# TCEQ LogoNational Comments

# Executive Review Summary

**TCEQ Proposed Comments On:**

Request for Public Comment; *Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply*; Docket ID Number COE–2016–0016.

**Overview of Proposal:**

**The U.S. Army Corps of Engineers (Corps) published a notice of proposed rulemaking to update and clarify the Corps’ policies governing the use of its reservoir projects for domestic, municipal, and industrial water supply pursuant to Section 6 of the Flood Control Act of 1944 (Section 6) and the Water Supply Act of 1958 (WSA). The proposed rule only applies to Corps reservoirs.**

The 60-day public comment period for the rule began on December 16, 2016.  **The comment period was extended to May 15, 2017 by notice dated February 7, 2017.**

**The stated intent of the proposed rule includes the following relative to Section 6 and the WSA:**

* **define key terms;**
* **respond to issues the Corps has encountered in exercising its authorities;**
* **explain and improve the Corps interpretations and practices under Section 6 and the WSA and to seek comments from stakeholders on the interpretations and practices;**
* **enhance the Corps’ ability to cooperate with state and local interests in the development of water supplies in connection with the operation of its reservoirs for federal purposes as authorized by Congress;**
* **facilitate water supply uses of Corps reservoirs by others under applicable law; and**
* **avoid interfering with lawful uses of water by any entity when the Corps exercises its discretionary authority under either Section 6 or the WSA.**

**The rulemaking addresses the following topics:**

* ***Corps Authority:* The preamble provides a discussion of uses for which states can allocate water. For example, throughout the preamble the Corps refers to the states’ prerogatives to allocate water for consumptive uses (81Fed. Reg. 91563). Additionally, the preamble states that purposes – such as storage for hydropower - that are non-consumptive in nature are carried out pursuant to the Commerce power and do not require the Corps to secure water rights.**
	+ **TCEQ provided comment on the Corps interpretation of its authority, including that a state water right permit is required for reservoirs located on a state watercourse. See the comment summary below.**
* ***Surplus Water definition:* TCEQ had concerns about the treatment of surplus water contracts in a preliminary draft of the proposed rule and TCEQ provided comments on the preliminary draft. The preliminary draft did not clearly state that surplus water contracts require a water right from the state. The current treatment of surplus water contracts requires that prior to making a final determination on surplus water availability, the Corps will prepare a written report documenting the basis for the decision, and coordinate the report with State water resource agencies. The proposed rule also states that the Corps would monitor its surplus water contracts to ensure that the contracts were not affecting existing uses in the reservoir. The current proposed surplus water rule would not affect TCEQ’s regulatory authority for water rights permitting. The holder of a surplus water contract would need to get a state water right permit prior to diverting water under the contract and the water right permit would be contingent on maintenance of the Corps contract. If the Corps determines that surplus water is no longer fully available to fulfill the contract, and changes the contract, the water right holder would only be able to divert the amount that is contractually available.**
	+ **TCEQ did not make comments on this topic.**
* ***Reallocation:* The rulemaking defines which Corps reservoirs the WSA reallocation authority applies to and the limitations on modifications to a Corps project that involve major structural improvement, if any, that Congress approved when authorizing a specific facility. The method the Corps uses to determine where and how much storage it can reallocate does not affect the water rights permitting program except insofar as a water supply contract holder for reallocated storage would need to get a state water right permit to effectuate the contract. The requirement for a water right permit is stated in the proposed rule.**
	+ **TCEQ did not make comments on this topic.**
* ***Storage pricing:* Storage pricing is how the Corps’ proposes to charge contract holders for storage. It does not affect TCEQ’s regulatory authority because that is not a factor TCEQ considers in water rights permitting.**
	+ **TCEQ did not make comments on this topic.**
* ***Storage accounting:*** **The proposed rule defines “made inflows” as inflows that are directed into a reservoir by a particular entity from a source outside the reservoir. Made inflows include return flows and water transported in a watercourse from within or outside of a river basin. The rulemaking proposes a method of water supply storage accounting where “made inflows” are allocated to water supply storage account holders in proportion to the amount of storage allocated to the account holders.**
	+ **Texas permits return flows, other water transported through the bed and banks of a watercourse, and water moved from one basin to another to specific water right holders. The proposed rule would result in the Corps allocating water under a state issued water right to another user. However, the Corps has also solicited comments on an alternative approach where a water supply contract holder would receive full credit for “made inflows”. TCEQ commented that the alternate approach should be used provided the water supply account holder to whom the “made inflows” are allocated has a state water right permit authorizing use of those “made inflows”. See comment summary below.**
* ***Federalism:* The proposed rule preamble states that there are no federalism issues related to the rulemaking.**
	+ **TCEQ disagrees that there are no federalism implications because the proposed rule directly conflicts with state primacy in water allocations. See comment summary below.**

**Summary of Comments:**

*Procedural Comment:*

TCEQ recommends that the Corps rescind the portion of the rule related to storage accounting and implement a stakeholder process with the states to account for variability in state water laws, or limit the scope of the proposed storage accounting method to states where the Corps has encountered the related issues. The proposed rule does not take into account variability in state water laws and was not developed through close coordination with the states.

