



April 17, 2023

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:

Please accept these comments as a supplement to the comments submitted by the Organizations regarding the original proposal and its relationship to the Recreational Trails Program. (“RTP”). As such we are not repeating our Organizational specific descriptions as you are aware of our general Organizational missions. We are also aware that many of our groups are also working with their state RTP program managers in development of additional state comments. Our membership has participated in almost every phase of the RTP process, from developing grants, to scoring grants, to meeting with legislators to obtain full funding for the RTP program. While we are aware that this comment period is limited to manufactured products, we are addressing the entirety of our concerns around the BABA Proposals. Part of our concerns center on the fact that in defining manufactured products as a portion of

an entire project, significant complications can arise. The Organizations must address a preliminary concerning the scope and basis for waivers for the RTP program generally. The public interests and benefits of the RTP program have been repeatedly and strongly identified by Congress since its inception in 1991 and as a result the Organizations must question. The RTP program is rather unique in federal highways programs as it is funded through the federal highway users fuel taxes but is managed with objectives now identified for the National Park Service. While the management may be shared for the program, the waiver authority is based on the funder of the program, so the NPS lacks authority to issue such a waiver. The Organizations believe the long and specific history of the Congressional findings for the RTP program warrant a waiver be issued on a public interest basis as well as the other statutory basis outlined previously.

The Organizations are concerned that the historical strength of the RTP Program has been its flexibility in creating public benefit in a wide variety of ways such as directly tangible benefits, such as buying equipment or supplies and the fact that the granting process is reasonably flexible. RTP also provides significant less tangible benefits such as getting underserved youth populations outside and engaged in public stewardship. These are components of the RTP program that are rather unique within the scope of FHWA operations. While the Organizations support BABA, we are also aware that FHWA has provided VERY limited waivers for BABA and previously Buy American standards when compared to other agencies. This has proven to create significant friction between local administrators, grant managers and grant applicants. It would be the Organizations desire that the BABA provisions are developed in a manner that reduces conflict rather than expands it.

The Organizations are also aware that the Made in America Office (“MAIO”) is being formed currently. Given that the MAIO is seeking to achieve consistency and timely issuance of waivers and processes across agencies.<sup>1</sup> The Organizations submit that the creation of the MIAO should be a concern as FHWA policy appears to significantly conflict with one of the premises of the office, mainly that waivers are available for projects and efforts. We would urge FHWA to be consistent as much as possible with other agencies simply for efficiencies, this type of consistency will be important for the small nonprofits that are commonly applying for these grants. They simply lack the time and resources to adjust projects midstream due to changes in accounting and grant administration guidance.

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<sup>1</sup> [Made in America](#)

**1(a) Congress has specifically recognized the public benefit of the Recreational Trails Program for decades.**

The Organizations must address the rather unusual nature of RTP within Federal Highways as this unique status is highly relevant to our comments. RTP is a comanaged FHWA program managed to US Park Service goals and objectives, with the funding stream coming from the federal highways fuels taxes. While the program maybe comanaged with NPS, waivers are issued by the funding agency and as a result must be issued by FHWA.

The Congressional findings regarding the RTP program are highly relevant to the public interest waivers that can be issued under the Infrastructure Act. RTP was originally enacted by the Intermodal Surface Transportation Act of 1991, which clearly laid out Congressional findings regarding the public benefits of RTP Program as follows:

“(a) IN GENERAL.—The Secretary, in consultation with the Secretary of the Interior, using amounts available in the Fund, shall administer a program allocating moneys to the States for the purposes of providing and maintaining recreational trails.”<sup>2</sup>

The Intermodal Surface Transportation Act of 1991 also specifically identified that the goals of the RTP program were to be managed to the goals and objectives established in the Statewide Comprehensive Outdoor Recreation Plan required by the Land and Water Conservation Funds. The LWCF program is administered through the National Park Service to the goals and objectives of the SCORP. The mandatory nature of this co-management relationship is outlined as follows:

(b) STATEMENT OF INTENT.—Moneys made available under this part are to be used on trails and trail-related projects which have been planned and developed under the otherwise existing laws, policies and administrative procedures within each State, and which are identified in, or which further a specific goal of, a trail plan included or referenced in a Statewide Comprehensive Outdoor Recreation Plan required by the Land and Water Conservation Fund Act.<sup>3</sup>

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<sup>2</sup> 16 USC 1261(a).

