

NAFSMA Annual Conference
Charleston, SC
June 27, 2017

Current Legal Issues of National Interest
Scott L. Shapiro

Topics

- Further observations on 408
- H.R. 2170 – NFIP and Agriculture
- NFIP Reauthorization

Further Observations on 408

- Thematically, 408 guidance needs to mature:
 - Emergency action provisions needed
 - NEPA compliance
 - Standardized approvals are needed
 - Delegation and OC issues
 - Funding of 408 review & Prioritization
 - Section 106 compliance issues
 - Advisory Council on Historic Preservation

NEPA Compliance for 408

- **Timing of HQ and MSC Review**
 - Review should occur during public review period.
- **33 CFR 230.9 - Categorical exclusions**
 - **(b)** Activities at completed Corps projects which carry out the authorized project purposes. **Examples include** routine operation and maintenance actions, general administration, equipment purchases, custodial actions, erosion control, painting, repair, rehabilitation, replacement of existing structures and facilities such as buildings, roads, **levees**, groins and utilities, and installation of new buildings utilities, or roadways in developed areas.

Standardized Approvals are Needed

- Geotechnical borings
- Culverts
- Poles
- Fence, gates, and other roadway and safety features
- Actions within floodways and/or channels (e.g., grading or vegetative planting in flood bypasses)
- Environmental restoration activities that do not cause a significant hydraulic impact or otherwise impair the structure.

408 Delegation and OC



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, D.C. 20314-1000

CECW-ZB

JUN 21 2017

MEMORANDUM FOR MAJOR SUBORDINATE COMMANDS, AND DISTRICTS

SUBJECT: Further Advancing Project Delivery Efficiency and Effectiveness of USACE
Civil Works

3. Make, Justify, and Document Decisions at the Most Appropriate Levels. Currently in Civil Works too many decisions that are better made at the Major Subordinate Command (MSC) or District levels are elevated to Headquarters. This results in unnecessary time and cost, which is ultimately borne by our sponsors and stakeholders and degrades our project delivery. We will take a series of steps to rebalance the decision-making responsibilities and authorities across Civil Works to achieve an efficient process that is risk informed and well documented. This will allow Headquarters staff to apply more energy and expertise to strategic decisions that have enterprise-wide impacts.

408 Delegation and OC

- Delegate approval to levels below the District Commanders.
- Remove the requirement for legal sufficiency review (similar to Section 404 program).
- For example, replacement of installation of a culvert or pipe with no significant effect on the environment, not injurious to the public interest, doesn't impair the functioning of the project:
 - Subject to six weeks of review by office of counsel
 - Routing time of up to four weeks for signature by the District Commander.
- These types of Section 408 actions should be delegated to the Levee Safety Officer, Levee Safety Program Manager, or Section 408 coordinator.

408 Funding and Prioritization

- Insufficient budget for section 408 review
- Budget prioritized for Civil Works, not 408, inconsistent with Trump Administration promotion of non-Federal funding.
- Laurel Avenue 408 – Feather River
 - Was proposed for 2016 construction
 - Section 106 Cultural Resource issues were raised
 - USACE elected a second non-required 45 public consultation period with affected Tribe, with knowledge that construction season would be missed.
 - Locals expended nearly \$5m in flood fighting
 - Now spending expected \$12m for construction

H.R. 2170

- The **F**lood and **A**griculture **R**isk **M**anagement Cost Reduction Act of 2017
 - Requirement for State and Local Land Use Control (Variance)
 - Farmhouses?
 - Levee Impacted Areas
 - Multiple Ag Structure Policy Pilot Program
- Effect of reauthorization?

H.R. 2170 - Variance

- New construction:
 - Neither floodproofing nor elevation is practicable; and
 - That the structure is not located in (i) a designated regulatory floodway; (ii) an area riverward of a levee or other flood control structure; or (iii) an area subject to high velocity wave action or seaward of flood control structures.
- Existing structures:
 - Neither floodproofing nor elevation to the base flood elevation is practicable; and
 - If such structure is located within a designated regulatory floodway, such official has determined that the repair or improvement does not result in any increase in base flood levels during the base flood discharge.
- The variance will not result in increased flood heights, additional threats to public safety, extraordinary public expense, create nuisances, cause fraud on or victimization of the public, or conflict with existing local laws or ordinances.
- Not more than one claim payment exceeding \$1,000 has been made for the structure under flood insurance coverage under this title within any period of 10 consecutive years at any time prior to the granting of the variance.

H.R. 2170 – AL Zone

6 sion of law, if a community that applies to the Ad-
7 ministrator for the remapping of a levee-impacted
8 area in which the pertinent levee system fails to
9 meet the National Flood Insurance Program’s min-
10 imum design, operation, and maintenance standards
11 required for levee accreditation on a flood insurance
12 rate map—

13 “(A) the Administrator shall establish
14 flood risk zones for those areas on such maps
15 to be known as AL zones; and

16 “(B) flood insurance shall be made avail-
17 able to properties located within such zones at
18 actuarial rates based upon the risk associated
19 with structures within the applicable AL zones.

Multiple Ag Structure Policy Pilot Program



NFIP Reauthorization (House)

- H.R. 1422, the Flood Insurance Market Parity and Modernization Act - flood insurance policies written by private carriers satisfy the mandatory purchase requirement.
- H.R. 1558, the Repeatedly Flooded Communities Preparation Act - community accountability for areas repetitively damaged by floods by requiring them to develop mitigation plans.
- **H.R. 2246**, the Taxpayer Exposure Mitigation Act of 2017, would repeal the mandatory flood insurance coverage requirement for commercial and multifamily properties.
- **H.R. 2565** would require the use of replacement cost value in determining the premium rates for flood insurance coverage.
- H.R. 2875, the National Flood Insurance Program Administrative Reform Act of 2017, would make administrative reforms to the NFIP.

H.R. 2246

- Repeal the mandatory coverage requirement for commercial and multifamily properties.
- Annually cede a portion of the risk of the program to the private reinsurance or capital markets
- Allow for private or community flood maps
 - The Technical Mapping Advisory Council to develop guidelines within 12 months for use by:
 - State and local governments
 - Metropolitan Planning Organizations (MPOs)
 - Councils of Local Governments
 - Rural Transportation Planning Organizations
 - **Mandatory** after 90 days for three-year old maps; good for three years.

Current Legal Issues of National Interest

Scott L. Shapiro

www.TheLeveeWasDry.com