

FMA Annual Conference
Reno, NV
Sept 5, 2018

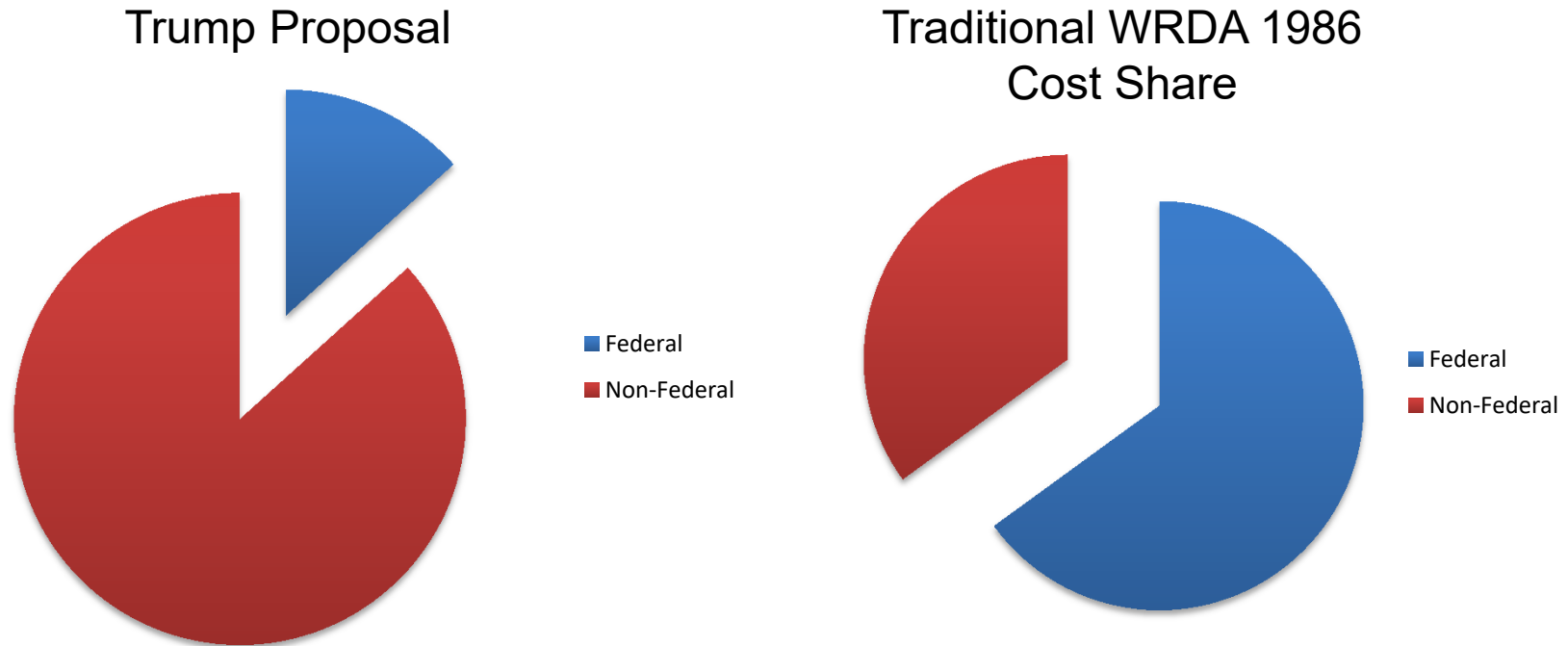
**LEGAL PANEL: WATER RESOURCE
INFRASTRUCTURE FINANCING UNDER THE TRUMP
ADMINISTRATION**

Scott L. Shapiro

PRESIDENT TRUMP'S LEGISLATIVE INITIATIVE TO REBUILD INFRASTRUCTURE IN AMERICA

- 1. Stimulate infrastructure investment: Invest \$200 billion in Federal funds to spur at least \$1.5 trillion in infrastructure investments with partners at the State, local, Tribal, and private level.
- 2. Invest in rural America: Invest \$50 billion in Federal funds to rebuild and modernize infrastructure in rural America.
- 3. Increase State and local authority: Empower State and local authorities to make investment and permitting decisions.