<sup>3</sup> 16 USC 1261(b).

When the Land and Water Conservation Fund was established in 1964, Congress clearly and directly the LWCF program has Congress clearly identified their findings of the Program serving the public interest in §460I of the Act as follows:

*“Congressional findings and declaration of policy. The Congress finds and declares it to be desirable that all American people of present and future generations be assured adequate outdoor recreational resources, and that it is desirable for all levels of government and private interests to take prompt and coordinated action to the extent practicable without diminishing or affecting their respective powers and functions to conserve, develop and utilize such resources for the benefit and enjoyment of the American People.”*

The clear Congressional findings regarding the compelling public interests served by the LWCF program were repeated in 460I-4 as follows:

**“§460I-4. Land and water conservation provisions; statement of purposes**

The purposes of this part are to assist in preserving, developing, and assuring accessibility to all citizens of the United States of America of present and future generations and visitors who are lawfully present within the boundaries of the United States of America such quality and quantity of outdoor recreation resources as may be available and are necessary and desirable for individual active participation in such recreation and to strengthen the health and vitality of the citizens of the United States by (1) providing funds for and authorizing Federal assistance to the States in planning, acquisition, and development of needed land and water areas and facilities and (2) providing funds for the Federal acquisition and development of certain lands and other areas.”

In 2014 the historical findings of Congress regarding LWCF and RTP was consolidated into 54 USC 200101<sup>4</sup>, which again reaffirmed the Congressional findings of a public benefit if the LWCF and RTP programs as follows:

“Congress finds and declares it is desirable—

*(1) that all American people of present and future generations be assured adequate outdoor recreation resources; and*

*(2) for all levels of government and private interests to take prompt and coordinated action to the extent practicable without diminishing or affecting their respective powers and functions to conserve, develop, and utilize those resources for the benefit and enjoyment of the American people.”*

In this update and clarification of numerous statutory requirements affecting the NPS, Congress also clearly stated their intent in undertaking this revision and clarification as follows:

“...the intent is to conform to the understood policy, intent, and purpose of Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections...”<sup>5</sup>

The Organizations vigorously assert that the provisions of 54 USC 200101 were strengthened by Congress in response to the almost ongoing addition of programmatic barriers and additional documentation on many of the programs covered by these provisions. These barriers had resulted in some rather public failures of the Agency to provide basic service and this revision was created to assure this did not happen again. Again, we submit that the RTP program specifically, and the LWCF program also, were created with a specifically identified public benefit and as a result should be provided a waiver simply based on the public benefit waiver identified in Infrastructure Act. The Organizations are unable to envision how a waiver for of the RTP

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<sup>4</sup> See, Public Law 113-287 §7

<sup>5</sup> See, Public Law 113-287 §2b.

program would not be within the scope of a government action to conserve, protect and utilize the RTP program benefits previously provided in 54 USC 200101.

The Organizations must identify the immense amount of overlap between the RTP/LWCF management issues that were addressed with Public Law 113-287 and strengthening of 54 USC 200101 and the concerns that are to be addressed with the issuance of waivers under the Buy America provisions of the Infrastructure Act. The basis for FHWA issuance of public interest waivers is clearly identified by the OMB Memo m-22-11 as follows:

“Public Interest Waivers

A waiver in the public interest may be appropriate where an agency determines that other important policy goals cannot be achieved consistent with the Buy America requirements established by the Act and the proposed waiver would not meet the requirements for a nonavailability or unreasonable cost waiver. Such waivers shall be used judiciously and construed to ensure the maximum utilization of goods, products, and materials produced in the United States.<sup>33</sup> To the extent permitted by law, determination of public interest waivers shall be made by the head of the agency with the authority over the Federal financial assistance award.<sup>34</sup>

Public interest waivers may have a variety of bases. As with other waivers, they should be project-specific whenever possible, as what is in the public interest may vary depending upon the circumstances of the project, recipient, and specific items, products, or materials in question.

**Federal agencies may wish to consider issuing a limited number of general applicability public interest waivers in the interest of efficiency and to ease burdens for recipients.** The agency remains responsible for determining whether such a waiver is appropriate to apply to any given project: the Made in America Office will not review each application of such a waiver.”<sup>6</sup>

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<sup>6</sup> Pg 10.

