



Upper
Mississippi River
Basin Association

ILLINOIS, IOWA, MINNESOTA, MISSOURI, WISCONSIN

April 18, 2008

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Dear Rich and Chuck,

Thank you for the opportunity to review the draft NESP Implementation Guidance prior to it being finalized by the Assistant Secretary of the Army for Civil Works. We understand that partner review and consultation is not typically part of the process of developing such guidance, and we are therefore particularly appreciative that the states and other NESP partners were afforded this opportunity.

Enclosed are the UMRBA Board's comments on the draft guidance. These comments also reflect input from the state representatives on the EMP-CC and NECC-ECC. Individual state representatives may also be submitting additional comments and/or questions.

In short, we believe the draft guidance strikes a very useful balance between the flexibility that will undoubtedly be necessary and the policy clarity that the partners need, in order to understand the limitations and opportunities prescribed by the ASA(CW).

We look forward to continuing our discussion about the Implementation Guidance at the upcoming UMRBA meeting on May 20. Should you have questions, please do not hesitate to contact UMRBA staff Holly Stoerker or Barb Naramore for clarification.

Sincerely,

Martin Konrad
UMRBA Chair

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UMRBA Comments
on
Draft NESP Implementation Guidance
April 18, 2008

Overview

The March 18, 2008 draft *Implementation Guidance for Upper Mississippi River and Illinois Waterway System — Title VIII of the Water Resources Development Act of 2007* successfully balances the need for clear direction regarding implementation of NESP and the equally important need for sufficient flexibility to address issues as they arise.

Dam Point Control

Section 7B of the draft guidance states that “Dam point control will replace hinge point control for water level management...” In reality, these projects anticipate adding dam point control to augment hinge point control for environmental pool management, rather than actually replacing hinge point control entirely. In so far as this sentence of the guidance could be interpreted as a directive, it is suggested that it be revised.

Delegation of Authority

Delegation of authority to the Division and/or District Commanders for approval of implementation plans and Design Documentation Reports for navigation projects and for Project Implementation Reports (PIRs) for ecosystem projects will improve program efficiency. The experience with delegation of EMP project approvals in 1993 and 2000 suggests that it streamlines implementation and reduces costs. Consideration should be given to further delegating the authority for the fish passage and dam point control projects from the Chief of Engineers to the Division Commander, once key policy and design issues have been addressed with the initial projects of these types.

In addition, consideration should be given to increasing the \$5 million cutoff for defining small projects that can be delegated to the District for approval. Given the increasing cost of materials, relatively “small” projects can often cost over \$5 million. As an example, the cost of a relatively simple MVS dike alteration project recently rose to more than \$5 million, simply because the cost of rock escalated due to high demand for rock in New Orleans. Due to the continued effects of inflation, the States also recommend that the dollar limit for approval at the District level be evaluated over time and addressed as part of the Implementation Reports prepared in accordance with Section 8004(g) of WRDA 2007.

Floodplain Restoration Projects

Recognizing NESP’s connectivity and floodplain restoration goals, the draft implementation guidance specifies that the Corps’ policy regarding land-intensive ecosystem restoration will not apply to NESP. The absence of a ceiling on land value as a percent of total project costs will presumably facilitate floodplain restoration efforts and is thus particularly welcome, given that these projects are a relatively new and important ecosystem restoration tool on the Upper Mississippi River. In addition, the provision

allowing the non-Federal sponsor to be reimbursed for the value of LERRD that exceeds the required 35 percent non-Federal share, will undoubtedly be a very helpful approach to ensuring that the NESP floodplain restoration authority is effectively and fully utilized.

However, it is not yet clear how the requirement that floodplain restoration projects “include active restoration measures” may affect the type of projects undertaken and their effectiveness in meeting systemwide ecosystem restoration goals. Therefore, the States recommend that the partners’ experience with this requirement be monitored and the policy be reevaluated as part of the NESP Implementation Reports prepared in accordance with Section 8004(g) of WRDA 2007.

Condemnation

Sections 7B, 7C, and 7D each contain an identical sentence describing under what circumstances condemnation will or may be used to acquire land for ecosystem restoration projects. Presumably, this language would apply only to projects that are 100 percent federally funded — i.e., Sections 7B and 7C. For cost-shared projects, such as floodplain restoration projects (Section 7D), the nonfederal sponsor is responsible for LERRDs and that sponsor’s policies, laws, and regulations governing land acquisition should apply.

Even for 100 percent federally-funded projects, the States and other NESP partners have a stake in ensuring that land is secured from willing sellers whenever possible, that the use of condemnation is minimized, and that condemnation policies are clearly understood by all affected parties. Therefore, it is recommended that the Corps’ real estate condemnation policies be discussed in more detail with the Corps’ state partners, prior to finalizing the implementation guidance.

