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NEPA Compliance and the American Recovery and Reinvestment Act of 2009

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On May 18, 2009, the Council on Environmental Quality ("CEQ") issued its report to Congress on the status of environmental reviews for all projects funded under the American Recovery and Reinvestment Act ("Recovery Act").[1] As the May 18 deadline approached, it was still unclear whether Congress' emphasis on "shovel-ready" projects could be squared with its requirement that all of these projects comply in full with the National Environmental Policy Act ("NEPA").[2] Based on CEQ's report, it appears that most Recovery Act projects are not encountering significant NEPA-related delays.

Section 1609 of the Recovery Act obligates federal agencies to undertake NEPA reviews for all projects funded under the Act. But the law also directs that these reviews be "completed on an expeditious basis and that the shortest existing applicable process under [NEPA] shall be utilized."[3] On April 3, 2009, CEQ issued guidance for reporting to the Council on the NEPA status of Recovery Act projects, but that guidance merely restates existing regulations and does little to ease the tension set up by the Recovery Act.[4]

The CEQ guidance merely states that "Recovery Act implementation should proceed expeditiously and in compliance with all environmental, health and safety requirements."[5] To comply with NEPA, agencies have the option to:

- use categorical exclusions for projects where appropriate;
- use concise and focused environmental assessments;
- prepare programmatic analyses where there are similar, connected or cumulative proposals;
- adopt or incorporate by reference NEPA analyses and documentation completed by other federal agencies; and
- engage CEQ to address specific NEPA compliance concerns.[6]

For most projects, the application of a categorical exclusion would be the most efficient means of expediting the NEPA process. A categorical exclusion is defined as "category of actions which do not individually or cumulatively have a significant effect on the human environment. . .".[7] Therefore, no additional NEPA review is necessary. Before classifying an action as a categorical exclusion, a federal agency must determine that it will not fall within the regulatory exception for "extraordinary circumstances

in which a normally excluded action may have a significant environmental effect."[8]

Each agency develops its own categorical exclusions and to date only one agency – the National Endowment for the Arts – has established a categorical exclusion applicable specifically to projects funded by Recovery Act grants.[9] At this point, most projects funded through the Recovery Act must fall within an existing categorical exclusion or go through NEPA review.

There are a number of categorical exclusions that could apply to Recovery Act-funded projects. For example, in March 2009 CEQ approved the Department of Energy's use of a categorical exclusion for activities undertaken pursuant to DOE loan approvals for the agency's Advanced Technology Vehicles Manufacturing Incentive Program.[10] The Department of the Interior has issued a specific categorical exclusion for grants, including state planning grants and private land restoration, where environmental effects are minor.[11] Many agencies also have categorical exclusions for repair and maintenance activities.

As CEQ's report to Congress clearly demonstrates, the agencies have met their obligation to expeditiously review projects proposed for Recovery Act funding by relying on categorical exclusions whenever possible. The agencies reported on the status of over 51,600 projects and activities. According to the CEQ, for those projects and activities for which NEPA compliance was required, over 40,000 reviews were completed using categorical exclusions. By contrast, over 500 projects and activities were evaluated via an environmental assessment and over 150 were evaluated via an environmental impact statement. For the other projects or activities undergoing NEPA review, the trend is the same. The vast majority are being reviewed as categorical exclusions – 4,566 as categorical exclusions, 396 environmental assessments and 23 environmental impact statements.

In some cases, NEPA review may not be necessary. Of the over 51,000 projects and activities included in the report , 1,614 of them were identified as not requiring review under NEPA. If federal funding is not a significant percentage of overall project costs, and the federal government does not exercise authority or control over the project, then NEPA is not triggered. Although the Ninth Circuit has emphasized that "there are not clear standards for defining the point at which federal participation" transforms a project into a major federal action subject to NEPA,[12] the courts have held that federal funding amounting to between 1.3% and 10% did not federalize projects for purposes of NEPA.

Another topic of note is that the Recovery Act process has made clear that certain agencies do not have NEPA procedures that allow them to expeditiously review projects and activities. CEQ reports that it is working with the Department of Commerce and the National Telecommunications and Information Administration, the Department of Education, the National Park Service, the Corporation for National and Community Service, the National Endowment for the Arts, and the United States Agency for International Development to develop NEPA procedures to ensure

expeditious review.

An applicant for Recovery Act funds should identify the necessary regulatory approvals. The application will be better situated if it demonstrates to a federal agency that the proposed activity is not subject to NEPA, falls within a categorical exclusion, or is otherwise eligible for an expedited NEPA process. If you have any questions about federal statutory compliance, including NEPA, NHPA or other environmental statutes, for Recovery Act-funded projects, please contact us.

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1. Pub. L. No. 111-5 (2009).
2. Agencies also must expeditiously complete the requisite reviews under other federal environmental statutes. In a February 18, 2009 memorandum to heads of Executive Branch departments and agencies at page 7, the Office of Management and Budget stated that Executive Branch departments and agencies shall distribute Recovery Act funds in accordance with "the National Environmental Policy, the National Historic Preservation Act, and related statutes…."
3. *Id*. § 1609.
4. Mem. from N. Sutley, Chair, CEQ to Heads of Depts and Fed'l Agencies (April 3, 2009).
5. *Id*.
6. *Id*.
7. 50 C.F.R. § 1508.4.
8. *Id*.
9. 75 Fed. Reg. 21,011 (May 6, 2009).
10. Ltr. from N. Sutley, Chair, CEQ, to S. Chu, Secretary, Dept. of Energy (March 20, 2009) (the program is designed to provide funding to private parties for the development of advanced technology vehicles).
11. Department of Interior, 516 DM 8.5.
12. *Rattlesnake Coal. v. U.S. Envtl. Prot. Agency*, 509 F.3d 1095, 1101 (9th Cir. 2007).
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