It is significant to note that there are no prohibitions on the issuance of waivers, and compared to previous guidance the OMB process outlines is a relaxed standard for the issuance of waivers. The OMB memo further outlines several other basis for waivers that would be at least partially applicable to the RTP program. Given the repeated Congressional recognition of the immense public interests that flow from the RTP program generally and the compelling need to avoid governmental barriers to its application, the Organizations vigorously assert the RTP program has a very strong Congressional provision for the issuance of the waiver. Without the issuance of a public benefit waiver, the RTP program would be in direct violation of existing Congressional mandates to streamline the administration of the RTP and LWCF programs.

**1(b)The RTP program provides unique public benefits to communities which Congress has previously sought to protect from undue barriers to the Program's implementation.**

The Organizations are aware that almost every project that FHWA is involved with provides some level of public benefit but almost none of these efforts are comanaged with the National Park Service or subject to the provisions of 54 USC 200101. The RTP program is unique in that the level of public benefit that is provided. While the awareness of RTP efforts to maintains trails is one of the cornerstones of the RTP program, the indirect public benefits of the program extend further than just trail maintenance. The RTP program gets underserved communities outside, engages with the Youth Corp to use these resources to maintain public access. Very few FHWA can identify this type of benefit from their efforts.

The RTP funding program also provides significant fire protection to western communities as these routes that are maintained are also providing access for fuels mitigations and firefighting efforts. This benefit is immense as hotshot crews are able to engage with firefighting activities and not have to cut trails and roads open to get to the areas where they need to be working. RTP provides resources that firefighters are not able to develop in their timeframes, such as bridges over creeks and mapping resources. RTP can provide a bridge that allows firefighters to simply get closer to the areas they need to be working in. Building bridges simply is not a viable tool for firefighters who are engaged in responding to a wildfire. Again the Organizations must note that the strength of the RTP program extends far beyond normal FHWA concerns and any overhead is simply not an additional cost that can be carried through. These are highly

competitive projects and efforts that are driven by volunteers and include concerns such as engaging youth corps and underserved communities. RTP can continue to serve as a catalyst for development of nonprofit partners to leverage RTP funds or it can serve as a barrier to the existence of these groups. We vigorously urge FHWA to allow RTP to continue to serve in its intended role with the issuance of waivers for projects that allow organizations to continue to function.

**1(c) RTP is a catalyst for on the ground efforts that benefit the public.**

The Organizations are also aware that programmatic motorized partner funding for RTP funds was developed far before RTP was ever imagined. The same cannot be said for non-motorized activities throughout the Country. We are aware that many focused on nonmotorized efforts are continuing to see the RTP as a catalyst for other efforts. As an example, recently Great Outdoors Colorado announced another \$500k in grant funding to leverage the RTP funds in an attempt to stimulate the development of non-motorized crew maintenance efforts similar to the motorized efforts already in place. The availability of RTP money has been an effective catalyst in development of efforts such as this and these efforts cannot be overlooked. While the voluntary registration programs that leverage the motorized portions would continue to function, albeit at a lower funding level, matching efforts such as this would become problematic in the long term as there was no other funding source that would be matched.

The programmatic efforts that have been driven in part by the RTP program are immense, on the motorized side of the Program as many states developed a State OHV registration program either as RTP was being developed or in direct response to the RTP program. These programs have now far exceeded the value of RTP funding in many states. Many other states have not adopted this model and RTP remains the sole source of funding for motorized activities. The Organizations hope that the RTP program will continue to serve as an inspiration in these states to take up this model at some point in the future.

**2. Tiny projects by FHWA standards are consistently funded and can make a huge difference on the ground.**

As the Organizations have noted, many of the public benefits resulting from the RTP Program are unusual in comparison to traditional Federal Highways Projects. The Organizations are aware that our original submissions were generally focused on the motorized side of the RTP Program, and with these comments



we are going to be focused on certain aspects of the non-motorized portions of the RTP program. The Organizations believe it is important to identify that RTP program funds are applied on the allocation of 30% of funding is used for motorized projects, 30% is applied to non-motorized projects and the remaining 40% is applied for diverse projects. The non-motorized portions of the program are very different in terms of model and function on how the RTP funds are applied on the ground for a variety of reasons, including limited matching funds being directly available and different scopes of funding and resources for projects, and where the projects are even located.