Collaboration

The Implementation Guidance provides that Project Implementation Reports (PIRs) for ecosystem restoration projects be initiated “based on project priorities established in a collaborative process with the Federal agency partners, the five states, non-governmental organization (NGO) partners, other stakeholders and the Advisory Panel.” This recognition of the value and importance of a collaborative approach is a welcome inclusion in the guidance and will ultimately be the foundation of the program’s success.

Feasibility Cost Sharing Agreement

The requirement that non-Federal sponsors contribute half the cost of some feasibility studies associated with cost-shared projects is a departure from the approach used in the EMP, which has never required that feasibility studies be cost-shared. The fact that this requirement only applies to feasibility studies exceeding \$100,000 obviously limits the applicability and may, in fact, provide an incentive to contain study costs. However, in so doing, it may also limit the scope and size of cost-shared ecosystem restoration projects. Whether this does in fact result, what impacts it may have on the effectiveness of ecosystem restoration systemwide, and thus what the most appropriate cost threshold is should be evaluated over time and addressed as part of the Implementation Reports prepared in accordance with Section 8004(g) of WRDA 2007.

Monitoring and Adaptive Management

Given that the monitoring of individual NESP ecosystem projects will undoubtedly be part of the broader NESP adaptive management effort, it is appropriate that the NESP implementation guidance distinguish NESP projects from the monitoring policies and restrictions applicable to other Corps ecosystem restoration projects. In particular, the NESP draft guidance says that monitoring will not be limited to one-percent of project costs and adaptive management will not be prohibited, as provided in Appendix F of ER 1105-2-100 for CAP projects. However, the draft NESP guidance does not mention the 3-percent limit on adaptive management costs, which is part of the broader provisions on ecosystem restoration contained in ER 1105-2-100. The 15-year NESP ecosystem plan recommended in the 2004 feasibility study identifies \$136 million for adaptive management. This is over 9 percent of the total ecosystem restoration cost of \$1.462 billion recommended in that plan. It may therefore be advisable to explicitly exempt NESP from the 3-percent adaptive management limit in current Corps' policy.

Another issue that the guidance does not address and is thus left ambiguous is limitations on the period of time for post-construction project monitoring. Currently, ER 1105-2-100 limits the period of cost shared post-construction monitoring to 5 years. Section 2039 of WRDA 2007 establishes a new 10-year limit, after which time the monitoring cost will be entirely the responsibility of the non-Federal sponsor. Specific limitations on length of project monitoring do not seem prudent for a regional ecosystem restoration program, such as NESP, which presumably will require an approach to monitoring that integrates numerous individual project results and has a long term time horizon.

Consultation and Funding Agreements

Section 7H of the draft guidance directs that the "ecosystem restoration program" be carried out in consultation with the Secretary of the Interior and the five states, consistent with Section 8004(e) of the authorizing language. The States' reading of the guidance is that this directive is intended to apply to all elements of the NESP ecosystem authority, including restoration projects, adaptive management, and long term resource monitoring. This would certainly be consistent with Section 8004(e)(2), which authorizes funding transfers for the "planning, implementation, and evaluation of *projects and programs established by this section*" (emphasis added). Moreover, we understand the delegation language in the guidance to limit the District Commanders' approval authority for such transfers to \$100,000. The States do not anticipate that this would be problematic, so long as the MVD Commander has delegated authority to approve transfers exceeding \$100,000, such as those necessary for implementation of the Long Term Resource Monitoring Program and adaptive management activities. As these examples suggest, a \$100,000 annual cap on transfers regardless of approval level would be quite debilitating to the implementation of NESP. Due to the effects of inflation over time, the States recommend that the \$100,000 limit for approval at the District level be evaluated over time and addressed as part of the Implementation Reports prepared in accordance with Section 8004(g) of WRDA 2007.

Advisory Panel

NESP federal, state, and NGO partners are currently considering what might be the most appropriate and effective institutional arrangements for implementing NESP in a collaborative way. The NESP Implementation Guidance provides a very useful framework for these ongoing discussions. In particular, the guidance explicitly recognizes that the role of the Advisory Panel mandated in Section 8004(h) need not be limited to the fairly narrow functions specified in that section. In addition, “independent guidance” is interpreted in a way that does not exclude individuals who are involved in NESP implementation activities from serving as members of the Advisory Panel. Both these provisions are helpful, in so far as they permit consideration of a variety of alternative institutional mechanisms.

Comparable Progress

The clarification that comparable progress does not mean annual funding allocations for navigation and ecosystem restoration must be proportional to total authorized funding for these two NESP elements is very useful and appropriate. However, it will be challenging to develop an alternative definition of comparable progress that is easily measured. The guidance suggests that funds should be allocated so as to assure that the ecosystem and navigation projects are “funded efficiently” and “completed in the same timeframe.” This is a useful concept, but may be difficult to operationalize. Additional consideration may need to be given to this issue, in the context of preparing the Implementation Reports required by Section 8004(g) of WRDA 2007.

On a minor note, in the second sentence of the comparable progress section, we believe the intent was to use the word “authorized” rather than “appropriated” in the phrase “proportional to the total amount appropriated.”