



**ASSOCIATION OF
METROPOLITAN
WATER AGENCIES**



**American Water Works
Association**

May 15, 2017

Re: Docket COE-2016-0016, Comments on the proposed rulemaking: Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal and Industrial Water Supply

Dear Mr. Fredericks:

The Association of Metropolitan Water Agencies (AMWA) is an organization representing CEOs and general managers of the largest publicly owned drinking water utilities in the United States and the American Water Works Association (AWWA) is an international, nonprofit, scientific and educational society dedicated to providing total water solutions assuring the effective management of water. Many members of both organizations have storage agreements with the U.S. Army Corps of Engineers, some are actively involved in basin reauthorization studies with the Corps for the purpose of reallocating portions of stored water for municipal use, and many more are interested in how the Corps intends to clarify policies regarding the use of its reservoirs. The terminology, definitions and change in applicability and procedures are very important to our members.

In light of the importance of this rulemaking to our members, AMWA and AWWA are pleased to submit these comments on the proposed rulemaking. While both organizations agree that additional clarifications related to the issues covered in this rulemaking are necessary, a final rulemaking should be delayed until additional consultations with states, utilities and other vested stakeholders can be undertaken. The issues at play in this rulemaking are complicated and nuanced to a degree that we believe a re-proposal is necessary to allow sufficient review of changes from the current proposal and assure critical issues are being properly addressed prior to finalization of the rule.

Our specific comments are provided as an attachment. If you have any questions, please contact Erica Brown (brown@amwa.net), AMWA's Chief Strategy and Sustainability Officer or Steve Via, AWWA (svia@awwa.org).

Sincerely,

Diane VanDe Hei
Chief Executive Officer
Association of Metropolitan Water Agencies

G. Tracy Mehan, III
Executive Director of Government Affairs
American Water Works Association

**Comments from the Association of Metropolitan Water Agencies and
American Water Works Association
May 15, 2017**

Introduction

Many of AMWA's and AWWA's members have storage agreements with the U.S. Army Corps of Engineers, some are actively involved in basin reauthorization studies with the Corps for the purpose of reallocating portions of stored water for municipal use and many more are interested in how the Corps intends to clarify policies regarding the use of its reservoirs. Therefore terminology, definitions and change in applicability and procedures as related to the Corps' reservoir projects are very important to our members. Similarly, it is critical that the Corps' divisions and districts are working from the same understanding of how Section 6 of the Flood Control Act of 1944 and the Water Supply Act of 1958 should apply across the country to water supply projects and storage agreements.

In light of the importance of this rulemaking to our members, AMWA and AWWA are pleased to submit these comments. While AMWA agrees that additional clarifications related to the issues covered in this rulemaking are necessary, a final rulemaking should be delayed until additional consultations with states, utilities and other vested stakeholders can be undertaken. The issues at play in this rulemaking are complicated and nuanced to a degree that we believe a re-proposal is necessary to allow sufficient review of changes from the current proposal and assure critical issues are being properly addressed prior to finalization of the rule.

The Role of States Versus The Corps in Determining Allocations

At the heart of the reservoir rules, and, thus, the Corps proposal, is one overriding issue of relevance to the water utilities with storage contracts— i.e., the role and legal rights of states in allocating water flows and how those state responsibilities fit into the Corps' mission to provide water storage in its projects. By definition, the Corps provides *storage space* in its reservoirs.¹ It is the states that have jurisdiction over the *allocation of water* within the bounds of established water allocation agreements/contracts. As written, the Corps proposal does not maintain a clear distinction between these two responsibilities.

From a water utility perspective, once it has acquired storage space within a reservoir project, it should be able to utilize that space in the most efficient way possible to maximize its water yield

¹ It is recognized that all arguments regarding the use of storage space need to respect the Corps' operational obligations of the reservoirs (e.g., observing rule curves, etc.). In addition, in some instances, existing contracts between the Corps and a water utility may provide a right to a specified amount of water or other benefits. Existing contract rights and benefits should be acknowledged in the rulemaking and should not be abridged or negated directly or indirectly by a new rule.

in accordance with its state-issued water contracts and/or permits. In most respects, water utilities approach the operation of their storage – essentially a defined empty space – within the conceptual framework of a mass balance equation. Because the Corps is only providing storage space, it should only be concerned with how much water an authorized user has in the reservoir at any single point in time. Water availability should be based on a storage owner’s net water used over any contractually designated time frame.