*General Comment:*

Language throughout the proposed rule conflicts with both Federal law and Texas water law. The TCEQ recommends that the Corps make it clear that states have jurisdiction over the allocation of water as authorized in the Texas Water Code and recognized in both the Flood Control Act and the Water Supply Act. The discussion of state authority should be modified throughout the preamble to ensure consistency with both state and federal statutes.

The preamble is inconsistent in its discussion of uses for which states can allocate water and the authority of states to manage and permit water rights within their borders. For example, throughout the preamble the Corps refers to the states’ prerogatives to allocate water for consumptive uses. In other sections the Corps defers to state water right allocation systems. In Texas, state authority to allocate water is not limited to consumptive uses. State law allows both consumptive and non-consumptive uses to be permitted under a Texas water right permit. Further, if hydropower or other non-consumptive uses which require a state water right permit are associated with a Corps reservoir, irrespective of whether storage for consumptive uses are included in the authorization for the project, under Texas law, a state water right permit is required for the reservoir. In addition, we disagree that uses such as hydropower would be considered completely non-consumptive if they are associated with storage in a reservoir as that term is defined in the proposed rule.

*Comment on Water Supply Storage Accounting:*

TCEQ recommends that the Corps’ water supply storage accounting accommodate state law by adopting an alternative approach to water supply storage accounting. “Made inflows” should be allocated only to the water supply storage account holder that created those flows, provided the account holder has a state issued water right permit for those “made inflows”. The section of the proposed rule related to water supply storage accounting does not take into account variability in state laws for allocation of surface water. TCEQ has jurisdiction to allocate surface water within its borders. Texas water right permits can include allocations for specific return flows and other “made inflows” such as water originating from transfers within a river basin or from another river basin. These water rights require accounting to demonstrate compliance with state water law and the terms of the state issued water right. Allocation of return flows and other “made inflows” to all users in a reservoir would result in water that is permitted to an existing Texas water right being allocated to other users in a manner that violates state statutes and ownership of state water. Under the Corps proposed storage accounting method, the Corps would not recognize state issued water rights permits, including the accounting provisions included in those water rights. Texas water right holders have made significant investments to utilize their permitted water. The proposed rule would have the effect of allocating this water to someone else and the Corps accounting would directly conflict with the terms of the state issued water rights.

In addition, not all “made inflows” would be available for storage under Texas law because a water right holder downstream of a reservoir may have a state issued water right authorizing diversion and use of those flows. The Corps would need to operate its project to ensure that those flows are passed through the reservoir to the water right holder with state authorization to divert and use those flows. “Made inflows” that are allocated to Texas water right holders under a state water right permit should not be considered available for storage unless the water right holder for those “made inflows” is also a water supply storage account holder. The proposed rule, which would authorize the Corps to allocate ”made inflows” proportionally among all storage accounts, would interfere with the ability of Texas water right holders to divert and use their authorized water.

*Comment on Federalism:*

TCEQ disagrees with the Corps’ finding that there are no Federalism implications for the proposed rule. The proposed rule states that there are no federalism implications, defined in Executive Order 13132 as regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government.” The Corps stated reason for this finding is that the proposed rule does not interfere with the States’ allocation of water, interfere with State prerogatives, establish or determine consumptive water rights, or have a direct effect on the States. The proposed rule would directly conflict with Texas primacy in water allocation and management of state issued water rights. The rule, if adopted as written, would authorize the Corps to allocate state water under the proposed storage accounting method and deprive Texas water right holders of water authorized under their state issued water rights.

**Lead Office:** Allison Woodall/Office of Water

**Internal Coordination: Kathy Alexander of the Water Availability Division, Office of Water and Robin Smith of the Environmental Law Division, Office of Legal Services.**

**Deputy Director Approval: L’**Oreal W. Stepney, P.E.

**Deadline**: April 28, 2017