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Environmental Reviews Could Delay Projects Seeking DOE Loan Guarantees

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The purpose of the Department of Energy Loan Guarantee Program, originally authorized in Section 1703 of the Energy Policy Act of 2005, is to encourage early commercial use of new or significantly improved technologies in energy projects. The American Recovery and Reinvestment Act, signed into law on February 17, 2009, added a new Section 1705 to the EPAct, intended both to increase significantly the amount of funds available under the Loan Guarantee Program and to expand the types of eligible projects. An important issue for applicants is the timing and potential delay inherent in any required review under the National Environmental Policy Act .

Loan Guarantee Program

The purpose of the Department of Energy ("DOE") Loan Guarantee Program, originally authorized in Section 1703 of the Energy Policy Act of 2005 ("EPAct"), is to encourage early commercial use of new or significantly improved technologies in energy projects. The American Recovery and Reinvestment Act ("Recovery Act"), signed into law on February 17, 2009, added a new Section 1705 to the EPAct, intended both to increase significantly the amount of funds available under the Loan Guarantee Program and to expand the types of eligible projects.[1] The Recovery Act also includes funds for direct grants and direct loans by DOE for a wide range of eligible energy projects.

On February 19, 2009, the Secretary of Energy set an aggressive schedule for disbursing Recovery Act funds, announcing plans to disburse up to 70% of available Recovery Act investment by the end of 2010. Secretary Chu also predicted that the first loan guarantees, under the original Section 1703 solicitation, would be approved by late April or early May 2009. A step was taken when DOE conditionally approved the first loan guarantee for $535 million for Solyndra, a manufacturer of solar panels, on March 25, 2009. To date, however, the Solyndra loan guarantee is the only one that DOE has granted under Section 1703. Moreover, DOE has

[1] *See* Pillsbury Client Alert, "Stimulus Bill Promotes Green Energy and Energy Infrastructure," Feb. 18, 2009, available at http://www.pillsburylaw.com/index.cfm?pageid=34&itemid=39035.

not published the regulations and guidelines for Section 1705 and, therefore, has not released any solicitations. DOE has predicted that it will release these regulations and guidelines during the late summer or fall of 2009. To be eligible under Section 1705, project construction must commence by September 30, 2011.

Is There an Argument that NEPA Does Not Apply to Loan Guarantees?

Although Secretary Chu has announced changes to the Loan Guarantee application process intended to accelerate approvals, such as rolling appraisals of applications and proposals for simplified paperwork, loan guarantee applicants continue to be seriously concerned about the potential for significant delays as a result of having to comply with the National Environmental Policy Act ("NEPA"). These concerns have already been the subject of a number of articles and commentary.[2]

A preliminary question is whether NEPA applies to the Loan Guarantee Program in all situations. If DOE's only action is guaranteeing a loan, rather than providing direct funds, might this arguably exempt the Loan Guarantee Program from NEPA? Both Congress and DOE have made statements that suggest that they have been assuming that NEPA applies. During the Congressional debate there was discussion of exempting Recovery Act investments from NEPA or, alternatively, limiting the applicability of NEPA, in light of the goal of dispensing stimulus funds as quickly as possible. For example, Senator Barrasso proposed an amendment that would require completion of the NEPA process within nine months. Senator Boxer's alternative amendment became Section 1609 of the Recovery Act, requiring federal agencies to devote "adequate resources" to ensure NEPA review is "completed on an expeditious basis" utilizing the "shortest existing applicable process." The assumption implicit in the language of Section 1609 lends some support to those who argue that NEPA applies to all loan guarantee applications.

Major Federal Action

NEPA applies to "major Federal actions significantly affecting the quality of the human environment."[3] The regulations of the Council on Environmental Quality ("CEQ"), established by NEPA, define major Federal action to include "new and continuing activities, including projects and programs entirely or partly financed ... or approved by federal agencies."[4] Covered projects include "actions approved by permit or other regulatory decision as well as federal and federally assisted activities."[5] DOE's NEPA regulations adopt the CEQ definitions and add a definition of "action": "a project, program, plan, or policy ... that is subject to DOE's control and responsibility. Not included within this definition are purely ministerial actions with regard to which DOE has no discretion."[6] The definition of "project" includes "funding for a facility, process, or product, or similar activities…"[7]

While there is case law that would support the argument that a loan guarantee alone is not a "major" Federal action triggering NEPA review,[8] it will be a difficult position for DOE to take given the risk of lawsuits and likely criticism, in light of the Congressional discussion on NEPA and the inclusion of Section 1609 to the Recovery

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[2] *See, e.g.*, Ucilia Wang,"Solar Companies Fear Delays as Feds Work Slow Magic," Greentechmedia, June 10, 2009, http://www.greentechmedia.com/articles/read/solar-companies-fear-delays-as-feds-work-slow-magic/.

