

Session 23

Course Title: Floodplain Management

Module Title: Policy History: Rivers as a Legal Battleground

Session 23: State Policies

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Time: 75 minutes

Objectives:

23.1 Identify the major players in determining water policy.

23.2 Explain why and how states operate together to manage interstate rivers.

(PP.23.1)

Scope:

The purpose of this session is to understand the relationship between state governments and floodplain management. As explained in the last two sessions, since World War II, the federal government has usurped what were traditionally state and local responsibilities. During this session the instructor will explain how states have responded to federal decisions that have basically replaced state prerogatives concerning floodplain management with mandates to attain federal goals. In this session, some approaches taken by states will be explained, and recommendations of the California Floodplain Management Task Force in their December 2002 *California Floodplain Management Report* will be presented in detail to illustrate how a single state attempts to meet multiple goals comprehensively in an integrated fashion. However, it should be remembered that these examples may not reflect what goes on in other states as each state has generally taken its own approach and no two states are exactly alike. Also, students should be reminded that federal, state, and local laws, interpretations of laws, and implementation decisions are always in flux with many interests either supporting or seeking change in the status quo.

Readings:

Student Required Reading:

An Assessment of Floodplain Management in Georgia's Flint River Basin by Elliott Mittler, Institute of Behavior Science, University of Colorado, 1997, Chapter 3, pages 53-62 and Chapter 4, pages 91-98.

California Floodplain Management Report by the California Floodplain Management Task Force, December 2002 (located on Internet at fpmtaskforce.water.ca.gov).

Water Resources Management Policy (NR-3) by the National Governors Association, 2004 (located on Internet at www.nga.gov).

Student Recommended Reading:

Flood Plain Land Use Management: A National Assessment by Raymond J. Burby and Steven P. French et al., Studies in Water Policy and Management, No. 5, Westview Press, Boulder, Colorado, 1985.

Instructor Reading:

Floodplain Management in the United States: An Assessment Report prepared for The Federal Interagency Floodplain Management Task Force by L. R. Johnston Associates, FIA-18, June 1992, Chapter 11.

General Requirements:

None. See individual objectives.

Objective 23.1. Identify the major players in determining water policy

Requirements:

The content should be presented by lecture with time allocated for discussion as necessary.

Remarks:

As stated in the last session, the Federal government has taken on a larger and larger role in the management of the floodplain until today where it is the most significant player in determining what is permitted and what is not permitted in the floodplain. In response to federal statutes, states have often been mandated to implement federal wishes. Even when unfunded mandates were reduced, states have still had difficulties appropriating sufficient funds to meet federal requirements. At this time, states are faced with multiple requirements involving land use, several environmental concerns including clean water and endangered species, flood mitigation, and agriculture, some of which may be mutually exclusive. In their attempt to meet federal requirements, states have often had to pass ultimate program responsibility to local governments to ensure that programs would be

implemented. Quite often, states find themselves in the middle ground between federal policy makers and local program implementers, moderating between what is required and what is possible. Understanding state policies and how they are carried out can help us to understand contemporary floodplain management practices.

I. Historical Context.

- A. In the last major assessment of floodplain management in the United States conducted by L. R. Johnston Associates in 1992, the authors assert that “widespread adoption of state...floodplain management regulations...did not occur until the 1970s” (chapter 11, page 13). These were the direct result of several federal mandates, the most important of which was the National Flood Insurance Program that required the adoption of community floodplain regulations for all new construction in the 100-year or 1% floodplain in all communities that joined the program. Often associated with federal mandates were the provision of technical assistance by federal agencies to states to increase the capacity of the states and local governments to monitor the mandated programs. Sufficient assistance was seldom provided. **(PP23.2)**

- B. When federal programs transferred powers to the states to manage floodplain programs, states responded by taking either of two approaches singly or in tandem: (1) direct regulation of floodplains, or (2) state standard-setting for local regulation. In the first approach, states would typically create or assign an agency to regulate the floodplain, usually the Department of Natural or Water Resources, to establish uniform practices and enforce compliance among local governments. In the second approach, a state agency would establish minimum standards that local communities would have to adopt. However, in the latter case, communities had the option to adopt more stringent regulations, and they would have the power to enforce compliance. Typical regulations affected zoning, subdivision regulations, building codes, and housing codes, including elevation requirements. In virtually all cases, states and local floodplain management measures were designed to prevent any increases in damage potential in the built environment by concentrating their regulations on the design and location of new development. They were not designed to reduce potential damage to existing development. **(PP23.3)**

- C. By 1985, Burby and French noted that states generally had taken the approach to inform, aid, and coordinate local floodplain management efforts, essentially assisting communities to meet federal requirements. States placed the onus of responsibility on the locals.

