

## Obtaining Stimulus Funds Comes With "Green" Strings Attached

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On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act (ARRA). The Act is an extraordinary response to the slowdown plaguing the United States economy. Among the ARRA's goals are stabilization of the economy, modernization of the nation's energy and transportation infrastructure, providing education funding to increase the skills of the American workforce, and improving access to affordable healthcare. Funds from the ARRA are provided either in the form of grants, which require the grantee to share a percentage of the project costs (usually 50%), or low interest loans. As part of President Obama's goal of promoting transparency and accountability in government spending, the administration required all departments to create a Recovery Act website and provide weekly updates to the public concerning their implementation of the Act. A summary of the various department's actions can be found [HERE](#).

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Although the ARRA's stated goal is to distribute funds to "shovel ready projects" as quickly as possible in order to promote job creation, this must be balanced against the need to assess the potential environmental impact of any project. The ARRA is subject to the National Environmental Policy Act (NEPA), which adds a significant layer of bureaucratic hurdles to overcome prior to project approval. Thus, organizations seeking to obtain funding through the ARRA must take a proactive approach in managing the application process. In fact, many entities report that their requests for funding have been denied for failure to provide sufficient detail in the application process. This article will highlight the critical need for organizations to understand how their proposed funding requests will be impacted by federal environmental regulations and the importance of preparing an application that demonstrates compliance with NEPA.

With over \$32 billion in funding authorized as of November 6, 2009, the [Department of Energy](#) (DOE) has been among the most active in announcing opportunities and allocating funds to eligible projects. Periodically, the DOE will release a Funding Opportunity Announcement (FOA). The FOA identifies the nature of the project, the criteria used to determine the recipient(s), and all relevant deadlines. Each FOA contains different criteria and provides the scoring system used by the DOE to weight each particular aspect of a project. Common criteria include confirmation that the project site has been secured, regulatory approval obtained, the applicant has secured funding for their portion of costs and an adequate workforce is in place.

Once an agency makes a decision to award funding for a project, a determination is made as to whether the project satisfies NEPA. NEPA is triggered when federal funding is awarded, a project involves the use of federal land, and/or the issuance of a federal permit. Once NEPA applies, compliance is established via one of the following:

1. Categorical Exclusion;
2. Environmental Assessment; or
3. Environmental Impact Statement

Funding will not be distributed until an applicant can demonstrate that the project satisfies NEPA.

Categorical Exclusions (Cat-Ex) are the simplest manner in which to satisfy NEPA. Cat-Ex's are defined as "a

category of actions which do not individually or cumulatively have a significant effect on the human environment ... and ... for which, therefore, neither an environmental assessment nor an environmental impact statement is required."<sup>1</sup> However, the types of projects specifically identified as a Cat-Ex are narrow. Typically, the agency will provide a list of Cat-Ex's in the FOA, and some agencies have established a list of standard Categorical Exclusions in their respective provisions of the Code of Federal Regulations. If a proposed project is listed as a Cat-Ex, NEPA is satisfied and no further analysis is necessary.

Due to sharp criticism over federal agencies' use of Cat-Ex's as a means of avoiding the lengthier reviews of environmental assessments or environmental impact statements, the White House Council on Environmental Quality ("CEQ") has issued draft guidance for the use of Cat-Ex's. The guidance calls for more rigorous review of Cat-Ex's, increased public notification and disclosure of decisions, and calls for agencies to develop the capacity to monitor activities as a project is implemented to ensure there truly is no environmental impact. The draft guidance was subject to public notice and comment through April 9, 2010, and will likely lead to tighter oversight by the CEQ of agency decisions related to Cat-Ex's.

Environmental Assessments (EA) are another manner in which a hopeful recipient can illustrate that a project complies with NEPA to obtain project funding. When the impact of a particular project is uncertain, applicants may be required to conduct an environmental assessment. EA "[m]eans a concise public document for which a Federal agency is responsible that serves to: (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact; (2) Aid an agency's compliance with the Act when no environmental impact statement is necessary; and (3) Facilitate preparation of a statement when one is necessary."<sup>2</sup> Normally, a period of public notice and comment is required before a determination of the environmental impact is made.

Prospective applicants must also be cognizant of additional agency regulations when submitting an application. When an FOA is unclear as to what constitutes a Cat-Ex, applicants would be wise to provide key information in an Environmental Assessment format. Therefore, the application should include information related to key considerations such as greenhouse gas emission estimates, environmental justice factors, cumulative impact analysis, risk of environmental exposure or terrorist action and public involvement. Taking these steps proactively allows an agency to convert the application to an Environmental Assessment if it is deemed necessary.

If at any point in the process of preparing an EA it is discovered that the project would result in significant impacts an Environmental Impact Statement (EIS) must be prepared.<sup>3</sup> An EIS is triggered when a project poses a significant impact to the quality of human environment. Unfortunately, an EIS is the most costly and complex option for satisfying NEPA. An EIS is a full disclosure document that details the process through which a project was developed, includes consideration of a range of reasonable alternatives, analyzes the potential impacts resulting from the alternatives, and demonstrates compliance with other applicable environmental laws and executive orders. The EIS process is completed in the following ordered steps: Notice of Intent (NOI), draft EIS, final EIS, and record of decision (ROD). The NOI involves publication in the Federal Register and is the first step in a process that involves significant public and governmental involvement to scope the full implications of a project. The process will normally take at least a year to complete and involves substantial cost commitments.

Recent experience has revealed the pitfalls facing those who wish to become eligible to participate in projects announced under the ARRA. Organizations seeking to capitalize on the massive funding available under the ARRA must first carefully evaluate the resources necessary to complete the application process and develop processes which ensure their submission will receive proper consideration by federal agencies. Potential applicants are encouraged to seek assistance from consultants with a thorough understanding of environmental law and experience obtaining federal funds. As always, communication with the agency and key decision makers will help provide the best opportunity to secure funding.

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(1) 40 C.F.R. 1508.4.

(2) 40 C.F.R. 1508.9

(3) 40 C.F.R. 1502.1 *et. seq.*