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May 12, 2017

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

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

Dear Messrs. Fredericks and Inkelas:

As you may know, the Texas Water Conservation Association ("TWCA") is an association of public and private entities interested in the conservation, development, protection, and utilization of the State's water resources for beneficial purposes. The Association has statewide membership that consists of more than 400 total members, including more than 200 regional entities, municipalities, water districts and authorities, flood control and improvement districts, irrigation districts, river authorities, and private corporations, in addition to individual members. Many of TWCA's members have an existing water supply that depends on water from USACE-operated reservoirs, including, but not limited to, Lake Benbrook, Lake Chapman (Cooper Lake), Lavon Lake, Lewisville Lake, Lake Ray Roberts, Lake Texoma, O.C. Fisher Lake, and Waco Lake.

Request to Extend Comment Period

TWCA is writing to request that the public comment period for the above-referenced rulemaking, the USACE "Water Supply Rule", be extended at least six months to provide greater coordination and collaboration with stakeholders. TWCA's diverse membership and interests means this proposed rulemaking, the "Water Supply Rule", is critically important to TWCA. However, the conversations that have occurred to date among TWCA members and with USACE have made two points clear: (1) stakeholders were not involved in the development of the proposed rule, and (2) as a result, the proposed rule contains fundamentally unacceptable terms that not only disproportionately affect certain stakeholders, but also undermine states' rights.

Nevertheless, TWCA is confident that continuing dialogue would be productive with appropriate stakeholder participation. The perspective of an alliance such as TWCA is instructive on how to craft a rule that will minimize unintended consequences, unfairly single out certain stakeholder groups, or impede state authority. Therefore, TWCA requests the public comment period be extended to provide an opportunity to continue meaningful discussions to improve upon the effort that has been invested in this proposed rule.

Should the deadline to file comments not be extended, TWCA respectfully submits for your consideration in this matter the following comments and recommendations.

Comments and Recommendations

Federalism

TWCA is aware, as the proposed rule notes, that the Water Supply Rule was crafted with the intent to not infringe on state power in water supply management in USACE-owned reservoirs. As explained in Section E of the proposed rule relating to federalism, “Congress did not intend for the Corps to interfere with State allocations of water when exercising its discretion under Section 6 or the WSA.” 81 Fed. Reg. 91556, 1587. However, the rule as proposed impedes states’ ability to continue to concurrently utilize USACE reservoirs and implement a program to administer and regulate water rights within their boundaries, if states have such programs. The proposed rule—despite the USACE’s stated intention to the contrary—encroaches on the states’ role in allocating water. As described in particular instances in more detail below, the proposed rule conflates the USACE’s ability to make storage available in its reservoirs with the states’ ability to make water available to users pursuant to state-issued water rights, causing the proposed rule to not only be unwarranted, but also unconstitutional. U.S. CONST. Amends. IV, X and XIV.

Failure to Address Stated Purpose

The stated purpose of the proposed rule is to “seek public comment on the Corps’ interpretation of key provisions of Section 6 and the WSA, and on the Corps’ proposed policies to more clearly and effectively provide for use of its reservoirs with the authority conferred by these two statutes.” 81 Fed. Reg. 91556, 91557. Additionally, the proposed rule is promoted as reinforcing USACE practices by “clarifying policies, and providing for improved coordination with the public and other federal agencies prior to taking final action pursuant to Section 6 or the WSA.” 81 Fed. Reg. 91556, 91559. However, as explained in greater detail below, the proposed rule creates uncertainties and ambiguities that did not previously exist in policies relating to storage contracts with USACE. These “clarifications” have the potential to impede rather than assist states and water suppliers in utilizing USACE reservoirs to meet water supply needs. Consequently, the prospect for future contracts seems much less reliable and much more burdensome as a result of this proposed rule as currently drafted, further supporting TWCA’s recommendation that additional time be taken to redraft the Water Supply Rule in a way that meaningfully addresses the issues USACE is experiencing with its contracts for storage in USACE-owned reservoirs.

Surplus Water (33 CFR §§ 209.231(b)(2), (e))

The Water Supply Rule purports to authorize USACE to enter into contracts “for the use of surplus water” with “surplus water” as now defined. This authorization is contrary to USACE’s authority under Section 6 and contradicts USACE’s repeated assertion that the rule does not interfere with state-issued water rights. As mentioned previously, USACE’s authority is limited to contracting for storage in a USACE-owned reservoir, not to contracting for water supplies. The Texas framework for allocating water rights includes allocation of “surplus water” as that term is defined in the Texas Water Code, consistent with the primary authority of a state to manage water supplies and allocate water resources within that state. By framing the proposed rule in terms of “surplus water”, USACE is not only exceeding the scope of its authority, but also impeding states’ ability to regulate water supplies. As a result, the proposed rule creates uncertainty for holders of state-issued water rights.

