned that these provisions could cripple a program with decades of demonstrated success in providing high quality recreational opportunities to the public, engaging critically underserved communities, driving economic growth around trail networks. These successes are contingent upon the public support for the projects and efforts that have resulted from the catalyst of the RTP program that have taken decades to develop but could be easily lost if projects are not completed on the ground. It has also been our experience that while many of the programs and efforts supported by the RTP program are in compliance with BABA requirements, they simply are unable to document that compliance. As a result, we vigorously assert the waiver is a tool to be used in achieving the long-term goals of the BABA effort and many other goals and objectives outside just the BABA program.

The Organizations are also open to discussion on possible contingencies or guardrails to narrow the scope of any waiver but we believe a waiver is necessary to streamline our acquisitions and efforts. Buy American Steel has already precluded RTP funding from supporting a large number of projects. If you have questions, please feel free to contact Scott Jones, Esq. (518-281-5810 / scott.jones46@yahoo.com) or Fred Wiley (661-805-1393/ fwiley@orba.biz).

Respectfully Submitted,

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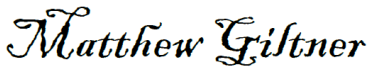

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