- D. After Congress enacted additional federal mandates, states generally responded to each mandate independently such that a single state agency would be given sole responsibility for its implementation. For example, the Department of Transportation would be given responsibility for roads and bridges in the floodplain, the Department of Environment or Environmental Quality would be

responsible for clean water; Fish and Wildlife would be responsible for endangered species, and Emergency Services would be responsible for natural hazards including floods. By the 1990s, states had multiple agencies working on programs affecting floodplain management, most working without concern for other agencies or being required to minimize any negative impact of its decisions outside its area of responsibility. To reduce the number and severity of adverse impacts of a decision made by a single agency, states began to develop systems' approaches for floodplain management, generally forming interagency groups to discuss their decisions and determine if there would be ways to avoid adverse impacts. State governors sometimes signed Executive Orders requiring agencies to work out their floodplain issues together.

E. States have generally not been able to maintain pace with new federal programs and subsequent amendments. Even if state agencies cooperated efficiently, new requirements came faster than the time needed by state and local officials to respond adequately to previous ones. As a result of the onslaught of federal regulations and the pressures put on states to implement and enforce them in a timely fashion, states generally have been reluctant to devise or to stick to a comprehensive systematic approach to floodplain management programs. Instead, they have fallen back to the simpler approach, having individual agencies retain sole responsibility for individual programs and making decisions that might maximize their benefits, even if these decisions were suboptimal from a systems perspective. Not all states, however, have been satisfied with the latter approach. In California, for example, as part of Assembly Bill 1147, enacted in 2000, the legislature recommended that the California Floodplain Management Task Force be created to establish how the impacts of flooding can be reduced through better coordination of floodplain management decisions. (In the next section, the task force, its findings, and its recommendations will be discussed in detail to illustrate how states might effectively deal with a variety of floodplain regulations, goals, and stakeholders.)

F. Since 1991, the National Governors Association (NGA) has had a policy position on Water Resources Management Policy. In the latest version adopted in 2004, there is a brief section (Section 3.8) devoted to floodplain management. On behalf of the state governors, it states:

“Effective floodplain management is a federal-state-local partnership”. The Governors emphasize that efforts to mitigate flood damage to existing development must be continued and strengthened. **(PP23.4)**

The Governors believe that it is critical to reduce the potential for existing and future flood damage through the implementation of comprehensive floodplain management programs. They recommend the following.

- At a minimum, continue federal technical and financial assistance for state and local implementation of feasible and cost-effective nonstructural flood damage mitigation measures.

- Develop a new partnership to address a number of issues related to floodplain mapping, including improved local confidence, a reinvented mapping process, utilization of new technologies, and quick delivery of accurate maps.
- Develop federal minimum erosion management standards for the regulation of coastal lands to minimize risks to public safety, reduce future property damage, and mitigate existing hazards.
- Create public and private incentives, such as reduced flood insurance rates and incentive-based cost-sharing for disaster assistance and flood mitigation projects, to encourage enhanced floodplain management and state and local measures to protect natural and beneficial floodplain functions.
- Expand efforts to achieve multiple natural resource and development objectives through comprehensive river and coastal management.
- Coordinate among federal programs and policies and with state programs and policies to ensure that floodplain management and damage mitigation objectives are met.
- Stipulate that federal cost-sharing requirements should fully credit nonfederal contributions to all phases of structural and nonstructural projects (planning, design, construction, etc.) and should be based on local ability to pay.
- Support the continuation of the National Dam Safety Review Board and dam safety general assistance and training grants to the states from the Federal Emergency Management Agency”.

Except for the inclusion of new federal initiatives, the NGA policy position to increase federal, state, and local cooperation and have the federal government provide more resources to states and locals to carry out federal policies has not changed since the original policy position was written.

II. A Systematic Approach to Water Policy (California as an Example).

- A. California suffered one of its most expensive and extensive flood disasters in January 1997, with damage estimated at \$2 billion. In response to the flood and public concern, Governor Wilson formed the Flood Emergency Action Team (FEAT) made up of 13 representatives from state agencies to recommend how the state should respond to the disaster and also how it should improve its emergency response and floodplain management practices. One recommendation was for the governor to appoint a Floodplain Management Task Force with a broad membership from all government sectors and interested community stakeholders “to examine issues related to State and local floodplain management and to make recommendations for improved statewide floodplain management policies.” The FEAT recommended that the task force be created by March 1, 1998. However, no task force was created during the remaining time Governor Wilson was in office.
- B. In the last year of the Clinton administration, Congress enacted the Federal Disaster Management Act of 2000 (Public law 106-390) requiring all states and

local governments prepare Multi-Hazard Mitigation Plans by 2004 to continue to be eligible to receive federal disaster assistance funding.