Additionally, USACE reservoirs may contain water from natural flows that would exist even without the construction of the reservoir. As currently defined, “surplus water” includes such natural flows and authorizes USACE to allocate such water despite the fact that such water may be otherwise allocated under a state water rights program.

Stakeholder Coordination (33 CFR § 209.213(c)(4))

TWCA fully supports and encourages enhancing coordination with federal agencies. However, the proposed rule gives the Power Marketing Administration (the “PMA”) greater procedural authority than other stakeholders by allowing it to coordinate with USACE in advance of all other stakeholders when a reservoir has a hydropower purpose. TWCA recommends deleting this provision in its entirety and only allowing the PMA to have input at the same time and at the same level of detail as other stakeholders.

Storage Accounting (33 CFR §§ 209.231(d)(1)-(2))

If adopted, the proposed rule would authorize USACE in a storage contract to make allocations of more than just storage within the reservoir. Indeed, the proposed rule effectively authorizes USACE to account for and allocate water, which is beyond USACE’s authority under Section 6 and the WSA. When entering into a storage contract, the roles of both USACE and the state must be clear: USACE provides storage, whereas the state water rights program authorizes the diversion and use of water to be stored. The proposed rule authorizes USACE to determine the yield and the source of that yield in addition to specifying the amount of storage available, encroaching into states’ authority in that regard. Instead, such a determination should remain with the state under that state’s water rights allocation procedures.

Moreover, storage contracts should not be limited to “the actual yield of the reallocated storage, as measured by the storage accounting.” Withdrawals should be determined by a state pursuant to its water rights program, unless specifically delegated to USACE. In short, USACE should only determine how much storage can be made available consistent with the authorized use of the reservoir and without impact to other users of storage, whereas a state determines how much water comes in and out of that storage space. In this way, water rights holders are certain that they are no worse off using a USACE reservoir than a non-USACE reservoir.

The proposed rule requires a storage contract to include or reference a storage accounting mechanism. TWCA does not necessarily object to such a provision, however, this language is sufficiently broad to trigger an interpretation that USACE can impose or otherwise influence certain accounting procedures. If such a requirement is maintained, it should be limited such that the applicable accounting is consistent with state-issued water rights and any accounting plan required thereunder, specifically, or the state's water rights program procedures, generally. With this limitation, the risk of impeding states' rights is lessened.

Finally, TWCA has significant concerns with the federal overreach in the proposed rule's accounting principle that "all inflows to and losses from the Corps reservoir are credited or charged proportionately to each water supply storage account" This principle stands in stark contradiction to the state water rights program in Texas and the statement in the proposed rule that USACE does not "issue, sell, adjudicate, or allocate water rights These users are exercising their separately-derived water rights." By dictating that all inflows will be allocated proportionately across all storage users, USACE is effectively interfering with those state-issued, separately-derived water rights, which may exclusively entitle the water rights holder to certain inflows. In Texas, for example, return flows may be specifically reserved within a water right, less only carriage losses. Thus, a proportionate allocation of such flows across storage accounts in a reservoir disregards that permitted water right and allocates water, not storage, contrary to USACE's authority under Section 6 and the WSA.

Pricing (33 CFR § 209.231(d)(3))

Overall, the pricing method described in the proposed rule lacks the necessary specificity to truly provide clarity and bring reasonableness to how costs are allocated across all reservoir users. Moreover, as currently drafted, the cost allocation under the three differing scenarios may be a disincentive to some entities, particularly political subdivisions, which makes up a significant portion of TWCA's membership, to enter into a contract for storage in a USACE reservoir.

Although TWCA agrees that USACE should be able to recoup costs for making the storage available pursuant to storage contracts, the vague description of the pricing methodology suggests that USACE would be able to use the sale of available storage in a way that generates significant revenue for USACE, even above and beyond what is necessary to fund the underlying project, make storage available, and pay normal operations and maintenance costs. The use of cost allocation in this manner is inconsistent with the WSA in that it is not "reasonable", as required by that statute.

TWCA thus recommends USACE take additional time to receive stakeholder feedback on a more reasonable and well-defined pricing methodology than currently proposed in the Water Supply Rule.

Conclusion

USACE has participated in TWCA functions for many years to collaboratively address issues related to managing water supplies in Texas, including the very contracts the proposed rulemaking addresses, and that positive relationship continues to this day. TWCA strongly urges

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the opportunity for further evaluation and refinement with stakeholders by delaying the public comment period an additional six months. To the extent such an extension is not granted, TWCA respectfully requests your consideration of its comments in order to improve the rule as currently drafted.

Thank you for your consideration of this request and these comments. Should you need any additional information, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink that reads "Dean Robbins". The signature is written in a cursive style with a large, stylized "D" and "R".

Dean Robbins
General Manager