

May 16, 2023

## **CHIPS ACT UPDATE: NEW GUIDANCE ON FEDERAL ENVIRONMENTAL PERMITTING OF CHIPS ACT PROJECTS**

To Our Clients and Friends:

In a May 11, 2023 webcast, the Department of Commerce’s CHIPS Program Office (“CPO”) provided a deep dive on the Environmental Questionnaire required for funding applications and pre-applications. This questionnaire is designed specifically to assist the CPO in “determining the appropriate level of environmental review required under the National Environmental Policy Act (“NEPA”) and related laws.”<sup>[1]</sup> We have provided a fulsome discussion of CHIPS Act funding in our previous alerts [\[here\]](#), [\[here\]](#), and [\[here\]](#).

The key takeaway from this most recent discussion is that the Environmental Division of the CPO intends to work closely with applicants to facilitate their development of necessary environmental data and to ensure applicants are prepared for permitting processes and review under NEPA. The CPO stressed, however, that it intends to prioritize applications “that demonstrate a clear path” to satisfying these requirements in a timely manner.<sup>[2]</sup>

This guidance applies only to applicants applying for funding pursuant to the CHIPS Act’s first Notice of Funding Opportunities (“NOFO”), which focuses on commercial fabrication facilities.<sup>[3]</sup> Detailed instructions for other applicants will be released after the publication of the second and third NOFOs later in 2023.

### **I. The Environmental Questionnaire**

All applicants for CHIPS Funding must submit responses to the Environmental Questionnaire, both at the pre-application and final application stages. Applicants seeking funding for multiple projects need only submit one Environmental Questionnaire for their entire application, although the CPO stressed that multiple project-specific Environmental Questionnaires are welcome.<sup>[4]</sup>

During the May 11th webcast, CPO Environmental Division staff described this questionnaire as serving a number of purposes:<sup>[5]</sup>

- Allowing the CPO to assess the environmental risks and merits of every project;
- Helping the Department of Commerce fulfill its statutory and regulatory duties under NEPA and other environmental laws;

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- Supplementing and providing additional context to the “Climate and Environmental Responsibility Plan” that each applicant must submit pursuant to Section IV.G.11 of the NOFO;[6]
- Helping applicants better understand the environmental impacts of their projects and determine how to mitigate these impacts; *and*
- Helping applicants determine their legal obligations under NEPA and other environmental laws.

The Environmental Questionnaire consists of 26 questions related to the following topics:[7]

A. Project Description	B. Project Site & Affected Environment	C. Resource Consumption Rates & Effluent Emissions Streams and Impacts
D. Tribal, Historic & Cultural Resources	E. Project Setting	F. Vegetation & Wildlife Resources
G. Conservation Areas	H. Coastal Zone & Navigable Waters	I. Wetlands
J. Floodplains	K. Endangered Species	L. Land Use & Zoning
M. Solid Waste Management	N. Hazardous or Toxic Substances	O. Impacts to Water Quality & Water Resources
P. Water Supply & Distribution System	Q. Wastewater Collection & Treatment Facilities	R. Environmental Justice & Socioeconomics
S. Transportation (Streets, Traffic & Parking)	T. Air Quality	U. Greenhouse Gases & their Environmental Effects
V. Noise	W. Health & Safety	X. Permits & Other Government Agency Involvement
Y. Public Notification & Controversy	Z. Environmental Experience & Approach	

For each topic, applicants are required to provide “a sufficient level of documentation and analysis to inform CPO’s assessment of the appropriate level of NEPA review” and are encouraged to attach any relevant documents, such as permit applications, background research, field investigations and surveys, and any past planning or studies.[8]

## II. Evaluation Criteria for the Environmental Questionnaire

As discussed in our [previous alert](#), the CPO will evaluate all applications and pre-applications according to six key criteria: (1) economic and national security objectives; (2) commercial viability; (3) financial strength; (4) technical feasibility and readiness; (5) workforce development; and (6) projects’ broader impacts.[9] During the May 11th webcast, CPO staff emphasized that assessment of an applicant’s Environment Questionnaire will focus primarily on **technical feasibility and readiness**.[10]

