NAFSMA Annual Conference
Jackson Hole, WY
August 18, 2015

Current Legal Issues of National Interest
Scott L. Shapiro
www.TheLeveeWasDry.com
Context

– General or Special Counsel for nearly $2 billion in locally-sponsored flood risk reduction projects.
– Represent non-Federal sponsors on C.W. Projects
– General Counsel for the California Central Valley Flood Control Association.
– Special Counsel to cities and landowners on FEMA appeals or remapping actions.
– Additional work on water supply projects, including those with Bureau of Reclamation
Agenda

– Cultural Resources - Tribal: Section 106 of the National Historic Preservation Act of 1966
– E.O. 13690 & FFRMS
– Local Enforcement Authority
– Potpourri
  • Crediting Update
  • Relevant BCR
Cultural Resources - Tribal

– What is the intersection of issues?
  • Levee construction or repair, etc.; point of no return on some activities (e.g., slurry wall construction)
  • Locations are along major, perennial waterways where tribes have lived since time immemorial

– Nature of the Federal Undertaking
  • Section 408 Authorization
  • NEPA compliance
  • Section 7, 10
  • Triggers Section 106 NHPA

– Highly tribe-specific in approach
Cultural Resources

- Section 106 of the National Historic Preservation Act
  - Requires Federal agencies to take into account the effects of their undertakings on historic properties.
  - If the agency's undertaking could affect historic properties, the agency determines the scope of appropriate identification, consults with the SHPO/THPO, and identifies historic properties in the area of potential effects.
  - If the agency finds that there is an adverse effect, the agency begins consultation to seek ways to avoid, minimize, or mitigate the adverse effects.
  - Consultation usually results in a Memorandum of Agreement (MOA)/Programmatic Agreement (PA), which outlines agreed-upon measures that the agency will take to avoid, minimize, or mitigate the adverse effects.
  - Advisory Council on Historic Preservation provides resources.
Cultural Resources

– Conflicts and challenges:
  • Timeline.
  • Confidentiality.
  • USACE "mitigation" obligation v. tribal desire to re-bury.
  • Intersection with State law (e.g., grave goods versus non-grave goods; mini-NEPAs).
  • Potential to mitigate with other collections.
  • Potential need for re-consultation.
  • Emotional issues associated with burials.

– Solutions:
  • Documentation.
  • Relationship building.
EO 13690 & FFRMS

–Prologue

• In 1977, then President Carter issued E.O. 11988, setting forth additional considerations regarding floodplains:
  – 100 year floodplains, as determined by what are now FEMA's NFIP maps.
  – The language was significantly oriented toward preserving natural floodplains.
  – Language did require evaluation of actions including Federal funding and permitting.

• Some agencies more strict in implementation
• FIFMTF considered amending E.O. 11988
E.O. 13690 & FFRMS


– This E.O. amended E.O. 11988.

– Along with the amended E.O., the Federal Government issued draft implementation guidelines to be used by Federal agencies in developing agency-specific guidelines.
E.O. 13690 & FFRMS

– During workshops, Federal Agencies have said:

• The FFRMS is designed to influence Federal investments decisions in light of climate change.
• Many communities have adopted stricter floodplain management ordinances; this simply catches up the Federal Government.
• The FFRMS is not intended to direct that FEMA do anything different in mapping under NFIP.
• The FFRMS is not intended to influence the actions of local government.
E.O. 13690 & FFRMS

– Local concerns were shared on draft:
  • Procedural concerns (Water Resources Council, comment period, comments before people understand certain agency impacts, etc).
  • Application to Federal agencies, or more???
  • What is the definition of an "action" triggering FFRMS?
  • Continuing application of E.O. 11988?
  • Language regarding "indirect support of floodplain management"
  • Potential for "Hydra" approach on inconsistent policy
  • Issues with leveed basins.

– See May 6, 2015 comment letter.
Figure 1: Eight-step Decision-making Process for E.O. 11988

Step 1: Determine if proposed action is in the floodplain
- YES
  - Early public review
  - Identifying and evaluating alternatives to locating in the floodplain
    - No action alternative
    - In the floodplain
    - Not in the floodplain
      - Does the action have:
        a) impacts in the floodplain, or
        b) indirectly support floodplain development?

Step 2: Identify impacts of proposed action

Step 3: Minimize harm and restore and preserve natural and beneficial values

Step 4: Reevaluate alternatives
- Limit action — Return to Step 3
- In the floodplain
- No action

Step 5: Findings and public explanation

Step 6: Implement proposed action
E.O. 13690 & FFRMS

– Local concerns were shared on draft:
  • Procedural concerns (Water Resources Council, comment period, comments before people understand certain agency impacts, etc).
  • Application to Federal agencies, or more???
  • What is the definition of an "action" triggering FFRMS?
  • Continuing application of E.O. 11988?
  • Language regarding "indirect support of floodplain management"
  • Potential for "Hydra" approach on inconsistent policy
  • Issues with leveed basins.

– See May 6, 2015 comment letter.
Local Enforcement Authority

– PCAs, PPAs, and assurance agreements have consistently required that:
  • Sponsors hold harmless and indemnify USACE
  • Sponsors agree to keep project free from unauthorized encroachments.

– Hundreds of these agreements have been signed around the country in the last century.
– But it is not clear that sponsors always have the enforcement authority implicit in these agreements.
– What to do? What are the consequences?
BCR for LPP/NEDs?

– Once a project is authorized, administrations often prioritize projects based on benefit cost ratios (BCR).

– But what BCR should be used when an LPP was authorized?

– Sponsors have argued in favor of using the NED BCR, as this controls the Federal investment.

– Some within OMB are arguing for the LPP BCR, perhaps in an attempt to screen-out more projects.
Federal Crediting: A Refresher

- Congress has created ways to allow non-Federal interests to perform advance construction as work in kind, with that construction counting as a credit toward the non-Federal interest’s cost share.
- On May 5, 2011 the Assistant Secretary of the Army – Civil Works (ASA-CW) issued a memo declining to use Section 104 of 1986 WRDA in the future.
- ASA-CW indicated that non-Federal interests should use Section 221 of WRDA 1970 (as amended by Section 2003 of WRDA 2007).
Federal Crediting

- A coalition of non-Federal interests worked with the ASA, USACE, and Congress to reform the Section 221 process which the coalition believed was too restrictive.
- ASA-CW and Corps have made several changes:
  - Moved milestone from feasibility study to draft engineer’s report;
  - Allowed credits to be used in coordination with 104; and
  - ASA has given personal assurance that waivers may be considered.
- ER 1165-2-208 (February 17, 2012).
Federal Crediting

- WRRDA section 1018 provided clarifications. Waiting on guidance on:
  - Credit for planning and design before a crediting agreement;
  - A more inclusive public process;
  - Benefit and cost calculation;
  - Interim credit applications; and
  - Lands, easements, relocations, rights-of-way, or areas for disposal of dredged materials (LERRDs).
Current Legal Issues of National Interest

Scott L. Shapiro

www.TheLeveeWasDry.com