

Determination if BABA is implicated.

What is the definition of a project? BABA applies specifically to infrastructure projects. In determining whether BABA is implicated, please use the definition of infrastructure project provided in [2 CFR 184.3](#).

1. 2 CFR 184.3: *Infrastructure project* is defined as any activity related to the construction, alteration, maintenance, or repair of infrastructure in the United States regardless of whether infrastructure is the primary purpose of the project. See also paragraphs (c) and (d) of [§ 184.4](#).
2. [The small project general applicability waiver](#) applies to small projects **where assistance agreements or subawards under assistant agreements are less than \$250,000**.
3. EPA defines “project” as, “any activity related to the construction, alteration, maintenance, or repair of infrastructure in the U.S.” For purposes of Section 319(h) grants, each individual subgrant awarded by a state (such as, through a competitive RFA process) is considered a “project,” even if multiple, separate BMPs are implemented under the subgrant. If a subgrant award is above \$250,000, it is not eligible for the small project waiver. **If a state does not distribute §319 funds to subrecipients, the state’s annual §319 allocation is considered the “project”.**

Typical §319 activities within a project

The next step is to consider the types of 1) activities, 2) the materials used, and 3) the public use of where the activities are occurring (private or public land). State Nonpoint Source Programs are encouraged to coordinate with the EPA as questions arise for specific projects.

1) Activities

- If all the activities in a project support agricultural or conservation BMPs, BABA may not be implicated. The EPA Headquarters programs are examining whether agricultural conservation practices would reasonably be considered “infrastructure.”

2) Materials

- Whether the products covered under 2 CFR 184.3 are permanently incorporated into the project site. Non-permanent, temporary items used and removed during construction, and other materials or equipment that may be removed from the site are not covered under BABA (e.g., temporary scaffolding).
- If BABA applies, the [De Minimis waiver](#) is an important implementation tool. The *De Minimis* waiver allows the use of products of non-domestic or unknown origin up to 5% of the total project cost.

3) Public use

- Project activities solely for the purchase, construction, maintenance, or improvement of a private property solely for non-public use may not implicate BABA. For example, installing fencing to restrict private livestock from access on private land.
- Another example is an acid mine drainage project if the work occurs on private land.
- infrastructure project and BABA may not be implicated. However, if the property includes public access or use, BABA may be implicated.
- Public access or public use may implicate BABA. Projects that include activities in populated areas may implicate BABA if they are implemented outside privately owned land. In municipal-owned lands, if practices use iron or steel products, manufactured products, or construction materials as

defined in [2 CFR 184.3](#) (i.e., manufactured bioinfiltration system, rain gardens using piping and plastic materials, etc.), BABA may be implicated.

- One example of BABA potentially being implicated on private property is when attaching a home to a sewer system (lateral line connection). This activity is a connection to a treatment works and will most likely implicate BABA as the public function extends beyond private property.

Recordkeeping

If BABA applies: The assistance recipient is responsible for assuring projects meet BABA requirements in compliance with the terms and conditions of the grant. Often, a first step for recipients is bidding on a contract that clearly identifies the domestic preference requirements. If BABA is implicated for a project, contract, and compliance documents (principally developed by a contractor) it should be retained by the state for the appropriate record retention period for the grant (minimum of three years from the date of submission of the final Federal Financial Report (FFR), consistent with [2 CFR 200.334](#), unless the state requirements exceed this timeframe).

- The *De Minimis* waiver allows the use of products of non-domestic or unknown origin up to 5% of the total project cost. Recordkeeping for *De Minimis* is simple, as many recipients keep a simple tabular list of items and their costs to track the *De Minimis* waiver use.

If BABA does not apply or is waived at the project level: The state NPS program should ensure that the following information is noted in the project file:

- The total cost of the award or subaward to ensure BABA compliance under the Small Projects Waiver,
- Evaluation of the materials used to implement the practices funded with the award or assistance agreement,
- Whether the project is implemented on private property and not for public use.

Terms and conditions

EPA should confirm that the BABA-specific term and condition is included in annual §319 grants to states. If you are uncertain, you may confirm with your grant specialist.

References

1. OMB Guidance: [M-24-02](#) and <https://www.ecfr.gov/current/title-2/subtitle-A/chapter-I/part-184>
2. EPA Websites: www.epa.gov/cwsrf/build-america-buy-america-baba
3. Made in America Office: MBX.OMB.MadeInAmerica@omb.eop.gov
4. [Supplemental Q&As for BABA Act Implementation: Procedures for Office of Water Federal Financial Assistance Programs memo.](#)