This concept is particularly important as it pertains to return flows and made inflows. If return flows or made inflows are credited to a water utility in accordance with state-assigned water allocations, the Corps should respect that allocation. Return flows or other made inflows - defined as inflows into a Corps reservoir that have been allocated by a state to an owner of storage in the reservoir - should be fully credited to the storage account holder responsible for such flows, provided that the flows can be reliably measured.

Both practically and conceptually, the Corps definition of water storage needs to be simplified to allow the maximum flexibility for states to manage their legal right for allocating water. As written, the Corps proposal suggests changes or modifications to rule language that would intrude on states’ rights for water allocation.

One example of this is a medium-sized wholesale water and wastewater utility that owns a state water right for its indirect reuse water. If the Corps does not recognize the state’s right to allocate the reuse water to the utility, the utility must purchase additional reallocated storage from the Corps or seek additional resources elsewhere to serve its customers. At current raw water rates, the utility would spend up to \$3 million per year under current conditions. Future water needs could require the utility to purchase up to \$10 million per year at current raw water rates.

Federalism

Because of the fundamental relationship between the Corps and states, and the use of storage in Corps projects within state allocations of water rights, there are clearly Federalism implications for almost every aspect of the proposed rule. It is unclear how the Corps came to a contrary conclusion in its assertion that Executive Order (EO) 13132 (Federalism) does not apply to this rulemaking. AMWA and AWWA strongly believe that this conclusion was incorrect, and that the robust outreach and consultation with states and local officials required under the Federalism EO is absolutely necessary prior to moving forward with this rule in any respect. Ideally, the results from such consultations should be shared widely with all stakeholders and incorporated into a re-proposal of the rule.

Throughout the proposal, much of the language refers to Corps decisions that would impact state, local, and tribal governments, but there is little information on how these levels of government or actual affected users (e.g., a water utility) would be engaged aside from through responding to public notices issued by the Corps. Therefore, in the spirit of reconsidering the proposal of this rule under EO 13132, as recommended elsewhere in our comments, the processes for making Corps decisions under this rule must include more proactive engagement of all stakeholders, including state, local and tribal government entities, and the requirements and mechanisms for such interactions need to be better reflected throughout this rulemaking.

Authorizations

The Corps rule proposes that approvals of state reallocations or surplus water determinations require sign-off by the Assistant Secretary of the Army (ASA). Given the historical record on moving many Corps projects through such approvals (i.e., it is already a very cumbersome, slow process), we believe this would be an excessively burdensome requirement, having the potential to cause further extensive delays in implementing much needed changes. Instead of creating a system that requires higher-level approvals, the revised rule should encourage streamlining of such processes wherever possible. Many of the decisions involved in reallocations and surplus water determinations are dependent on local conditions and technical in nature; therefore, responsibility for review and approval of these requests best resides with Corps District leadership familiar with projects and impacts for all parties involved.

As an example, Public Law 110-114 Sec. 5019 (Nov 8, 2007) provides the authority for the Secretary of the Army to enter into agreement with the Interstate Commission on the Potomac River (ICPRB) basin to provide temporary water supply at Corps facilities in the Potomac River Basin during specific drought periods. In this case, while this authorization provided requirements for the duration and applicability of any agreement, the proposed rule should be modified to provide the authority to allow the Corps District office, in this case the Baltimore District, to enter into agreement and/or reallocate non-contractually obligated water storage directly with the ICPRB Co-Op section. The Baltimore District office is responsible for developing and implementing the operating rules of the Corps Reservoir and, consequently, has direct knowledge of the rationale used to make Reservoir releases. A decision made at the District level provides a more efficient mechanism to accomplish surplus water declarations and/or reallocations of water storage that can be more effectively used by the local community.

Reassessing Existing Uses

The proposal describes reassessment of current uses when easements expire or within five years of the effective date of the final rule, whichever is earlier. If municipal and industrial water supply allocations require the approval of the Assistant Secretary of the Army, this concept raises several logistical challenges, i.e.:

1. If the review leads to a change in status, what timeframe will be afforded existing municipal and industrial users to transition to alternative sources or re-position outfalls in response to the assessment?
2. What, if any, other statutes would be triggered by this review?
3. What data gathering would be necessary?
4. What decision criteria would be used?
5. What is the status of existing uses during the review process?
6. What conditions apply to users during the review period?
7. How much time would the review process require?

