
GUIDING YOUR STIMULUS ACT PROJECT THROUGH NEPA REVIEW

On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act (“ARRA”) into law. ARRA was passed with the goal of stimulating the economy by providing billions of dollars to federal agencies for allocation through grants and loans to state, local, and tribal entities and in some circumstances directly to private companies. The private sector opportunities vary widely—from contracts to restore habitat, to development of a “Smart Grid,” to energy efficiency projects for federal buildings. Private businesses seeking ARRA funds must determine whether the agency’s funding of their project is subject to the National Environmental Policy Act (“NEPA”). NEPA requires federal agencies to review the environmental impacts of and alternatives to “major federal actions significantly affecting the quality of the human environment.”

TYPES OF NEPA REVIEW

Whether the agency believes the project may have significant environmental impacts determines what form the NEPA analysis takes—a Categorical Exclusion determination, an Environmental Assessment (“EA”) with a finding of no significant impact (“FONSI”), or an Environmental Impact Statement (“EIS”) and Record of Decision. Of these, Categorical Exclusions are the least time-consuming and least expensive of the reviews, whereas EAs and EISs are increasingly more burdensome.

OPPORTUNITIES UNDER ARRA SUBJECT TO NEPA REVIEW

ARRA projects that may be subject to NEPA review are those projects where, for example, federal funding and federal decision-making power over the outcome are present, or where a federal agency retains a certain level of control through its approval of a grant or a permit. Examples of such projects include Brownfield cleanup grants administered by the Environmental Protection Agency, loans under the Innovative Technology Loan Guarantee Program administered by the Department of Energy, contracts for implementation of the “Smart Grid” and grants for construction of electrical transmission lines administered by the Department of Energy, and contracts for construction of high speed rail corridors and intercity passenger rail service administered by the Federal Railroad Administration. Each federal agency is required to promulgate its own NEPA regulations applicable to its substantive jurisdiction, so whether an ARRA project is subject to NEPA will largely depend on which agency is administering the particular ARRA project.

HOW THOMPSON & KNIGHT CAN HELP

Section 1609(b) of ARRA directs that adequate Stimulus Act resources be devoted to ensuring that environmental reviews under NEPA are completed expeditiously using the least burdensome NEPA review applicable to the project. Guidance issued by the Council on Environmental Quality on April 3, 2009, further emphasizes the necessity of expedient but comprehensive NEPA review. Due to this sense of urgency, agencies are more likely to fund Stimulus projects that have already undergone NEPA review, qualify for a Categorical Exclusion, or for which the applicant furnishes the information—both in form and substance—the agency will need to prepare a NEPA-compliant EA or EIS.

Although the most expeditious outcome of NEPA compliance is to identify and document an applicable Categorical Exclusion, if a project does not qualify for an exclusion, the applicant may submit to the agency a comprehensive review of the environmental impacts and alternatives considered under an EA (if no significant impact on the environment is expected) or an EIS (if the project may have a significant impact). Such a review will likely need to address the potential impacts on climate change, associated cumulative impacts, environmental justice concerns, public involvement as appropriate, and the status of required environmental or other permitting. Further, this type of comprehensive review and documentation will guard against legal challenges to the type and scope (such as the impacts evaluated and the alternatives considered) of NEPA review that often arise.

Legal assistance can be invaluable to expediting NEPA review and ensuring compliance with the NEPA process. Ways we can help:

- Determine if the project is subject to NEPA review;
- Document the applicability of a Categorical Exclusion;
- Evaluate whether extraordinary circumstances exist that would negate the applicability of a Categorical Exclusion;
- Ensure the proper scoping of an EA or an EIS;
- Ensure completeness of the administrative record—context, intensity, “hard look,” etc.;
- Guide consideration of mitigation, which would reduce a project’s environmental impacts, to facilitate issuance of a “mitigated” FONSI, including use of an adaptive management component;
- Ensure compliance with any public notice and review requirements; and
- Ensure the lead agency consults with all other appropriate agencies under other applicable laws (e.g., the Endangered Species Act, National Historic Preservation Act).

CONCLUSION

Evaluation of NEPA applicability is highly fact-specific. Thus, each ARRA project should first be evaluated to determine whether it may be subject to NEPA due to its funding source, the amount of

federal control involved, or the need for federal approval mechanisms such as permits. For projects subject to NEPA, providing the granting agency with documentation of an applicable Categorical Exclusion or sufficient information to prepare an EA or an EIS will increase an applicant's likelihood of success.

Further, just as with the federal bailout money, how the ARRA funds are used will likely be heavily scrutinized. Thus, it is important to effectively and efficiently utilize these resources. Prudent pursuit of these federal funding opportunities dictates that entities mindfully navigate the federal funding process by understanding and ensuring compliance with the laws and regulations that may be applicable to ARRA projects.

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