

PERSPECTIVES FROM THE FIELD

Economic Stimulus and NEPA: Lessons Learned in the First Year¹

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Under Section 1609 of American Recovery and Reinvestment Act of 2009 (hereafter referred to as the Recovery Act) federal agencies are required to devote adequate resources to ensuring that applicable environmental reviews carried out under the National Environmental Policy Act (NEPA) are completed expeditiously by using the shortest existing, applicable process allowed by the law. With this requirement, Congress expressed the clear intent that agencies must still comply with NEPA, but that they should do so in a streamlined fashion within NEPA's existing legal framework. Section 1609 also requires the president to submit quarterly reports to Congress [specifically, the United States (US) Senate Committee on Environment and Public Works and the US House of Representative Committee on Natural Resources] on the NEPA compliance status of projects and activities funded by the Recovery Act. The president has delegated this responsibility to the Council on Environmental Quality (CEQ). Remarkably, this is the first time in NEPA's 40-year history that federal agencies are required to account for their progress systematically in complying with NEPA. As of this writing, the CEQ had transmitted four such reports to Congress on May 18, August 3, and November 2, 2009, and January 1, 2010.² These reports are based on detailed filings that each federal agency made to the CEQ. This article summarizes and assesses the first year of NEPA compliance for Recovery Act funding. It reveals the number of each type of NEPA

document that federal agencies have prepared, highlights examples of what federal agencies are doing to streamline NEPA compliance, and discusses how the Recovery Act reporting may have wider influences on NEPA practices in general.

Recovery Act Reporting Requirements

The Section 1609 reporting requirement was part of a congressional compromise under which Congress agreed not to weaken NEPA in the name of economic recovery, but rather to encourage streamlining within the existing legal framework and to require greater congressional oversight through period reporting. Section 1609 also requires that agencies provide adequate resources (e.g., funding and staffing) to ensure that environmental reviews applicable under NEPA are expedited by using the shortest applicable process under NEPA. Although the law does not specify which type of NEPA document must be prepared for each economic stimulus project, it certainly encourages agencies, in light of the short spending timetables dictated by the Recovery Act, to use previously prepared NEPA documents, categorical exclusions (CEs), and other legitimate streamlining techniques to comply with NEPA. The Recovery Act does not, however, provide federal agencies with a license to take inappropriate shortcuts not allowed by NEPA.

Analysis of the First Full Year of Quarterly Reports

As seen from the numbers in Table 1, the first year's reporting reveals that the large majority of federal projects were "shovel ready," meaning that NEPA compliance and other federal permitting had already been completed, or that the underlying projects were not subject to NEPA. Of those activities that were subject to NEPA, by far the largest category was projects being pro-

cessed using CEs (approximately 94.9%). The large number of CE projects is not surprising. Even before the passage of the Recovery Act, federal agencies prepared far more CEs than environmental assessments (EAs) or environmental impact statements (EISs). While each agency's list of CEs is different, most agencies include maintenance and repairs of existing facilities, continued funding for ongoing activities, and a host of other minor projects that have little likelihood of resulting in significant impacts on the human environment.

Thus, given a choice of how to spend Recovery Act dollars, most agencies are apparently marshaling those discretionary funds to projects that fit into CEs. One reason for the extensive use of CEs may be that the Recovery Act mandates brief times to deadlines for the allocation and spending of funds. In some situations, if an agency does not spend the money by specified deadlines, the funding for those programs is no longer available. Agencies should be mindful, however, that the desire to act quickly in the name of economic stimulus is not, itself, a reason to rely on a CE. Rather, for a CE to apply a project must fit squarely into an adopted CE category and not be subject to any exceptions for extraordinary circumstances.

As the reports show, relatively few Recovery Act projects are being evaluated using EAs (approximately 4.6%) and even fewer using EISs (approximately 0.5%). This is not surprising given that the Recovery Act is intended to bring project funds to bear quickly. Federal agencies indicated that they are generally completing those projects expeditiously and often adding Recovery Act funding to projects that had already begun or completed an EA or EIS. This "need for speed" is evidenced in the difference in the percentages of projects that are relying on previously prepared EAs versus previously prepared EISs. Approximately 67% of the projects using EAs are relying on a previously prepared EA, whereas about

POINTS OF VIEW

Table 1. Summary of National Environmental Policy Act (NEPA) compliance for Recovery Act–funded projects (January 2009 through December 2009)

Type of NEPA action	Status	Number of actions by status	Total NEPA actions by document type	Approximate percentage of all NEPA actions
NEPA does not apply			4,141	N/A
Categorical exclusions	Completed CEs	154,040	158,316	94.9
	Pending CEs	4,276		
Environmental assessments	Completed EAs	6,316	7,596	4.6
	Pending EAs	1,280		
Environmental impact statements	Completed EISs	719	806	0.5
	Pending EIS	83		
Total NEPA actions	Completed actions	161,075	166,718	100
	Pending actions	5,643		
Total Recovery Act–funded projects		161,553*		

*The total does not equal sum of NEPA documents because of the status of some pending, unfunded projects.

87% of the projects using EISs are relying on a already prepared EIS.

Several agencies reported using programmatic NEPA reviews to address similar projects and activities. Using a programmatic review can facilitate NEPA implementation of individual projects and activities either by providing full NEPA compliance or by programmatically addressing common environmental issues and thereby eliminating the need to replicate the analysis of those issues in subsequent, project-specific, NEPA reviews. In some cases, these programmatic documents are based on new, innovative approaches that are outside of the traditional NEPA model. For example, the Maritime Administration, within the Department of Transportation, reported preparing a programmatic CE for all 75 Recovery Act grants issued under the Small Shipyard Grant program.