- C. Also in August 2000, just before third reading, Assembly Bill 1147 (Chapter 1071) was amended to include a recommendation for the governor to establish a floodplain management taskforce similar to the one first proposed in 1997. Section 1 of the law reads as follows:

“SECTION 1. The Legislature finds and declares that the impacts of flooding can be reduced through coordination of floodplain management decisions. It is the intent of the Legislature that the Governor establish a floodplain management task force with broad membership from the local, state, and federal government and stakeholders with an interest in flood control. If the task force is established, it is the intent of the Legislature that it examine specific issues related to state and local floodplain management, including, but not limited to, features that substantially reduce potential flood damages, and make recommendations for more effective statewide floodplain management policies.”

- D. In February 2002, the governor delegated authority to the Department of Water Resources (DWR) to convene a Floodplain Management Task Force. The task force was composed of 39 representatives from 27 groups representing state and local government as well as other interested stakeholders. Nine representatives from five federal agencies were unofficial members of the task force and “provided insight and advice.” The variety of members demonstrates the degree of inclusion that the state wanted in its task force; however, in a state as large and diverse as California, not all possible stakeholders were invited, and several areas of floodplain concern (See Table 22.1 in the last session) did not have a seat on the task force. (See Table 23.1 for a list of the member agencies involved.)
(PP23.5)

The choice of a task force to determine state floodplain management policy demonstrates the predicament states find themselves. States have been unable in most cases to set policy (a federal prerogative) and unable to implement policy (a local task). They need the assistance of other jurisdictions to meet their responsibilities. Furthermore, responding to policies independently has led to many unacceptable adverse effects and an inability to determine best practices to benefit citizens. As a consequence **major players in determining water policy** are a combination of state agencies, local and regional governments that will implement policies, and other stakeholders in the state who are affected by the policies.

- D. Two federal issues influenced the formation and content of the state inquiry:
1. The Disaster Management Act of 2000 requiring the state to create a multi-hazard mitigation plan by 2004; and

2. A FEMA notification to the state that the existing Executive Order of the Governor for floodplain management in 1977 did not bring the state and its political subdivisions into compliance with the current NFIP. Continued noncompliance could endanger state's ability to obtain federal financing for construction and improvement projects in the floodplain and for disaster relief.

- E. **Defining floodplain management.** To place its recommendations in context, the task force defined several terms including **floodplain, flood management, floodwater management, and floodplain management.** (*California Floodplain Management Report*, pages 19, 23.) (PP23.6)

Floodplain:: any land area susceptible by floodwaters from any source.

Flood management:: an overarching term that encompasses both floodwater management and floodplain management.

Floodwater management:: actions to modify the natural flow of floodwaters to reduce losses to human resources and/or protect benefits to natural resources associated with floodplains flooding. Sample actions include:

1. Containing flows in reservoirs, dams, and natural basins;
2. Conveying flows via levees, channels, and natural corridors;
3. Managing flows through reservoir re-operation; and
4. Managing watersheds by decreasing rainfall runoff and providing headwater stream protection.

Floodplain management:: actions to the floodplain to reduce losses to human resources within the floodplain and/or to protect benefits to natural resources associated with floodplains and flooding. Sample actions include:

1. Minimizing impacts of flows (e.g., flood-proofing, insurance);
2. Maintaining or restoring natural floodplain processes (e.g., natural community succession, meander corridors);
3. Removing obstacles within the floodplain voluntarily or with just compensation (e.g., relocating at-risk structures);
4. Keeping obstacles out of the floodplain (e.g., planning, mapping, and zoning land-use decisions);
5. Educating and planning for emergency preparedness (e.g., emergency response plans, data collection, outreach, insurance requirements); and
6. Ensuring that operations of floodwater management systems are not compromised by activities that interfere with, or are damaged by, design floods of these systems.

- F. **Defining reasonably foreseeable flood.** The task force decided that floodplain management should be concerned with floods that can be reasonably expected in

a particular geographical area. (*California Floodplain Management Report*, page 13.)

Reasonably foreseeable flood: a flood event that is realistically probable for a particular area. In many cases, this event could exceed a predicted “100-year” flood. It is important to note that the determination of a reasonably foreseeable flood can vary depending on its use and application for any given area. Sources of information on reasonably foreseeable floods may include historic floods, paleo-floods, hydrologic modeling using transposition, historical flood damage, and hydrologic models. It is up to each community to consider all information on reasonably foreseeable floods in making land-use and flood management decisions. (PP23.7)

G. Impediments to effective floodplain management. Before making recommendations, the task force identified three major impediments to effective floodplain management (*California Floodplain Management Report*, page 25.): (PP23.8)

1. Insufficient understanding of the risks from reasonably foreseeable flooding;
2. Single-purpose approaches to floodplain management issues; and
3. Insufficient technical assistance and funding to local agencies.