[3] 40 U.S.C. § 4322(C).

[4] 40 C.F.R. § 1508.18(a).

[5] *Id.* § 1508.18(b)(4).

[6] 10 C.F.R. § 1201.104(b).

[7] *Id.* § 1201.104(b).

[8] A number of cases have considered the question whether funding of a project by a federal agency is a sufficient involvement to trigger NEPA, generally focusing on the nature of the federal funds and the extent of federal involvement in the project. *See, e.g.*, Rattlesnake Coalition v. EPA, 509 F.3d 1095, 1101 (9th Cir. 2007) A small amount of federal funding—for example, less than 2% of the entire project—will not make the entire project a major Federal action. *See, e.g.*, Ka Makani 'O Kohala Ohana Inc. v. Water Supply, 295 F.3d 955, 960 (9th Cir. 2002). One case has held that a loan guarantee was not a Federal action because the agency's action "stop[ped] at approval based on the financial status and needs of the applicant" and there was no "ongoing control over the borrower, nor of the property involved." Ctr. for Biological Diversity v. U.S. Dep't of Hous. and Urban Dev., 541 F. Supp. 2d 1091, 1099 (D. Ariz. 2008).

Act. Also, the regulations and solicitations of applications under the program include a number of covenants and other provisions that would make it difficult to argue that the loan guarantees are not "major" actions.

If NEPA Applies To A DOE Loan Guarantee, What Does That Mean For Applicants?

The Requirement to Prepare an Environmental Impact Statement

If NEPA applies to a Federal action, the statute requires that the federal agency prepare a detailed statement or "environmental impact statement" ("EIS") on:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[9]

Despite the language quoted above, not all proposed major Federal actions ultimately require preparation of an EIS. Each federal agency is mandated to adopt Categorical Exclusions ("CE"),[10] which are "actions which do not individually or cumulatively have a significant effect on the human environment."[11] In addition, in lieu of an EIS, the federal agency may elect to prepare an "environmental assessment" ("EA") a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]."[12] If, pursuant to the EA, an agency determines that an EIS is not required, it must issue a "finding of no significant impact" ("FONSI"), which briefly describes the reasons why the proposed agency will not have a significant impact on the human environment.[13]

DOE already has stated that it does not believe any loan guarantee application for commercial scale projects will fall within a CE,[14] although more than half of DOE's directly funded projects under the Recovery Act have qualified for a CE.[15]

How Will DOE Decide Whether to Prepare an EA or EIS?

DOE's regulations provide examples of the types of projects that will require an EIS and those for which an EA is sufficient. For example, an EA is generally sufficient for "siting, construction, and operation of energy system prototypes including but not limited to, wind resource, hydropower, geothermal, fossil fuel, biomass and solar energy projects."[16] On the other hand, an EIS is required for "allocation of electric power, major new generation resources/major changes in operation of generation resources/major loads."[17] The DOE Loan Guarantee Program regulations require that an application include "a report containing an analysis of the potential environ-

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[9] 42 U.S.C. § 4332(2)(C) (2009).

[10] DOE's list of CE's are located in Subpart D, Appendices A and B of DOE's NEPA rules, 10 C.F.R. Part 1201.

[11] 40 C.F.R. § 1508.4.

[12] *Id.* §§ 1501.4(b), 1508.9(a).

[13] *Id.* §§ 1501.4(e), 1508.13.

[14] *See* Attachment B, *NEPA Guidance*, Loan Guarantee Solicitation Announcements.

[15] *See* Council on Environmental Quality, *Report on the National Environmental Policy Act Status and Progress for American Recovery and Reinvestment Act of 2009 Activities and Projects*, May 18, 2009, *available at* http://ceq.hss.doe.gov/nepa/nepanet.htm.

[16] 10 C.F.R. Part 1021, Subpart D, Appendix C

[17] 10 C.F.R. Part 1021, Subpart D, Appendix D.

mental impacts of the project that will enable DOE to assess whether the project will comply with all applicable environmental requirements, and that will enable DOE to undertake and complete any necessary reviews under [NEPA]."[18] The NEPA Guidance, Attachment B to Loan Guarantee Solicitation Announcements, provides a detailed list of the information that must be submitted under Section 609(b)(23) in a number of categories. The list includes specified data on facilities, project location, proposed project construction and operation, project progression, status of other environmental and regulatory review (including permitting), alternative sites or operating parameters, post-operational requirements and other actions in the project area. DOE's review of the environmental report will determine whether it believes an EIS must be prepared or whether an EA will be sufficient because it likely will result in a FONSI.