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Since there is no legal authority to change the cost-share currently, the question is what other things can be changed to allow for better project delivery??

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- 4. Eliminate regulatory barriers: Provide needed flexibility for projects to be developed and managed effectively and efficiently.
- 5. Streamline permitting: Shorten the permitting process to two years, or less.
- 6. Empower American workers: Reform Federal education and workforce development programs to better prepare Americans to perform the in-demand jobs of today and the future.

Delivery Options Available

- Options
 - 0: Sponsor construction with only sponsor funds.
 - 1: Traditional USACE Civil Works Construction.
 - 2: Sponsor/USACE shared construction.
 - 3: Reimbursement under WRDA 1996 section 211, as amended.
 - 4: Reimbursement under WRDA 1986 Section 204, as amended.
 - 5: USACE funding under WRDA 2014 section 1043.

1: Traditional USACE Civil Works Construction

- NFS provides 35-50% of the resources for the project, including:
 - LERRDs; and
 - 5% cash contribution.
- USACE constructs project.
- Subject to many constraints:
 - Appropriations stream; bid packages;
 - Extensive review;
 - Bidding environment; and
 - Bid & project management.

2: Sponsor/USACE shared construction

- 2A: Shared construction can be achieved through a number of different structures:
 - Historically, credit under 1986 WRDA section 104, or
 - Credit under 1970 FCA section 211, as amended.
 - But Credit requires an IDR.
- 2B: Authority of standard PPA for NFS to start construction.
- All are subject to future appropriations.
- All are constrained by eventual USACE construction to complete the project.

LOTS OF WORDS

- “The Non-Federal Sponsors shall contribute a minimum of 35 percent, up to a maximum of 50 percent, of construction costs, as follows: In providing in-kind contributions, if any, the Non-Federal Sponsors shall obtain all applicable licenses and permits necessary for such work.”
- “The term “in-kind contributions” means those materials or services provided by the Non-Federal Sponsors that are identified as being integral to the Project by the Division Commander for South Pacific Division (hereinafter the “Division Commander”). To be integral to the Project, the material or service must be part of the work that the Government would otherwise have undertaken for design and construction of the Project.”
- “In carrying out its obligations under this Agreement, the Non-Federal Sponsors shall comply with all the requirements of applicable Federal laws and implementing regulations, including, but not limited to: Section 601 of the Civil Rights Act of 1964 (P.L. 88-352), as amended (42 U.S.C. 2000d), and Department of Defense Directive 5500.11 issued pursuant thereto; the Age Discrimination Act of 1975 (42 U.S.C. 6102); and the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), and Army Regulation 600-7 issued pursuant thereto.”
- “Placement Area Improvements. The Government shall include in construction costs and credit towards the Non-Federal Sponsors’ share of such costs, the value of placement area improvements required for the Project.... Such costs shall include, but not necessarily be limited to, actual costs of constructing the improvements....”
- “The value [to be credited to the non-Federal sponsor] shall be equivalent to the costs, documented to the satisfaction of the Government, that the Non-Federal Sponsors incurred to provide the in-kind contributions. Such costs shall include, but not necessarily be limited to, actual costs of constructing the in-kind contributions....”

