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Can NEPA And The Stimulus Bill Coexist?

Law360, New York (February 26, 2009) -- The American Recovery and Reinvestment Act of 2009, signed by President Obama on Feb. 17, provides billions of dollars for a dizzying array of projects cutting across numerous sectors of the economy.

Equally dizzying are the varying procedures, timing restrictions and formulas to be used for distributing the money to intended recipients.

But one common theme permeates the act: it is designed to pump money into the economy fast. As the Congressional Budget Office wrote in a letter to Congress on Jan. 28, 2009, "a recession is clearly under way ... it is better if stimulus affects spending quickly in order to mitigate further deterioration in the economy."

Pushing for passage of the stimulus package, President Obama stated that it was necessary to "jolt our economy back to life." This need for speed creates multiple tensions as state and local governments, as well as private entities, scramble for their piece of the pie.

Not the least of these tensions is the fact that many of the projects funded by stimulus money must pass through the environmental review and permitting process under the National Environmental Policy Act ("NEPA"); a process not known for being "speedy."

The need for NEPA review likely will skew the types of projects funded by the act by favoring: 1) projects that have already passed through the environmental review process; and/or 2) maintenance, repair and other similar smaller projects that are likely not subject to NEPA.

The NEPA Process Takes Time

Environmental review under NEPA must be undertaken for every "major federal action significantly affecting the quality of the human environment."

This “federal action” can take many forms, including actions that are under federal control, are undertaken on federal land, require a federal permit, or — possibly most importantly for the stimulus bill — receive federal funding.

Stimulus spending on any number of different types of projects that may have a significant environmental impact must therefore clear the NEPA hurdle before they get off the ground.

If federal action exists, and the impacts are “significant,” an “Environmental Impact Statement” (“EIS”) must be prepared by the federal agency authorizing or funding the project.

The EIS must analyze the direct, indirect and cumulative impacts of the project. This process is extensive and can often take multiple years to complete.

If it is unclear whether the impacts will be significant, a less extensive “Environmental Assessment” may be prepared to determine whether an EIS is necessary. But even this less extensive process can stretch to over a year before the project receives final approval.

The NEPA process is simply not set up to approve projects quickly. Although there is scant empirical research on the issue, a recent statistical analysis conducted by the Federal Highway Administration found it took an average of more than three-and-a-half years to complete an EIS for highway projects.

The same study found that many projects took a decade or more to pass through the NEPA process. This languid timeline is not what comes to mind when one envisions action designed to “jolt our economy back to life.”

The Stimulus Bill Mandates Speed

Contrasting with the multiple year process often required to get through NEPA is the stimulus package’s overarching goal to pump money into the economy rapidly.

In many cases, this apparent conflict will not be an issue. This is because, although most projects funded by the act are arguably “major federal actions,” many of those projects are unlikely to have environmental impacts that are sufficiently significant to trigger extensive NEPA review.

The bill contains billions of dollars for energy efficiency tax credits and grants, income tax breaks, health care and education spending, funding for scientific research and a vast array of similar projects that will probably not have to pass through NEPA to be implemented. Minor maintenance and repairs to existing infrastructure will also likely pose little problem.

For many other projects funded by stimulus money, however, NEPA approval may be mandatory. These projects include major transportation and infrastructure projects, developments on federal lands and certain major energy and transmission projects. And to obtain the money available for these projects, the clock is ticking.

Section 1602 of the Recovery Act directs that recipients of funds “shall give preference to activities that can be started and completed expeditiously, including a goal of using at least 50 percent of the funds for activities that can be initiated not later than 120 days after the date of the enactment of this act.”

Putting teeth to section 1602’s general objective, other provisions of the act contain concrete timing requirements for the use of funds. Many of these requirements apply to projects that will likely require NEPA approval.

For example, certain qualifying renewable energy projects are eligible to receive grants of up to 30 percent of the cost of the project in lieu of a tax credit. To qualify, however, the project must begin construction in 2009 or 2010.

