



May 15, 2017

Docket No. COE-2016-0016

U.S. Army Corps of Engineers  
ATTN: CECC-L  
US Army Corps of Engineers  
441 G St. NW  
Washington, DC 20314

Re: Docket No. COE-2016-0016  
Use of US Army Corps of Engineers Reservoir Projects for Domestic, Municipal  
and Industrial Water Supply

To Whom It May Concern:

I am writing on behalf of Mission H2O to provide comments on the above-referenced proposed rule, published at 81 Fed. Reg. 91556 on December 16, 2016. The public comment period was extended to May 15, 2017 via a notice published at 82 Fed. Reg. 9555 on February 7, 2017.

Mission H2O is an informal stakeholder group focused on the management of Virginia's water resources and, in particular, developments affecting water supply and water availability. Water is a critical component of the businesses of our members. We have a broad membership that ranges from municipal water providers to manufacturers to agricultural operations. While Mission H2O's primary focus is on Virginia-specific water supply-related developments, the Corps' proposed rule has the potential to impact water availability in Virginia due to the presence of several Corps dams and reservoirs in Virginia. Additionally, there are Corps facilities in surrounding states (North Carolina, Maryland and West Virginia) that are important water supply sources to Virginia, or provide supplemental flows to Virginia waterways.

Mission H2O supports the Corps' effort to develop a national policy on the management of its reservoirs. Currently, there is a great deal of uncertainty and confusion about how and when agreements with the Corps are needed, and the content of those agreements. Similarly, development of a uniform pricing policy, as well as a methodology for determining available "surplus" water, is an important and positive aspect of the proposed rule. Mission H2O also appreciates the Corps providing an opportunity for public participation in the development of this national policy.

Given that this is the first time the Corps has provided an opportunity for public comment on these topics, and the complicated nature of these issues, Mission H2O believes additional time is needed to allow the public adequate time to understand the proposal and develop comments, particularly given the wide variety of Corps facilities and state water rights systems. This policy has far-reaching implications that must be considered from a number of angles.

With respect to how this policy would apply in Virginia, there are questions regarding the definition of “surplus water,” as well as the relationship between Corps agreements and state water rights. With respect to “surplus water,” greater understanding is needed as to which facilities this term would apply. The explanation for why “natural flows” are not excluded from the surplus water definition is confusing, particularly when the Corps states that its agreements do not address or affect state water rights. Where a state has a riparian water right system, it would appear that natural flows must be excluded from the surplus water definition. It would also appear that the natural flows concept would apply in other settings beyond the Missouri River mainstem reservoirs.

Greater understanding of how the Corps defines “state water rights” is also needed. In Virginia, the common law riparian doctrine controls water rights. Yet Virginia also has a water withdrawal permitting program in place. The permitting program does not create water rights – but certainly creates an authorization for water withdrawals to occur. Will those permits be considered water rights by the Corps? If not, how will the Corps account for such permits when determining “surplus water” availability?

The Corps also asserts that there are no federalism implications in the proposed rule. Yet, the rule defines “domestic and industrial uses” as a “beneficial use under an applicable water rights allocation system.” The rule also refers to “then existing lawful uses.” These terms will be applied by the Corps in making various determinations as to water available for withdrawal. Thus, by the very nature of the intertwined federal and state law determinations that will be made, there are federalism implications. The fact that the Corps will hold public notice and comment on its surplus water determinations and various water supply agreements does not sufficiently resolve this issue.

Mission H2O supports the Corps’ recognition of return flows in the proposed rule. However, the manner in which the Corps has defined and applied return flows needs further discussion. In Virginia, there is a clear distinction in the permitting program between withdrawals for consumptive uses and withdrawals for nonconsumptive uses. The impacts are very different. The Corps’ proposed rule appears to reward all withdrawers by crediting return flows across the entire field of withdrawers. Given the fact that consumptive uses have greater impacts, it is unclear why all withdrawals would be treated equal, and the entity providing the return flow would not receive full credit. It is also unclear where a return flow would ever not be a “made inflow.”

Due to the importance of these issues and the clarifications needed, Mission H2O respectfully requests that the Corps either further extend the public comment period on the proposed rule, or reissue it with clarifications to address the uncertainties it raises. It would also be helpful for the Corps to host a webinar to further explain the proposed rule and provide an opportunity for questions and clarifications.



Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in blue ink that reads "Andrea Wortzel".

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cc: Mission H2O Members

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