ENVIRONMENTAL REVIEW REQUIRED FOR AFFORDABLE HOUSING PROJECT STIMULUS FUNDS UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

The Tax Credit Assistance Program (TCAP) provides funding for capital investment in Low Income Housing Tax Credit projects. The U.S. Department of Housing and Urban Development (HUD) has federal oversight responsibility for this program. The American Recovery and Reinvestment Act of 2009 (ARRA) authorized $2.25 billion in federal stimulus funding for the TCAP. Based upon guidance provided by HUD, projects receiving federal TCAP funds under the ARRA will be required to comply with the National Environmental Policy Act (NEPA), even if those projects are private residential or mixed-use development projects.

NEPA requires federal agencies to conduct environmental reviews of otherwise non-federal projects if those projects include some kind of federal involvement, such as federal approvals, permitting, or funding for a project. Because stimulus funds under ARRA for the TCAP are federal, NEPA environmental review is required for projects receiving those funds. This may be the case even for those projects that have already undergone environmental review under the California Environmental Quality Act (CEQA).

NEPA and CEQA Environmental Review

Environmental review required under NEPA, although similar to that required under CEQA, differs significantly. For example, both statutes require the agency conducting the environmental review to determine the appropriate level of environmental analysis required for the project. For "major federal actions" resulting in significant environmental impacts, NEPA requires federal agencies to prepare an environmental impact statement, or EIS, which includes an extensive environmental analysis of the project. NEPA also allows federal agencies to prepare a more limited environmental assessment/finding of no significant impact (EA/FONSI) for projects that will not result in any significant impacts. Some projects may be subject to a categorical exclusion, which is a category of actions that does not require any additional NEPA review.

CEQA includes a similar hierarchy of environmental analysis. Under CEQA, the state or local agency must prepare an extensive environmental impact report, or EIR, for projects that may result in significant environmental impacts. If the project will not result in any significant impacts or will not result in any significant impacts with mitigation, the agency may prepare instead a negative declaration or a mitigated negative declaration, respectively. Certain categories of projects are exempt from CEQA review pursuant to exemptions under the statute or the CEQA guidelines.

Because NEPA and CEQA are different statutory and regulatory regimes, compliance with one does not satisfy compliance with the other. Nonetheless, information and analysis developed for the evaluation of a project under one of the statutes may be used for the evaluation of that project under the other statute. This ability to essentially share environmental analysis may help expedite the environmental review process. For example, a federal agency conducting NEPA review for a project could "borrow" the environmental information and analysis used in the CEQA document for that project. In light of the fact that the funding authorized under the ARRA focuses on shovel-ready projects, expediting NEPA review by relying on a categorical exclusion or other streamlined NEPA review, or by borrowing the information and analysis from an already-prepared CEQA document, could be critical for projects seeking TCAP funds under the ARRA.

ARRA Provisions, California, and NEPA Compliance

ARRA provides that for projects using TCAP funds, the State of California is the "Responsible Entity" for compliance with the federal environmental requirements that apply to the TCAP, including compliance with NEPA. California has designated the California Tax Credit Allocation Committee (TCAC) to carry out the federal environmental responsibilities on behalf of the State. Even though it has designated those responsibilities to TCAC, the State of California remains the Responsible Entity with overall accountability for compliance with federal environmental laws applicable to TCAP funding.

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Importantly, the requirements of NEPA apply to any project as of the date the developer applies to TCAC for TCAP funds. Once an application is filed, there can be no "choice-limiting" activity on a project until completion of the NEPA review and execution of the "Authority to use Grant Funds" letter (or its equivalent). This prohibition applies to any physical change in the property including property acquisition, demolition, movement, rehabilitation, conversion, repair, construction, leasing or disposition.

Because TCAC has such limited experience with NEPA compliance, developers and owners need to be very proactive in determining the application of, and compliance with, NEPA. Even inadvertent failure to comply could result in a project's disqualification from receiving TCAP funds. Cox, Castle & Nicholson has some of the state's leading experts in NEPA compliance, and those experts work closely with the firm's Affordable Housing Practice Group. If you would like to know more about how NEPA can impact your affordable housing project, please contact Steve Ryan, Chair of the Affordable Housing Group, or Clark Morrison, Chair of the Land Use and Natural Resources Group.

If you have any questions concerning this Alert, please do not hesitate to contact:

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