

TROUTMAN
SANDERS

Roadblock to Recovery? Effect of the National Environmental Policy Act on Projects Receiving Loan or Grant Money under the Stimulus Bill



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NEPA REQUIREMENTS

- If: agency proposes to undertake (1) a major federal action (2) significantly affecting (3) the quality of the human environment
- Then: agency must take “hard look” at the environmental consequences of its action
- NEPA is “procedural,” not “substantive”



NEPA PROCESS

Environmental Assessment

VS.

Full blown Environmental Impact Statement

If full EIS, expect multiple years, possibly multiple agencies, and public comment – and expect to pay for it



Key NEPA Issue as to Stimulus Funding: Is Funding a Major Federal Action that Could Trigger NEPA?

- CEQ Regulations: “Actions include new and continuing activities, including projects and programs *entirely or partly financed*, assisted, conducted, regulated, or approved by federal agencies.”
 - 40 C.F.R. §1508.18(a)



Case Law on Whether Federal Funding Triggers NEPA: No Bright Line

- “...no clear standards for defining the point at which federal participation transforms a state or local project into a major federal action.’ ... ‘The matter is simply one of degree.’” *Ka Makani 'O Kohala Ohana Inc. v. Dept. of Water Supply*, 295 F.3d 955, 960 (9th Cir. 2002) (quoting *Almond Hill School v. United States Dep't of Agriculture*, 768 F.2d 1030, 1039 (9th Cir. 1985) and omitting citations)).
- Courts consider both the amount and nature of the federal funds used and the extent of federal involvement. Fact specific.



NEPA in Omnibus Bill

- Unsuccessful Barasso amendment, supported by industry coalition, to streamline NEPA process for projects funded by bill. Amendment placed deadline of 270 days from the date of enactment of the Act for completion of all NEPA reviews for covered projects. If review is not completed within the deadline, the project is considered to have “no significant impact” and work will be allowed go forward.
- Instead, Boxer amendment included as § 1609, including three findings as to why NEPA is important, including:

“When President Nixon signed the National Environmental Policy Act into law on January 1, 1970, he said that the Act provided the “direction” for the country to “regain a productive harmony between man and nature.”



Section 1609

“(b) Adequate resources within this bill must be devoted to ensuring that applicable environmental reviews under the National Environmental Policy Act are completed on an expeditious basis and that the shortest existing applicable process under the National Environmental Policy Act shall be utilized.

“(c) The President shall report to the Senate Environment and Public Works Committee and the House Natural Resources Committee every 90 days following the date of enactment until September 30, 2011 on the status and progress of projects and activities funded by this Act with respect to compliance with National Environmental Policy Act requirements and documentation.”



Don't Forget the Endangered Species Act

- Polar bear listing potentially can block projects emitting GHGs anywhere in U.S. – on theory that they contribute to climate change and thinning arctic sea ice
- DOI/DOC tried to limit effect of listing by amending their ESA regulations to not apply where effects of proposed action “are manifested through global processes” and are insignificant, remote or cannot be measured in a meaningful manner (73 Fed. Reg. 76272 (12/16/08))
- 3/03/09 – President Obama signs Memorandum directing DOI/DOC to reconsider this issue