3: Reimbursement under WRDA 1996 section 211

- Section 211 provided authority for non-Federal sponsors to undertake the design and construction of federally authorized flood control projects without Federal funding and to be eligible to be reimbursed an amount equal to the estimate of the Federal share, without interest (or inflation), of the design and construction cost of the project or separable element thereof.
- Only projects or separable elements of projects which have been specifically authorized by Congress are considered eligible for reimbursement under this provision.
- This appears to be a very limited universe of projects that were eligible for this reimbursement.
- But the concept is picked up in bills still being considered:
 - **Sec.3117. Pearl River Basin demonstration program.** This section directs the Secretary to establish a demonstration program to allow a project authorized under section 211 of WRDA 1996

4: Reimbursement under WRDA 1986 Section 204

- WRDA 1986 included the authority for a non-Federal sponsor to construct an entire navigation project and then obtain reimbursement from USACE.
- WRDA 2014 section 1014(b) and WRDA 2016 section 1127 amended this provision to broaden the authority to include flood damage reduction projects and other purposes.
- Section 204 reimbursement requires negotiation of a special agreement, for which USACE has not created a form agreement (introducing many “complications”).
- This can create cashflow challenges.
- Section 204 guidance mandates compliance with all Federal laws and regulations. What does this mean?
- Agreement must be executed before proceeding to construction. USACE guidance suggests that this process is slow.

4: Reimbursement under WRDA 1986 Section 204

- **PRE-PROPOSAL:** NFS notifies the ASA(CW) in writing.
- The ASA(CW) notifies HQUSACE and District with detailed information on the proposed work.
- District Commander will assess whether or not the proposed work meets the criteria. If the District Commander determines that the documentation provided by the non-Federal interest does not meet the requirements for review and processing of the proposal to the ASA(CW), the District Commander will, through the Major Subordinate Command (MSC) and appropriate HQUSACE Regional Integration Team (RIT), notify the ASA(CW) and formally return the proposal to the non-Federal interest with written documentation of the issues and concerns.
- The non-Federal interest may re-submit the proposal once the issues and concerns have been adequately addressed.
- **PROPOSAL:** Once the District Commander determines that the proposal may be submitted for higher level review, the District will prepare a report that fully addresses the criteria and proposed findings and includes an executive summary which summarizes the District Commander's conclusions. The District Commander must analyze whether the project meets NEPA and is economically justified based on appropriate Federal criteria, even when there is no difference between the project recommended in the feasibility report and the proposed project.

4: Reimbursement under WRDA 1986 Section 204

- The District Commander will submit its report to the MSC Commander.
- Once the MSC Commander determines that they are sufficient to meet current Corps criteria, design standards, and review processes, these documents, along with the MSC Commander's recommendations, will be submitted to the appropriate RIT.
- HQUSACE will review the documents and submit them, along with recommendations, to the ASA(CW).
- The ASA(CW) will advise the non-Federal interest and HQUSACE whether the non-Federal interest's proposal is approved, including any conditions on implementation of the project, or separable element.
- After the plan is approved by the ASA(CW), the ASA(CW) will take steps necessary to obtain any Administration clearances.
- Once the project is cleared and ASA(CW) submits the notification letters to the four Congressional Committees, the District Commander may develop an agreement with the non-Federal interest.
- The District Commander will submit the draft agreement through the MSC to the HQUSACE RIT following procedures for processing Project Partnership Agreements.
- HQUSACE will review the draft agreement and, if concurred in, submit it to ASA(CW) for approval.
- ASA(CW) will review and consider the draft agreement.

5: USACE funding under WRDA 2014 section 1043

- Section 1043 allows a non-Federal sponsor to construct a Federally-authorized project using Federal funds.
- Five year pilot program (proposed for extension in 2018 WRDA)
- Section 1043 requires compliance with all Federal laws and regulations. What does this mean?
- This program has never been used, so it is uncharted territory, with no guidance or sample PPA.
- 2018 USACE Workplan – “Under the authority of Section 1043 of the Water Resources Reform and Development Act of 2014, the Corps will work with the non-Federal sponsor to consider entering into an agreement for the non-Federal sponsor to assume responsibility for carrying out construction of this project. Subject to the conditions of the agreement and to the extent allowable under current law, the amount provided here is intended to cover the remaining Federal share of this project’s construction cost.”

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