Timing limits on the use of transportation funds are similarly strict. Nearly \$30 billion in highway money is provided through traditional funding paths to the states. The states may then allocate the money to specific projects, provided the money is allocated quickly.

But the U.S. Department of Transportation must withdraw and redistribute 50 percent of any funds not committed to a project within 120 days of allocation. If any state has funds left over after one year, they too will be reallocated. For projects subject to NEPA, these deadlines could prove insurmountable.

Republican Efforts to Streamline the NEPA Process Have Failed

Industry groups and trade associations have long criticized the lengthy and expensive path to approval under NEPA.

Many Republicans in Congress, including most notably Sen. Jim Inhofe, R-Okla., have been sympathetic to these concerns and for years have advocated for streamlining the NEPA process. With its emphasis on speed, the stimulus bill appeared to provide an opening for voicing these concerns.

Environmental review has been widely recognized as a potential obstacle for getting funding into the economy quickly. For example, in late January the Congressional Budget Office was requested by the Chairman of the Senate Committee on the Budget to assess how to accelerate the spending contained in the various stimulus proposals.

First on the list was: “Waiving requirements for environmental and judicial reviews.”

Although he opposed the stimulus bill, Sen. John Barrasso, R-Wyo., seized on this potential opportunity and introduced an amendment that would have streamlined NEPA review for all projects funded with stimulus money.

Under the amendment, NEPA review for such projects would have had to be completed within 270 days of the act's enactment. If the NEPA process could not be completed within that time period, projects would automatically be found to have no significant environmental impact — effectively excluding them from further review.

In support of the amendment, which was backed by the U.S. Chamber of Commerce and a score of other business groups, Sen. Barrasso stated: "If the goal is to actually spend stimulus funds in 2009 and 2010 and get the economy moving, we must do something about NEPA. There are jobs hanging in the balance."

Facing strong opposition from environmental groups, however, the amendment failed in early February.

In its place was inserted language, sponsored by Sen. Barbara Boxer, D-Calif., that emphasized the importance of environmental review under NEPA and made clear that all projects funded by the stimulus bill were subject to NEPA's requirements.

Although the amendment does state that "the shortest existing applicable process" under NEPA must be utilized, it is unclear what this language requires.

In support of her amendment, Sen. Boxer argued that there were more than enough projects that had already cleared environmental review, and were otherwise "shovel ready."

Whether she is correct on that point will in large part determine if stimulus funds will indeed flow quickly into the economy, or if funds will instead get stuck in the NEPA quicksands.

Conclusions

Potential conflict may be brewing between the speed required to obtain much of the funding available in the stimulus package, and the slow pace of the NEPA process.

Proponents of the act, and many environmental groups, claim that the supposed conflict is merely a red herring.

Because there are plenty of "shovel ready" projects that have either completed the NEPA process or are otherwise not subject to it, they argue, NEPA will not pose a barrier to getting stimulus funds into the economy quickly.

The proponents may be right. In late January, Congressional committees at work on the stimulus bill asked states to identify projects that could be begun within 30-90 days of enactment of the federal stimulus package.

States responded with a list of over three thousand separate projects, totaling around \$18 billion, that the states claim are simply waiting for funds to break ground.

It is doubtful, however, that all of these three thousand projects that had failed to obtain funding for their construction, have nevertheless managed to obtain the funding necessary to get through the expensive NEPA process.

And many states have passed their own “little NEPA” environmental review statutes that may provide an additional hurdle for projects to clear.

Regardless of whether there actually are plenty of “shovel ready” projects waiting for funding, the need for stimulus projects to comply with NEPA will skew the types of developments that are undertaken.

Funds will flow to projects that have already completed the NEPA process, eschewing even very smart projects with lengthy review still ahead.

Funds will also flow to relatively small scale activities like repaving, maintenance, and repair that likely will not require extensive NEPA analysis, rather than to major new infrastructure projects.

If the “need for speed” emphasized by the president and members of Congress is truly paramount, these may be acceptable tradeoffs. But the decision to require stimulus projects to go through NEPA has likely made the tradeoffs inevitable.

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