In addition to the statistical summary, the CEQ quarterly reports to Congress include agency-by-agency descriptions of some of the main Recovery Act spending programs. These spreadsheets provide interesting information about where agencies are focusing their economic stimulus efforts.³ Notably, despite what some critics had predicted, no departments or agencies have reported instances of substantial NEPA-related delays. However, in some

cases, the need to expedite Recovery Act funding has caused the agency to take a fresh look at some of the institutional delays that have traditionally slowed the NEPA process. For example, the Bureau of Indian Affairs, within the Department of the Interior, has noted that the requirement for tribal consultation has slowed some of its Recovery Act spending and is looking into ways to improve this process for economic stimulus projects.

The reports also show that the Recovery Act's emphasis on streamlining NEPA compliance is having a ripple effect on the broader NEPA practice. Some agencies have already initiated changes to their NEPA regulations and manuals to incorporate techniques and approaches for making NEPA compliance more efficient and expedient. The CEQ is encouraging these efforts and providing guidance to support them. For example, according to the August report, the Natural Resources Conservation Service, within the Department of Agriculture, has worked closely with the CEQ to revise its NEPA regulations to encourage expeditious completion of all projects subject to NEPA, not just economic stimulus projects. These proposed regulations are currently pending.

In a separate report on its NEPA Net Web site, the CEQ keeps track of recently im-

plemented and newly proposed Council on Environmental Quality Act (CEQA) procedures from other federal agencies. Notably, several agencies have developed new CEs just for certain types of Recovery Act projects. Additionally, some federal agencies have relied on other unique approaches to streamlining NEPA compliance for Recovery Act funding.⁴ An example of one such approach is the Department of Energy (DOE), which recently published several *variances* from the agency's normal NEPA procedures for Recovery Act funding. One variance applies specifically to competitive grant activities and the funding decisions for certain energy-efficiency projects. Under this variance, funding decisions are made without the DOE-prepared environmental critiques, environmental synopses, and supplemental reviews called for in the DOE's NEPA regulations. Instead, DOE NEPA Compliance Officers participate in a Merit Review Board that evaluates environmental questionnaires prepared by prospective grantees. The Merit Review Board considers environmental effects when selecting potential projects, and the DOE continues to prepare EAs and EISs before commencement of activities that could affect the environment. In other words, the use of variance changes the timing of NEPA compliance. Instead of complying with NEPA before the funding decision is made, the DOE will comply with NEPA after the funding is granted, but before any projects

with potential environmental impacts are actually implemented.

Although this *variance* approach to NEPA is not specifically supported by the CEQ NEPA regulations, the DOE asserts that it has the authority to conduct alternatives procedures for certain types of projects, in the interest of public welfare, by virtue of its own regulations.³ According to the DOE, the Recovery Act funding program meets that public welfare standard.

Conclusion

The CEQ's quarterly reports generally paint a glowing picture about the relationship between NEPA and the Recovery Act. For example, the final report includes dozens of success stories from throughout the federal government of how environmental analysis required by NEPA improved the projects, but still allowed timely Recovery Act funding. The CEQ provides the following observation about these and other examples:

Overall, the departments and agencies continue to report the timely completion of NEPA reviews that inform decisions on projects and activities receiving ARRA funds and position the agencies to implement those projects and activities in an environmentally sound manner. No department or agency has reported instances of substantial delays related to NEPA reviews. Agencies continue to meet the challenges of administering programs and projects that were dramatically expanded by ARRA funding by providing

tools (e.g., checklists, templates) and additional guidance to help program and project managers deliver projects and activities while meeting their environmental requirements.⁶

Despite the CEQ's remarks about the reported success stories, the overwhelming reliance on CEs and the reliance on other unusual NEPA shortcuts certainly raise a red flag. Unfortunately, prior to the Recovery Act, most federal agencies kept no statistics on the number of CEs, or their relative frequency of use, compared to other NEPA documents. Thus there is no baseline by which to determine whether reliance on so many CEs is appropriate. Hopefully, most agencies are taking their NEPA responsibilities seriously and using CEs only as they were intended—for minor projects with little likelihood of any potential environmental impacts. However, with more than 161,000 projects receiving Recovery Act funding, some misuse of NEPA has probably occurred. Nevertheless, to date there is no evidence of any widespread attempt to subvert the objectives of NEPA in the name of economic stimulus. Nor has there been any sudden increase in NEPA litigation over Recovery Act-funded projects, which would also be an indicator of alleged NEPA violations.

Between the statistical details, the agency-by-agency analysis, and the project examples, the first year's quarterly reports reveal thought-provoking information about NEPA practices and will hopefully pave the way for future additional improvements to NEPA. Additionally, the Recovery Act's first-ever NEPA reporting requirements should con-

tinue to foster an "open book" approach to overall NEPA compliance.

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Notes

1. This article is based on an earlier version first published in the Impact Report, "Summary of CEQ's First Two Status Reports to Congress on NEPA Compliance for Economic Recovery Projects." ICF International, Fairfax, Virginia, 2009, an online publication of ICF International (<http://icfi.com>).
2. The complete text of these reports is available on the CEQ's NEPANet Web site: <http://ceq.hss.doe.gov/nepa/nepanet.htm>.
3. The complete agency-by-agency spreadsheets are available on the NEPANet Web site.
4. Available for download from the NEPA Web site: http://ceq.hss.doe.gov/nepa/Agency_NEPA_Procedures_December_16_2009.doc.
5. 10 CFR 1021.343(c).
6. "The Fourth Report on the National Environmental Policy Act Status and Progress for American Recovery and Reinvestment Act of 2009 Activities and Projects." Council on Environmental Quality, Washington, D.C., February 2010.

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