As stated earlier, these are the most common complaints concerning floodplain management that have existed in most states since the federal government began setting water and floodplain-related policies.

H. Recommendations for more effective floodplain management. The task force made 38 specific recommendations organized under three headings that reflect the three impediments to effective floodplain management cited above. They are summarized as follows (*California Floodplain Management Report*, pages 20-21): (PP23.8)

Better Understanding of and Reducing Risks from Reasonably Foreseeable Flooding – Local, State and federal agencies should consider the risk to life and property from reasonably foreseeable floods when making their land-use and floodplain management decisions. To effectively consider the risk to life and property from reasonably foreseeable floods, decision-makers need better tools and information and specific methods to comply with the federal National Flood Insurance Program (NFIP) (e.g., maps, stream gaging and monitoring, flood-warning programs, and building codes). (PP.23.9)

Multi-Objective-Management Approach for Floodplains – State, local, and federal agencies should implement multi-objective floodplain management on a watershed basis. Where feasible, projects should provide adequate protection for natural, recreational, residential, business, economic, agricultural, and cultural resources for water quality and supply.

Local Assistance, Funding, and Legislation – DWR should identify and actively pursue funding opportunities, technical assistance to local governments and other organizations, and legislative proposals to implement Task Force recommendations and ensure successful floodplain management, recognizing that local governments have the primary responsibility and authority for land-use decisions.

Objective 23.2. Explain why and how states operate together to manage interstate rivers

Requirements:

None. See individual objectives.

Remarks:

I. History of Interstate Compacts to Manage Interstate Rivers. The federal government was formally the first jurisdiction to take control over the waters of rivers that traversed multiple states. In 1879, Congress established the Mississippi River Commission with a mission that included the following tasks:

- to correct, permanently locate, and deepen the channel and protect the banks;
- to improve and give safety and ease to navigation;
- to promote and facilitate commerce, trade, and the postal service.

In later years, flood control was added to the list of tasks.

Although there is no reference stating exactly when states began forming interstate compacts to legally decide issues concerning shared waterways, it appears that the first may have been the Colorado River Compact, originally authorized by Congress in 1921, that was created to apportion the waters between seven states (Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming). Without the compact, there would be no comity between the states.

It is difficult to say how many interstate compacts have been entered into or are in force today. The most comprehensive list is on the website of the U. S. Fish and Wildlife Service (<http://laws.fws.gov/lawsdigest/compact.html>), which contains just over 40.

II. How and Why States form Interstate Compacts

States agree to form an interstate compact to resolve issues that cannot be resolved in any other way. It can be considered a method of last resort. To enter into an interstate compact, the states generally form a commission to work out the language how future disputes or issues will be resolved. These normally provide the process of resolving issues as they may be different in different years, such as when there are droughts or

excesses of rainfall. After the legal documents are agreed to, legislatures of each participating state must ratify the compact. Once they agree, the United States Congress consents to the agreement. Over time, in many cases, state legislatures agree to add responsibilities to the river commissions in charge of the compact.

In the western United States, where water is scarce, the most prevalent reason for the creation of interstate compacts is the allocation of water. These compacts are mostly of two types: those that allocate a fixed amount or flow of water to individual states; and those that allocate percentages of available water to the states. Water allocation is also a significant reason in states east of the Mississippi.

Reasons for compacts are varied, but there are several common reasons, including the following: **(PP.23.10)**

- Comprehensive river basin or watershed planning;
- Water supply allocation;
- Flood control;
- Floodplain management;
- Protection and restoration of fisheries, wetlands, and aquatic habitat;
- Water quality;
- Hydroelectric power and its distribution;
- Water storage and irrigation.

Table 23.1 California Floodplain Management Task Force Membership

Federal Agencies

Federal Emergency Management Agency
National Marine Fisheries Service
U. S. Army Corps of Engineers
U. S. Environmental Protection Agency
U. S. Fish and Wildlife Service

State Agencies

Department of Fish and Game
Department of Food and Agriculture
Department of Housing and Community Development
Department of Water Resources
Governor's Office of Planning and Research
Office of Emergency Services
The Reclamation Board
The Resources Agency

Local and Regional Agencies

Association of California Water Agencies
California Association of Resource Conservation Districts
California Central Irrigation District
California Central Valley Flood Control Association
California State Association of Counties
Lower San Joaquin Levee District
Southern California Associated Governments
League of California Cities

Other Stakeholders

Agua Caliente Tribe
California Association of REALTORS
California Building Industry Association
California Business Properties Association
Community Alliance with Family Farmers
Floodplain Management Association
Friends of the River
Institute for Ecological Health
Natural Resources Defense Council
The Nature Conservancy
Sierra Club