In an effort to avoid duplication and expedite the NEPA process, DOE will determine whether there is an ongoing NEPA review for a project or a portion of a project for which a loan guarantee is sought or if there is an existing EIS or EA either of DOE or another agency that may be adopted in whole or in part.

In addition, however, in preparing an EIS or EA, the agency must consult with other agencies with applicable environmental review requirements, as well as state and local agencies and other stakeholders. This process can add significantly to an already lengthy time line for completion. In addition, a number of states have their own NEPA statutes that may impose additional requirements for review of the underlying project.

Preparation of an EA or EIS

The firm preparing an EA or EIS works under DOE direction; DOE is solely responsible for the contents of an EA or EIS. An applicant will be required to contract with and pay the firm and should recommend a firm or firms to DOE.

If DOE determines that an EA should be prepared, it must notify the affected state and any affected tribes. Once the EA is drafted, the state and tribes have between 14 and 30 days for a pre-approval review. DOE then determines if the impacts are not significant and issues the EA with a FONSI (and mitigation action plan if appropriate); alternatively, if the impacts are found to be significant, DOE must initiate an EIS.

If DOE determines that an EIS must be prepared, it will publish a Notice of Intent in the Federal Register. There follows a series of mandated comment periods, possibly including public meetings, the distribution of the draft EIS for review by Congress, other agencies, tribes, state and local governments, and other identified stakeholders, completion of the final version and a waiting period for effectiveness. The NEPA process is complete when a Record of Decision is published in the Federal Register, with a mitigation action plan if appropriate.

Current Reviews and Statistics

A recent report found that the average time to complete an EIS for all federal agencies is 3.4 years.[19] DOE reports that its average time for preparation of an EA in the 10 years ending December 2008 was 13.5 months; for an EIS for the same period it was 28.9 months.[20] With respect to the Loan Guarantee Program, DOE reports that there are 10 loan guarantee applications that have begun the NEPA process, with four in the EIS process and 6 either in the EA process or having completed EAs, including the Solyndra EA.[21] DOE's projected time for preparation of the four pending EISs ranges from 13 months to 46 months. All of the periods covered by these statistics begin with the publication of a Notice of Intent to prepare an EA or EIS; they do not

[18] 10 C.F.R. § 609.6(b)(23).

[19] de Witt and de Witt, "How Long Does It Take to Prepare an Environmental Impact Statement," Environmental Practice, Journal of the National Association of Environmental Professionals 164 (Dec. 2008).

[20] Carol Borgstrom, "NEPA Documentation," Dec. 3, 2008, available at http://management.energy.gov/documents/NEPA_Documentation.pdf.

[21] U.S. Department of Energy, "NEPA: Lessons Learned," Mar. 3, 2009, available at http://www.gc. energy.gov/NEPA/documents/2009_MARCH_LLQROnline.pdf.

include the time required to prepare and evaluate the initial environmental report or any required environmental critique comparing the environmental impacts of competing projects under 10 C.F.R. § 1021.216.

Under the 2008 solicitations, DOE reports it is attempting to make "early determinations" regarding the level of NEPA review required. With respect to the 2008 nuclear solicitations, the number of proposals exceeded the amount of loan guarantee resources, which triggered the requirement that DOE prepare an environmental critique under 10 C.F.R. § 1021.216. For the two front-end nuclear proposals, DOE reported that it has completed an environmental critique and is expected to select one project by the end of March, after which it would file an Environmental Synopsis with EPA, to be followed by whatever additional NEPA review is required.

Understandably the federal agencies, including DOE, have been criticized for the length of time they take to complete the EIS process. In the context of the mandate to disburse Recovery Act funds and guarantees as quickly as possible, DOE has been considering ways to shorten the NEPA process. For example, at a NEPA Compliance Officers' meeting in April 2009, a sample 15-month EIS schedule was disseminated and a number of ways to streamline the process internally at DOE were discussed, including, for example, adoption of a process to encourage pre-application consultation. Only time will tell if these efforts will be successful in shortening the NEPA process at DOE.

How Can Applicants Make the NEPA Process as Short as Possible?

Applicants should make an effort to have the NEPA process begin as early as possible after the application has been filed. Applicants should request that DOE set a time limit as provided by the CEQ regulations.[22] The environmental report filed with the loan guarantee application should be as comprehensive as possible, including even a draft EA. Applicants should work closely with DOE and take advantage of any consultation process available to ensure that DOE is satisfied that the required information is being supplied.

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[22] *See* 40 C.F.R. § 1501.8.