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NEPA Compliance for Projects Funded Under the American Recovery and Reinvestment Act of 2009: Is Your Project "Shovel Ready"?

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The American Recovery and Reinvestment Act of 2009 ("ARRA"), provides a \$787 billion economic stimulus package with funding for investments in infrastructure, energy, healthcare, education and science, among other sectors. With billions of dollars in federal stimulus funds available, the ARRA presents private firms with opportunities for financing eligible projects. For example, federal stimulus funds are available for certain affordable housing projects, as well as transportation infrastructure, including highway, bridge, road, transit, and rail improvements that may be associated with a development project. Stimulus funds are also available for wastewater and drinking-water projects, as well as environmental clean-up and remediation, and a wide range of other construction projects.

ARRA-Funded Projects Require NEPA Compliance

The award of any discretionary grant, loan, loan guarantee or other funding requires the federal agency granting the assistance to comply with the National Environmental Policy Act ("NEPA"), the federal environmental review statute. NEPA compliance will be required for projects involving federal funds, even if the project has already completed environmental review under an earlier version of NEPA or an equivalent statewide program. Depending on the scope of the project, obtaining NEPA compliance could seriously delay construction of the project and potentially subject the project to more delay from litigation challenging the adequacy of environmental review. Because one of the primary goals of ARRA is to inject federal stimulus funds into the economy as quickly as possible, Congress considered exempting ARRA projects from NEPA compliance. The final bill, however, does not contain a NEPA exemption. Instead, section 1609(b) of ARRA requires that federal agencies devote "adequate resources" to ensure that NEPA review of ARRA projects is "completed on an expeditious basis" using the "shortest existing applicable process." ARRA requires certain projects, particularly those involving renewable energy, to commence construction by September 30, 2011.

Streamlining the NEPA Process

The requirement that environmental review be "expeditious" and use the "shortest" applicable process is a direct signal to federal agencies to use a streamlined environmental review process. Therefore, the ARRA appears to favor and encourage Categorical Exclusions ("CatEx") of Projects from NEPA, or initiation of Environmental Assessments ("EAs") with Findings of No Significant Impact ("FONSI"), rather than full-blown Environmental Impact Statements ("EIS"), which can take multiple years and hundreds of thousands of dollars to complete. Furthermore, to ensure that NEPA review does not unduly delay the expenditure of federal stimulus funds and hold up projects, ARRA section 1609(c) requires the president to report to Congress on a quarterly basis on the status of NEPA review of projects funded by ARRA.

- **Categorical Exclusions (CatEx).** For projects that do not involve significant impacts, or projects that take place within existing facilities and do not alter those facilities or increase emissions, it may be possible to satisfy NEPA requirements with the lowest level of documentation, known as CatEx. Examples of projects that may be eligible for CatEx include, among others: (1) bridge, sidewalk, park and street rehabilitation/reconstruction; (2) energy-efficient and other green retrofits; (3) rehabilitation/reconstruction of existing rail and bus buildings; (4) construction of bus shelters in commercial

areas; (5) installation of low-water-use landscaping; and (6) replacement of traffic signals and street lighting with energy-efficient lighting technologies.

- **Focused Environmental Assessment (EA) / Finding of No Significant Impacts (FONSI).** The federal agency that disburses federal funds is required to complete NEPA documentation for qualifying projects, but the President's Council on Environmental Quality ("CEQ")—the overarching federal agency charged with NEPA compliance across the federal agencies—recently issued an important guidance document encouraging the use of EA along with FONSI ("EA/FONSI"). For example, documentation prepared pursuant to various state NEPA statutes can be referred to and briefly summarized in, an EA/FONSI to facilitate the NEPA process for these federal projects. A streamlined EA/FONSI can be obtained within the time constraints set forth under the ARRA.

Given that ARRA favors "shovel-ready" projects while still requiring NEPA compliance, the projects most likely to qualify for ARRA funding are fully permitted and entitled projects that already have a federal approval and therefore already have complied with NEPA, or projects that are more likely to be exempt or excluded from NEPA review. Each federal agency maintains its own list of exempt projects, so a project applicant must refer to the NEPA regulations of the agency from which the applicant will receive federal stimulus funds to determine whether the project is categorically excluded from NEPA review.

Guidance on NEPA Compliance

The CEQ is preparing guidance for federal agencies on expedited environmental reviews for work funded under ARRA. As set forth in an April 3, 2009, memorandum from CEQ to the heads of departments and federal agencies":

Recovery Act implementation should proceed expeditiously and in compliance with all environmental, health and safety requirements. In order to comply with NEPA, departments and agencies can: (a) ensure proposals that can potentially be categorically excluded have been or are being reviewed for extraordinary circumstances (40 C.F.R. 1508.4); (b) use concise and focused environmental assessments (40 C.F.R. 1508.9(b)); (c) prepare programmatic analyses in cases where consolidated analysis of similar, connected, or cumulative proposals will facilitate efficient compliance with NEPA (40 C.F.R. 1502.4(c), 1502.20, and 1508.28); (d) review other federal agencies' NEPA analyses and documentation for the project or activity for potential adoption (40 C.F.R. 1506.3) or incorporation by reference (40 C.F.R. 1502.21); and (e) engage CEQ to address any specific NEPA compliance concerns and issues.

Consequently, strategically managing the application process under the stimulus package for any project subject to NEPA review is critical to preventing NEPA from becoming an obstacle to securing timely project approval and funding. Firms seeking to obtain federal stimulus funding may want to plan for and begin NEPA review as soon as possible. The sooner the process is started, the sooner the federal agency dispensing the stimulus funds can determine that a project is categorically excluded from NEPA or issue a FONSI. Moreover, applications that timely and effectively address NEPA issues (*e.g.*, including a draft EA with the application) may fare better against competitors for the same funding, especially if the total funds sought by all applicants exceed the amount of money made available by Congress for the program in question. Additionally, by strategically developing the appropriate NEPA scoping documents and preparing the draft EA, applicants may be able to distinguish themselves from other applicants and to streamline and focus the NEPA review process. Applicants may want to have NEPA counsel involved early to assist in developing a strategy for minimizing NEPA-related delays.

For Further Information

If you have questions about this Alert, please contact one of the [members](#) of the [Energy, Environment and Resources Practice Group](#), or the attorney in the firm with whom you are regularly in contact.