The commercial fabrication facilities funded under the first NOFO are all likely to be subject to a wide array of federal, state, and local environmental and permitting requirements. Applicants must assure the CPO that funded projects will be able to satisfy these legal requirements. To demonstrate feasibility, applicants must clearly identify the necessary environmental compliance and permitting steps for each proposed project and, if needed, for individual activities within each project.[11]

Applicants should not be deterred, however, from beginning the application process simply because they do not yet have all necessary environmental information. The CPO staff repeatedly emphasized that, while more information is always better, applicants need only provide as much detail as is currently available to them.[12] However, rather than simply skipping inapplicable or not-yet-knowable questions, applicants should provide a brief statement explaining why the question is not applicable or what information is needed to provide a full answer.[13]

### a. Feasibility of NEPA Review

NEPA sets forth “a national policy that encourages productive and enjoyable harmony between man and his environment” and therefore requires federal agencies to consider the environmental impacts of all major federal actions that significantly affect the quality of the human environment.[14] These “major federal actions” include “projects and programs entirely or partly financed” by a federal agency, including the Department of Commerce.[15]

The Department of Commerce is therefore legally obligated under NEPA to assess the environmental impact of any project funded under the CHIPS Program. This involves a dynamic review process that will vary based on the project’s potential environmental impacts:

- Projects initially assessed as likely to cause significant environmental impacts will require a fulsome Environmental Impact Statement (“EIS”).[16] The drafting of an EIS is subject to public notice and comment, including comments from impacted communities and the Environmental Protection Agency. Once the EIS is finalized, the National Institute of Standards and Technology

(“NIST”) will issue a Record of Decision, indicating whether the project will be allowed to proceed.[17]

- Projects initially assessed as unlikely to cause significant environmental impacts require a brief, publicly accessible Environmental Assessment (“EA”).[18] If the EA demonstrates that the proposed project will not have significant environmental effects, the NIST will issue a Finding of No Significant Impact.[19] If, however, the EA suggests that significant environmental effects may occur, the project will require an EIS, described above.

The Environmental Questionnaire is designed to help the CPO determine which level of NEPA review any given project will require. This determination informs not just the substantive environmental data an applicant may be called to produce, but also the timeline for completion of the review. If an applicant’s project is likely to cause significant environmental impacts, for example, that applicant will be subject to a long notice-and-comment period and will be required to produce detailed data for an EIS.

Notably, the CPO has emphasized that applicants should be prepared to produce additional environmental data and documentation for this NEPA review. While the Environmental Questionnaire helps the CPO assess a project’s likely level of NEPA review, an EA or EIS may demand additional information. This may include detailed descriptions of site-specific impacts, descriptions of the purpose or need for a proposed project, a discussion of reasonable alternatives, and more.[20]

The CPO has published a detailed overview of the NEPA review process [online](#).[21]

## **b. Permitting Considerations**

The Environmental Questionnaire’s Question X specifically discusses permitting issues and provides applicants a useful model to assess the status of their permitting needs.

Applicants should be prepared to identify any federal, tribal, state, or local environmental plans or reviews that will be needed for each proposed project. These may include, for example, Clean Water Act 404 permits, stormwater management plans, coastal zone management and shoreline management plans, and Clean Air Act permits.[22] If available, copies of these permits or permit applications should be attached to the Environmental Questionnaire. In its May 11th webcast, the CPO recommended laying out all required permits in a simple table, such as the following:[23]

Permit or other requirement	Agency	Applicability	Permit Status

The CPO staff emphasized that applicants needn't have all permits secured at the time of submitting their pre-application or even full application. However, a clear understanding of a project's permitting timeline and requirements would allow the Environmental Division to encourage prompt review of permit applications by coordinating with other federal and state agencies as necessary.[24] Moreover, if an applicant identifies additional permitting requirements *after* submitting a pre-application, the CPO encourages the applicant to reach out to the Environmental Division immediately, rather than waiting to raise these concerns in a later final application.[25]

### III. Role of the CPO Environmental Division

Applicants for CHIPS Act funding will interface directly with the Environmental Division of the CPO when addressing the environmental impacts of proposed projects.

