

“What keeps you up at night?”

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The American Recovery and Reinvestment Tax Act of 2009: Provisions providing funding for environmental infrastructure and remediation programs

By David C. Apy

The American Recovery and Reinvestment Act of 2009 (the “Act”), more commonly known as the “Stimulus Plan,” provides more than \$8.0 billion for projects designed to improve the quality of the environment, predominantly through funding to the United States Environmental Protection Agency (“EPA”) and the Department of Defense. Additional funding, which is beyond the scope of this Alert, is available for construction projects managed by or under the oversight of the Department of the Interior.

This Alert is intended to provide an overview of how the funds have been allocated so that companies that may be impacted by the availability of Stimulus Plan monies, such as potentially responsible parties or environmental contractors, can prepare for the economic and regulatory impacts, whether by monitoring the expected activities of state and federal agencies or proactively seeking opportunities to obtain funding for covered projects.

In some instances, the Stimulus Plan is providing money for programs that have been “on hold” for a number of years. Programs like Superfund and Brownfields now will be infused with money and EPA can be expected to move forward vigorously to complete unfinished projects and regulatory initiatives. This may mean that there will be increased enforcement and, at the least, increased activity in these programs.

In other instances, the federal government is infusing public works projects with billions of dollars. These programs, such as watershed rehabilitation and clean water projects, will provide significant construction dollars to projects that have been on hold or are “shovel ready.”

A summary of the more significant provisions is provided below:

- **HAZARDOUS SUBSTANCE SUPERFUND:** \$600 million has been allocated for the Superfund Remedial program. The Act allows the Administrator to retain up to 3 percent of the funds for program management and oversight. There are many

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Superfund sites awaiting funding for remediation activities and more than 600 sites with ongoing construction activities that may benefit from these funds.

- **LEAKING UNDERGROUND STORAGE TANK TRUST FUND PROGRAM:** \$200 million has been allocated for the Leaking Underground Storage Tank Trust Fund Account for clean up of leaking underground storage tanks as authorized by section 9003(h) of the Solid Waste Disposal Act. To expedite use of these funds, the Act waives the state matching requirements in section 9003(h)(7)(B) of the Solid Waste Disposal Act. There are an estimated 116,000 sites around the country with the potential to contaminate existing water supplies.
- **FORMERLY UTILIZED SITES (i.e. Brownfields) REMEDIAL ACTION PROGRAM:** \$100 million has been allocated for programs, projects or activities that will not require new budget authority to complete.
- **BROWNFIELDS PROJECTS:** \$100 million has been allocated for Brownfields projects to implement section 104(k) of CERCLA. The Act waives the 20 percent cost-share requirements under section 104(k)(9)(B)(iii) of CERCLA for revolving loan fund and cleanup grants. The Act further requires that the funds be awarded in an expeditious manner, consistent with fair and open competition.
- **WATERSHED AND FLOOD PREVENTION OPERATIONS:** \$290 million, of which \$145 million is earmarked to purchase and restore floodplain easements as authorized by section 403 of the Agricultural Credit Act of 1978.
- **WATERSHED REHABILITATION PROGRAM:** \$50 million allocated to projects that can be fully funded and completed with the funds appropriated in the Act.
- **RURAL WATER AND WASTE DISPOSAL PROGRAM ACCOUNT:** \$1.38 billion for direct loans and grants for the rural water, waste water, and waste disposal programs authorized by sections 306 and 310B and

described in section 381E(d)(2) of the Consolidated Farm and Rural Development Act.

- **INVESTIGATIONS:** \$25 million for projects or activities that receive federal funds for Energy and Water Development.
- **OFFICE OF LEAD HAZARD CONTROL AND HEALTHY HOMES:** \$100 million for the “Lead Hazard Reduction Program,” as authorized by section 1011 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, and by sections 501 and 502 of the Housing and Urban Development Act of 1974. The funds will only remain available until September 30, 2011.
- **DEFENSE ENVIRONMENTAL CLEANUP:** \$5.127 billion for the Department of Defense Environmental Cleanup program, which is responsible for the remediation of nuclear waste at sites contaminated by governmental nuclear activities.
- **CLEAN WATER AND DRINKING WATER STATE REVOLVING FUNDS:** \$4.0 billion for the Clean Water State Revolving Funds and \$2.0 billion for the Drinking Water State Revolving Funds. The Act waives the mandatory 20 percent State and District of Columbia matching requirements for both Revolving Funds. However, the Act prohibits the use of both Revolving Funds for the purchase of land or easements and prohibits other set asides under section 1452(k) of the Safe Drinking Water Act that do not directly create jobs.
- **DIESEL EMISSIONS REDUCTION ACT (DERA) GRANTS:** \$300 million for DERA grants. The Act requires that the funds be awarded in an expeditious manner, consistent with fair and open competition.
- **UNITED STATES ARMY CORP OF ENGINEERS:** \$4.0 billion for the Army Corps of Engineers, including \$2 billion for “shovel ready” construction projects.
- **NOAA OPERATIONS, RESEARCH AND FACILITIES:** \$230 million for habitat restoration, research and maintenance projects.

All told, the Stimulus Plan provides significant opportunities to obtain funding for a broad range of environmental projects. However, two words of caution: 1) the Stimulus Plan contains aggressive deadlines for distribution of the funds; and 2) throughout the Act many of the funding provisions provide that “the Secretary [of the Department] shall have unlimited reprogramming authority for these funds provided under this heading” or some other more limited discretion to redirect funds to other projects that would create jobs. Accordingly, potential beneficiaries should monitor these programs on a regular basis and move swiftly when opportunities arise.

All of the members of the Saul Ewing LLP Environmental Department are available to answer any questions or to provide guidance on this Plan.

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