

The Economic Stimulus Package May Stimulate Environmental Regulation

The American Recovery and Reinvestment Act, commonly referred to as the "Stimulus Package," includes considerable funding for infrastructure improvements. Such projects may include the construction of highways, bridges and water and sewer systems, as well as various alternative energy projects. At the same time, EPA is moving forward on several fronts with new or revised environmental programs that could present increased challenges to construction of these infrastructure projects.

Wetlands

Many infrastructure projects have the potential to impact wetlands or other waters of the United States. At the end of last year, EPA and the Army Corp of Engineers finalized guidance on the scope of their jurisdiction over streams and wetlands. This new guidance arose from a 2006 decision of the United States Supreme Court which attempted to, but was not entirely successful in, defining the scope of federal jurisdiction over streams and wetlands that are not "navigable" in the normal sense of the word. The new guidance attempts to clarify the scope of this jurisdiction, but in large measure relies on a rather subjective determination as to whether there is a "significant nexus" to traditionally navigable waters. The guidance is likely to result in the broader federal jurisdiction over wetlands and stream encroachments for infrastructure projects.

Erosion Control

EPA has proposed new standards for the control of sediment discharge from construction sites and is under a court order to finalize those standards in 2009. The new standards will inject EPA more deeply into the regulation of construction activities and will force states to incorporate these new standards into their state-issued permits. EPA is for the first time proposing numeric effluent limits on sediment discharges from certain construction sites, while continuing to rely on BMPs at most sites. That approach has been criticized by some environmental groups. The Obama administration has been routinely revising Bush administration environmental policies to be more stringent, so the final standards may differ from the current proposal. In any event, federal standards for construction activities will need to be accounted for.

Climate Change

Increasingly, environmental groups and some state regulators are asserting that applicants for permits for infrastructure projects, particularly those related to transportation, must evaluate the project's potential impact on greenhouse gas emissions and climate change. In light of recent pronouncements from EPA regarding greenhouse gases, one can assume that these objections may increase with regard to certain infrastructure projects. EPA has now proposed an "endangerment finding" for CO₂ emissions, which paves the way for direct regulation of greenhouse gas emissions. However, even without specific regulations at this time, the endangerment finding will certainly stimulate demands from project opponents that greenhouse gas emission evaluations be performed. Such evaluations tend to significantly delay project implementation.

The attorneys in Post & Schell's Environmental Regulation Litigation Group regularly represent clients with regard to construction-related environmental matters and climate change issues. If you have any questions or would like additional information about the impact of environmental programs on infrastructure projects, please feel free to contact Terry Bossert at (717) 612-6018 or e-mail him at tbossert@postschell.com.

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