The Organizations are intimately familiar with the exceptionally small size of some projects that are funded through the RTP programs and we can say with absolute certainty that these small grants are some of the most satisfying and effective grants the program receives for everyone involved. With these small grants, huge benefit to communities can be easily achieved with exceptionally small amounts of money. The Organizations are intimately aware of the fact that every year there are great projects in all phases of the RTP program that are valued at far less than \$50k and we are not aware of grants that exceed the minimum acquisition thresholds being funded. The Organizations vigorously assert that it is due to the exceptionally small size of the RTP program, and the even smaller size of these grants is the basis for the Congressional mandate in 54 USC 200101. The benefits of these efforts are huge and benefit all the public and are provided generally by small nonprofit partners that often simply are unable to absorb any costs or delays in their grant funding. There is often no other funding for projects available and these groups lack funding to bridge funding shortfalls. Compounding the need for the RTP funding is the fact that an overwhelming portion of these funds are used on federal public lands in an attempt to address huge budget shortfalls for these federal lands managers.

As we have noted, many of the RTP grants provided are exceptionally small, but we are also aware that some samples of grants provided will help clarify these concerns. These are not large multinational corporations frequently found in FHWA projects but tiny organizations working on public lands to protect resources and improve recreational opportunities for everyone. We have provided a chemical toilet rental grant from the Columbine Ranger District on the Arapahoe Roosevelt National Forest in Colorado, which was funded but only cost \$9,000.<sup>7</sup> While this grant may be small, the benefits to the recreational community and the local community are overwhelming. This grant will allow a trailhead that has been

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<sup>7</sup> A copy of this grant and related documents is attached as exhibit 1.

simply overwhelmed with visitation to remain open and providing quality recreational facilities. Local community members will hugely benefit from a clean and neat trailhead and no longer having to pick up human waste from visitors that were not able to use the current toilets that had just been overwhelmed and were forced to use other less acceptable resources. By providing management and resources for this area, natural resources are protected as the unmanaged human waste is not flowing into local aquifers, and other areas that are totally unacceptable. If there was ever a project in the public interest, this would be a perfect example. Our first reason for including in the comments is the exceptionally small size of the grant. There is only going to be a small amount of paperwork that the applicant will be interested in completing before it simply is not worth the applicant's time, no matter how large the benefit may be. Avoiding this type of problems and barriers is a reason that we are asking for some type of programmatic waiver for RTP.

Our next concern about a project specific waiver, would be the fact we are unsure how to classify this project. Is this a manufactured product? Probably. What is within the requirements? That is difficult to say as we are not really sure what is in the chemicals that are in the toilet. Are there portions of the toilet that are iron and steel? Probably. How would the maintenance service on the toilets be classified? This periodic maintenance on the toilets is the service we really want. We simply don't see that fitting any of the BABA categories but given the broadly targeted nature of BABA, we can't confirm. We also don't want to provide a grant and then have the applicant be unable to provide BABA compliance and lose the funding and continue to experience so many impacts that are clearly not in the public interest. These types of questions are challenges are exactly the types of problems that 54 USC 200101 was put in place to avoid moving forward.

We are providing a second example of the grants that we frequently receive, which exemplifies another issue we are very concerned about, mainly the highly diverse nature of resources that are sought from the Program.<sup>8</sup> In this grant, the 14ers group is seeking 452 different hand tools, ranging in cost from \$10 to \$70 per item, for projects they are working on with their crews and this type of detail has been highly effective in the group obtaining funding as the high levels of detail is a strong indication that the effort is well run and will deliver on work they are seeking funding for. The Colorado 14ers initiative is a larger group in the trails world, but remains tiny in FHWA circles, that has used the RTP program funds to grow

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<sup>8</sup> A copy of this grant and related documents is attached as exhibit 2.

and prosper and these are the concerns that Congress has always been concerned about fostering. The specifics of the grant are where the barriers of both the BABA requirements and possible implications of the waiver mechanism become apparent. Application of the BABA provisions, would require a certification for each of the 452 hand tools, and the management burden on every phase of these documentation efforts would be immense. Issuing a waiver for each of these 452 pieces would be an immense burden as well, given the huge nature of items that are being obtained. This is a burden that must be streamlined as the work the 14ers do is an immense public benefit and could easily be stopped by either application of BABA requirements or an item-by-item waiver process being applied for.