The Environmental Division holds dual roles within the CPO. First, it is tasked with ensuring that the Department of Commerce satisfies all applicable environmental laws and requirements connected to CHIPS-funded programs. Second, the Environmental Division collaborates with federal and state agencies, as well as with applicants, to ensure "efficient, effective, and predictable reviews that result in informed and environmentally responsible decisions." [26] This latter mission involves working closely with applicants to identify gaps in their data that could cause problems later in the NEPA review or permitting process.

In general, applicants for CHIPS funding that have already submitted an Environmental Questionnaire are invited to request meetings with the CPO's Environmental Division. However, in limited circumstances, the Environmental Division will meet with potential applicants prior to submission of their pre-application or full application. To qualify for such a meeting, a potential applicant must satisfy all of the following three criteria:[27]

1. The potential applicant must have filed a Statement of Interest with the CPO;
2. The potential applicant must be currently eligible to apply for CHIPS funding under an open NOFO; *and*
3. The potential applicant either:
  - a. Requires support with Clean Air Act or Clean Water Act permits; *or*
  - b. Is currently drafting NEPA environmental review documents and has questions related to these documents.

### IV. Resources and Templates

The CPO has prepared and published a number of resources for the preparation of applications and pre-applications under the first NOFO, including materials on environmental compliance requirements.[28]

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The CPO maintains “CHIPS and Environmental Compliance“ FAQs online, which it plans to update regularly throughout the funding cycle. These FAQs primarily relate to the NEPA review process, as well as other environmental laws that may be relevant to an applicant’s project. In the May 11th webcast, the CPO indicated that it will be publishing additional FAQs on the NEPA review process soon.[29] General FAQs are also available on the CHIPS for America website.

In addition to CHIPS-specific environmental guidance, the CPO suggests that applicants refer to publications by environmental regulatory agencies when assessing permitting requirements and other legal obligations. These may include, but are not limited to, NEPA.gov, the National Marine Fisheries Service, the Advisory Council on Historic Preservation, the U.S. Army Corps of Engineers’ guidance on Section 404 of the Clean Water Act, and the U.S. Fish & Wildlife Service’s ECOS and IPaC systems.

Additional resources can be found at the CHIPS for America Guides and Templates webpage.

## V. How Gibson Dunn Can Assist

Gibson Dunn has an expert team tracking implementation of the CHIPS Act closely, including semiconductor industry subject matter experts and public policy professionals. Senior members of Gibson Dunn’s Public Policy Practice Group have more than 40 years of combined experience on Capitol Hill. Our team includes former congressional staff and administration officials who have significant experience tracking, developing, and implementing legislation and regulations.

Our team is available to assist eligible clients to secure funds throughout the application process. We also can engage with our extensive contacts at the Department of Commerce and other federal agencies to facilitate dialogue with our clients and discuss the structure of future CHIPS Act programs being developed.

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[1] CHIPS for America Guide: Environmental Questionnaire (Mar. 27, 2023), <https://www.nist.gov/system/files/documents/2023/03/27/Environmental-Questionnaire.pdf> [hereinafter, Environmental Questionnaire].

[2] Department of Commerce Webcast (May 11, 2023).