Reassessments are lengthy and complicated processes, and the rule changes need to do a much more thorough job of accounting for such contingencies for the rule to result in greater clarity and efficiencies.

Surplus Water Definition and Costs

In regard to the definition of surplus water, we do not believe the definition should include natural flows, but rather only stored water in excess of established contractual storage agreements should be counted under the definition. And when making decisions related to surplus water, the Corps should not be making judgments about “beneficial uses” (i.e., choosing one use over another). The Corps should be solely concerned with whether the water storage is needed for an authorized purpose. Thus, we agree with the Corps that the term “more beneficially used” in the definition in the Corps guidance should be removed, since this suggests that the Corps is making an assessment of which uses are “more beneficial” than another. Water storage volume under existing contractual storage agreement must not be considered “surplus water” under any condition. If the water is not needed for an authorized use in the basin, then it should be considered surplus water and available for someone with a contract in that basin to take.

The rule as stated also includes a caveat that surplus water may include water where the “authorized purpose for which such water was originally intended have not fully developed”. Water utilities acquire storage facilities based on very long-term projections, and 50 to 100-year needs are frequently considered in planning. So, if a utility is only 30 or 50 years into their plan, and is using only a portion of its contracted storage, that doesn’t necessarily mean the intended use has not fully developed. Utilities should not be put in a position of defending long-term plans to maintain their contracted storage volume.

Furthermore, we agree with the Corps proposal that the annual charge for surplus water should “reflect only the full separable costs, if any, to the Government associated with the surplus water withdrawals.” Reimbursement for indirect and forgone revenue, such as hydropower revenue, or other proposals strictly intended to enhance revenue should not be included in any surplus water pricing structure. With regard to the pricing of surplus water, the Corps should not be in the business of generating excess revenue.

Pricing of Water Storage Agreements

In general, greater clarity is needed in the costs to be included in water supply storage agreements. As a guideline, the Corps should focus its pricing strategy on simply recouping costs – not generating excess revenue/profit. All rule components related to pricing should be subject to further, targeted outreach focused on gaining first-hand feedback from the financial officers and accounting professionals tasked with addressing these issues within the entities effected by the rule.

For example, costs included for annual joint O&M in Corps storage agreements with water utilities varies widely, with little consistency in what’s included in those costs. For capital costs

related to buying into projects, depreciation of assets needs to be considered in the pricing structure. These, and all other costs, need to be assessed using well-defined, standard accounting practices. Furthermore, invoices need to show sufficient detail to allow auditing under accepted general accounting rules.

One rationale for the rulemaking is also greater consistency and equity in the cost structure of using Corps facilities. It is not clear from the proposal that charges would be more equitably distributed. In the proposal, the Missouri River system is identified as a natural flowing “mainstem reservoir,” to which the proposed pricing policy would not apply until June 2024. What about other similar systems like the Ohio River? Water utility withdrawals do not necessarily rely on storage in these systems; however, the proposed rule would result in new and inconsistent charges to authorize withdrawals from some rivers (i.e., the Missouri) but not others

Conclusion

AMWA and AWWA appreciate the general listening sessions the Corps has held to explain the current proposal. However, there was no substantive dialog and outreach to stakeholders prior to the proposal as required under the Federalism EO 13132. Therefore, given the absence of stakeholder outreach prior to proposal of the Corps rule, AMWA and AWWA strongly believe that additional robust consultations with all stakeholders are needed on the substance of the proposal. In addition, an official consultation with states and local government officials under the auspices of the Federalism EO 13132 is required and must be completed prior to moving forward with any aspect of this rulemaking.

Following the additional consultations, we believe the required changes to the proposal as written will be substantial enough to warrant a re-proposal of the rule to assure that the final product is workable for all interested stakeholders. This rulemaking makes changes to rules on the books since the 1940s and 1950s that have been subject to a broad range of interpretation and implementation across the country. How this rule is implemented in practice varies across Corps districts and divisions and the purpose of the rule is to clarify policy questions and interpretations that have arisen over time across the country by facilitating a more standard interpretation of the rule. In this context, the extra engagement and time to get all the details right is essential.