We have also provided a third example of another exceptionally small grant that was funded, has provided huge benefits for the recreational community while protecting public lands, which is the Carthart Trail grant.<sup>9</sup> This grant also proved to be a catalyst to the previously nonexistent organization that was applying and start to tackle larger projects in a more consistent manner. The value of this type of organizational development cannot be underestimated. While this grant lacked the specific item detail that the 14ers grant provided, the small nature of the grant would again be problematic from a cost benefit analysis. Having to document the BABA compliance would be a major burden to the applicant and could prevent the applicant from ever even applying. Again, the provisions of 54 USC 200101 were put in place to avoid the unnecessary delays and paperwork burdens that had plagued RTP and LWCF previously and highly aligns with the concerns that are the basis for waivers in the Infrastructure Act.

### **3. Consistency with other agencies on Made in America standards.**

The Biden Administration has announced the development of the Made in America Office, which is designed to achieve consistency in the development and implementation of the Made in America effort. As we have previously noted, many other agencies have been issuing waivers for an extended period of time for a wide range of issues. This effort has been more limited in FHWA. While the Organizations are aware that there will probably be significant discussion around why agencies are dealing with the same issues in a significantly different manner, this type of conflict will have immense impacts on the RTP managers and those applying for RTP grants moving forward.

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<sup>9</sup> A copy of this grant and related documents is attached as Exhibit 3.

The Organizations are very concerned that limited guidance has been provided for BABA at this point, but we are more concerned that changes in any guidance part way through the process will complicate applications and frustrate grant applicants. Many of our grants are very small in dollar amount but the applications are somewhat lengthy, and we are concerned that some applicants will simply not reapply under new guidance. We are even more concerned that small grant applicants may not be able to change directions on projects half way through their efforts. They simply don't have the resources to cover costs that they thought would be covered by the grant but can no longer be recovered due to new guidance standards being applied.

The Organizations are also very concerned about inconsistencies across agencies in their guidance for BABA. As the 14ers grant exhibits exceptionally well, many of our grant applicants are matching RTP funds with other public and private funding from a huge range of sources. This type of leveraging is critical to any efforts succeeding on the ground and we submit that the agencies must make these efforts as streamlined as possible for applicants. Every year federal lands managers rely on efforts such as these more and more simply because of declining funding being available to them from the general federal budgeting process. The Organizations submit that this situation makes every grant that much more important.

#### **4. Conclusions.**

Please accept these comments as a supplement to the comments submitted by the Organizations regarding the original proposal and its relationship to the Recreational Trails Program. ("RTP"). We are also aware that many of our groups are also working with their state RTP program managers in development of additional state comments. Our membership has participated in almost every phase of the RTP process, from developing grants, to scoring grants, to meeting with legislators to obtain full funding for the RTP program. While we are aware that this comment period is limited to manufactured products, we are addressing the entirety of our concerns around the BABA Proposals. Part of our concerns center on the fact that in defining manufactured products as a portion of an entire project, significant complications can arise. The Organizations must address a preliminary concerning the scope and basis for waivers for the RTP program generally. The public interests and benefits of the RTP program have been repeatedly and strongly identified by Congress since its inception in 1991 and as a result the Organizations must question. The RTP program is rather unique in federal highways programs as it is funded through

the federal highway users fuel taxes but is managed with objectives now identified for the National Park Service. While the management may be shared for the program, the waiver authority is based on the funder of the program, so the NPS lacks authority to issue such a waiver. The Organizations believe the long and specific history of the Congressional findings for the RTP program warrant a waiver be issued on a public interest basis as well as the other statutory basis outlined previously.

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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

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<sup>10</sup> [Made in America](#)

have questions, please feel free to contact Scott Jones, Esq. (518-281-5810 / [scott.jones46@yahoo.com](mailto:scott.jones46@yahoo.com)) or Fred Wiley (661-805-1393/ [fwiley@orba.biz](mailto:fwiley@orba.biz)).

Respectfully Submitted,



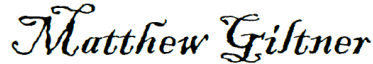
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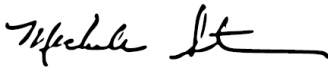
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