[3] 5 U.S.C. § 4651(2); U.S. Dep’t of Commerce Nat’l Institute of Standards and Technology Notice of Funding Opportunity, CHIPS Incentives Program—Commercial Fabrication Facilities, [https://www.nist.gov/system/files/documents/2023/02/28/CHIPS-Commercial\\_Fabrication\\_Facilities\\_NOFO\\_0.pdf](https://www.nist.gov/system/files/documents/2023/02/28/CHIPS-Commercial_Fabrication_Facilities_NOFO_0.pdf) [hereinafter, NOFO].

[4] Department of Commerce Webcast (May 11, 2023).

[5] *Id.*

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- [6] NOFO at 56. This “Climate and Environmental Responsibility Plan” must detail how a project will meet climate and environmental goals relating to: (1) energy consumption and use of renewable energy; (2) climate resilience; (3) water consumption and conservation; (4) sustainability transparency; and (5) community and environmental justice impacts. *Id.*
- [7] Environmental Questionnaire.
- [8] *Id.* at 1.
- [9] NOFO at 58–64.
- [10] Department of Commerce Webcast (May 11, 2023).
- [11] *See* NOFO at 18–19.
- [12] Department of Commerce Webcast (May 11, 2023).
- [13] *Id.*
- [14] National Environmental Policy Act, 42 U.S.C. § 4321 (1970).
- [15] 40 C.F.R. § 1508.1 (2020).
- [16] 40 C.F.R. § 1502 (2020).
- [17] 40 C.F.R. § 1505.2 (2020).
- [18] 40 C.F.R. § 1501.5 (2020).
- [19] 40 C.F.R. § 1501.6 (2020).
- [20] Department of Commerce Webcast (May 11, 2023).
- [21] CHIPS for America: CHIPS Overview of NEPA and Environmental Reviews (last accessed May 15, 2023), <https://www.nist.gov/system/files/documents/2023/04/20/3.18.23-CHIPS%20for%20America%20Overview%20of%20NEPA%20and%20Environmental%20Reviews.pdf>.
- [22] Environmental Questionnaire at 6.
- [23] Department of Commerce Webcast (May 11, 2023).
- [24] *Id.*
- [25] *Id.*

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[26] *Id.*

[27] *Id.*

[28] CHIPS for America Guides and Templates: CHIPS Incentives Program – Commercial Fabrication Facilities (last accessed May 15, 2023), <https://www.nist.gov/chips/guides-and-templates-chips-incentives-program-commercial-fabrication-facilities>; CHIPS for America: Environmental Compliance (last accessed May 15, 2023), <https://www.nist.gov/chips/environmental-compliance>.

[29] Department of Commerce Webcast (May 11, 2022).



*The following Gibson Dunn lawyers prepared this client alert: Michael Bopp, Roscoe Jones, Jr., Ed Batts, Amanda Neely, Danny Smith, and Sean Brennan.\**

*Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work in the firm’s Public Policy practice group, or the following authors:*

*Michael D. Bopp – Co-Chair, Public Policy Group, Washington, D.C. (+1 202-955-8256, [mbopp@gibsondunn.com](mailto:mbopp@gibsondunn.com))*

*Roscoe Jones, Jr. – Co-Chair, Public Policy Group, Washington, D.C. (+1 202-887-3530, [rjones@gibsondunn.com](mailto:rjones@gibsondunn.com))*

*Ed Batts – Palo Alto (+1 650-849-5392, [ebatts@gibsondunn.com](mailto:ebatts@gibsondunn.com))*

*Amanda H. Neely – Washington, D.C. (+1 202-777-9566, [aneely@gibsondunn.com](mailto:aneely@gibsondunn.com))*

*Daniel P. Smith\* – Washington, D.C. (+1 202-777-9549, [dpsmith@gibsondunn.com](mailto:dpsmith@gibsondunn.com))*

*\*Daniel P. Smith is of counsel working in the Washington, D.C. office who is admitted only in Illinois and practicing under supervision of members of the District of Columbia Bar under D.C. App. R. 49.*

*Sean J. Brennan is an associate working in the firm’s Washington, D.C. office who currently is admitted to practice only in New York.*

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