

NAFSMA Annual Conference
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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

- In January of 2015, President Obama issued E.O. 13690 establishing the Federal Flood Risk Management Standard (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

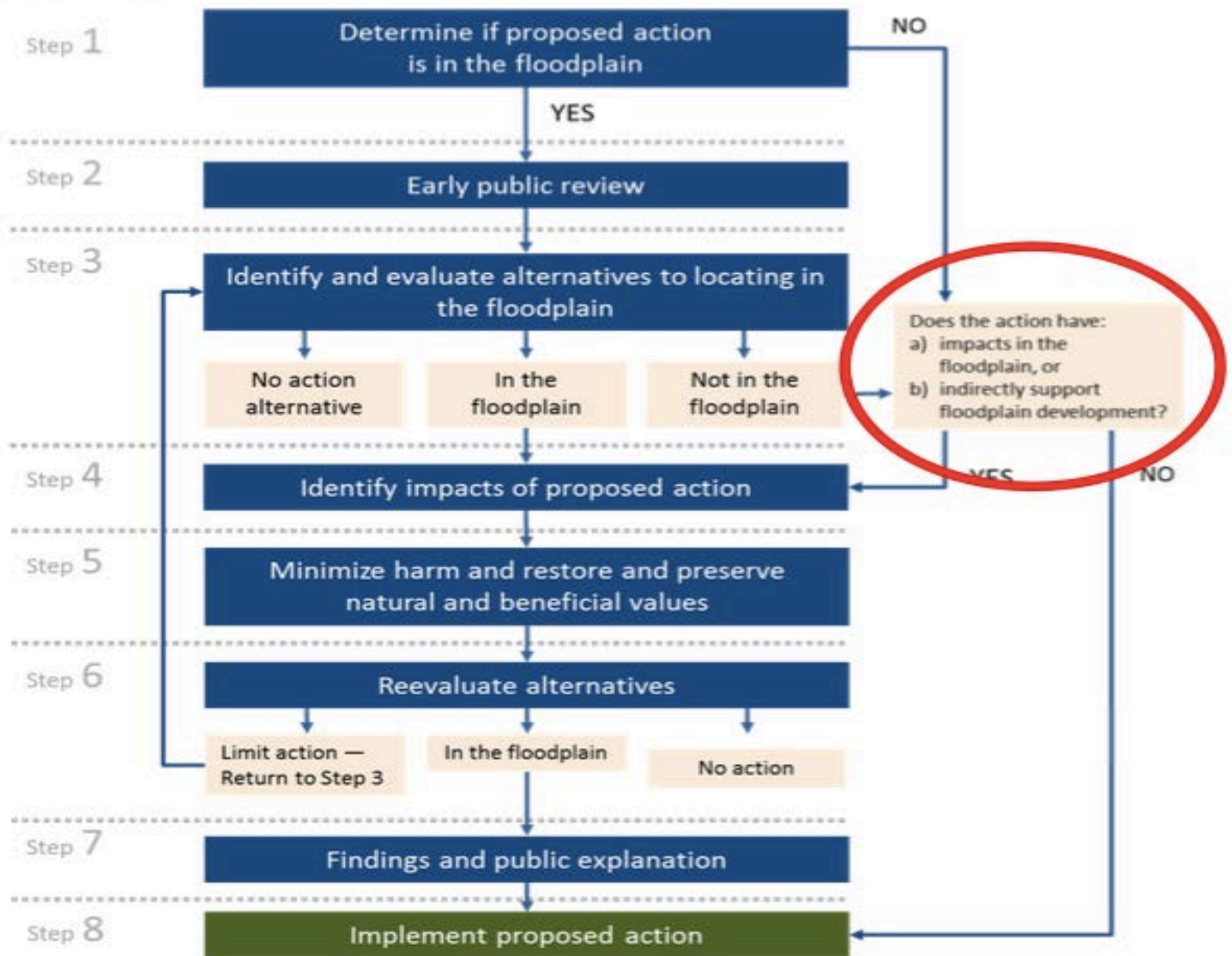
– During workshops, Federal Agencies have said:

- 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



E.O. 13690 & FFRMS

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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).

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