

**Floodplain Management Association
Rancho Mirage
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National and Western Flood Policy

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Context

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

Agenda

- An Introduction to Cultural Resources:
Section 106 of the National Historic
Preservation Act of 1966
- E.O. 11988, E.O. 13690, & FFRMS
- WRRDA Update
- Crediting Update

Cultural Resources

- 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

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.

EO 11988, 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.
- USACE enforced stricter implementation
- FIFMTF considered amending E.O. 11988

EO 13690, EO 13690, & FFRMS

- In January of 2015, President Obama issued E.O. 13690.
- 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.
- The two together established the Federal Flood Risk Management Standard (FFRMS)

E.O. 13690 & FFRMS

– During workshops, Federal Agencies have said:

- The FFRMS is designed solely to influence Federal investments.
- 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

– But many local concerns exist:

- Procedural concerns (Water Resources Council, comment period, comments before people understand impact, etc).
- Application to Federal agencies, or more???
- Continuing application of E.O. 11988?
- What is the definition of an "action" triggering FFRMS?
- Opposition to "indirect support of floodplain management"
- Potential for "Hydra" approach on inconsistent policy

– See May 6, 2015 comment letter.

Key Opportunities under WRRDA

- Section 1004: section 408 expediting
- Section 1014(a): local feasibility studies
- Section 1014(b): local construction
- Section 1018: in-kind contributions**
- Section 1020: transfer of excess credit
- Section 1043(a): non-Feds running F.S.
- Section 1043(b): non-Feds constructing

1004: Section 408 expediting

- Statute refers to Section 14 applications.
- Creates modest reforms
- Requires new guidelines after notice and comment within 1 year.
- Benchmark: determine complete application within 15 days.
- Benchmark: complete review within 45/180 days.
- Report to Congress on process.

1014(a): Local feasibility studies

- Non-Federal interest may prepared a feasibility study.
- Secretary shall issue guidelines.
- Secretary shall review to determine compliance with Federal standards.
- Within 180 days shall send to Congress.
- If authorized, credit toward construction of Federal share of study.

1014(b): Local Construction

- With advance permission, a local interest may construct an authorized project.
- Federal share will be reimbursed to local interest or act as a credit toward a future separable element (or project).
- Long list of conditions, all subject to complete discretion.
- Must obtain all permits and permissions, despite Federal authorization.

1020: Transfer of Excess Credit

- Excess credit may be transferred to a different project:
 - Comprehensive plan must be approved by USACE considering will it:
 - Help expedite;
 - Reduce Federal costs;
 - Aid completion.
 - Authority for transfer expires in 10 years.
 - Shall report to Congress every 2 years.

1043(a): Non-Feds Running F.S.

- Within 180 days Secretary shall establish a pilot program to evaluate non-Federal interest running study.
- Upon application and agreement the NFI may provide "full project management control."
- Federal funds may be used for Federal cost share.
- Five years of authority at \$25 million per year.

1043(b): Non-Feds Constructing

- Within 180 days Secretary shall establish a pilot program to evaluate non-Federal interest constructing.
- Seeking to test with 15 projects.
- Federal funds may be used for Federal cost share.
- Five years of authority at \$25 million per year.

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).

WRRDA Section 1018

- Modification to Section 221 authority:
 - Benefit-cost ratio;
 - Separable element sharing;
 - Reimbursement available where LERRDs change cost share;
 - Prior to construction or notice to proceed;
 - Guidelines to be developed within 1 year;
 - Reconsideration of "milestone" and where a milestone requirement may be waived; and
 - Determination of "integral" definition.

Federal Crediting

- 80 Fed Reg. 52258 (8/28/15):
 - Sponsors can ask to use 221 in lieu of specific provisions.
 - Milestone: TSP Conference, rather than draft study.
 - ASA can approve credit earlier, considering: is it a modification, does it follow existing alignment, wise use of floodplain, reduces risk, likely to be in TSP?
 - For planning, once a FCSA is signed.

Federal Crediting (cont.)

- 80 Fed Reg. 52258 (8/28/15):
 - Integral determination to be made by MSC, not ASA.
 - LERRDs: confirms cost share should remain constant; reimbursement available.
- Comments to be submitted by September 28, 2015: docket COE-2015-0013

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