

Texas Commission on Environmental Quality (TCEQ) Comments on Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply

Docket ID Number COE-2016-0016

Background

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 (FCA) and the Water Supply Act of 1958 (WSA). The 60-day public comment period for the rule began on December 16, 2016. The stated intent of the proposed rule is to define key terms under both Section 6 of the FCA and the WSA and to respond to issues the Corps has encountered in exercising its authorities under these statutes. Through this rulemaking, the Corps intends to explain and improve its interpretations of these statutes. The proposed rule is intended to 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, to facilitate water supply uses of Corps reservoirs by others, and to avoid interfering with lawful uses of water by any entity when the Corps exercises its discretionary authority under either Section 6 of the FCA or the WSA. The proposed rule only applies to Corps reservoirs.

The TCEQ manages State surface water in Texas. Texas water law began with Spanish and Mexican law, was later placed in statutory law, and was adjudicated under the Texas Adjudication Act. Today, TCEQ allocates State water in rivers and streams throughout Texas in accordance with Texas Water Code (TWC) Chapter 11.¹ Certain riparian rights still exist under common law.

A state water right is required to divert, use, or store state water. State water is defined as the water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state (TWC § 11.021). Water allocated under a state-issued water right can be used for both consumptive and non-consumptive beneficial purposes of use (TWC § 11.023). When TCEQ issues a water right, it is based on available water that is not committed to another state water right holder. New water rights are conditioned so as not to affect existing state water rights or the environment.

The Corps proposes to allocate made inflows (water that is directed into a reservoir by a specific entity, including return flows) to users in its reservoirs based on the users' proportionate share of storage in a Corps reservoir. In addition to state water that has not been allocated to a water right holder, TCEQ also issues water rights for water that is defined as "made inflows" under this rulemaking. Water rights for "made inflows" are issued to the entity that has authorization to claim those inflows under Texas law. These state water rights also include accounting provisions.

¹ See <http://www.statutes.legis.state.tx.us/Docs/WA/htm/WA.11.htm>.

TCEQ recognizes that the proposed rule acknowledges that the states have primacy in determining allocation of water. However, Corps policies, as set out in this rulemaking, have the potential to undermine state authority to allocate and manage water resources in Texas. The discussion in the proposed rule related to consumptive and non-consumptive use and the purposes for which Texas can allocate water conflicts with Texas statutes. In addition, the proposed section on water supply storage accounting does not take into account how water is managed and allocated in Texas.

The TCEQ offers the comments provided below.

Comments on Proposed Rule

- 1. 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.**

TCEQ recognizes the Corps stated need to develop a rule to respond to issues it has encountered in exercising its authority across the country. The Corps provides and sells storage, and not water. Use and distribution of water from storage in Texas is the responsibility of Texas. TCEQ understands the need to develop a system to determine how much water is held in the Corps storage for each user at any point in time and thus how much each user can withdraw from its storage, subject to its state issued water right to withdraw the water. However, the proposed rule does not account for variability in state water laws and was not developed through a stakeholder process involving close coordination with the states, who have primacy in water allocation. The storage accounting method proposed by the Corps appears to apply a solution nationwide to address a localized issue. TCEQ requests that the Corps rescind the portion of the rule related to storage accounting and commence a stakeholder process which includes close coordination with the states.

- 2. 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 federal Flood Control Act and the federal 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. We recommend that the discussion of state authority be modified throughout the preamble to ensure that nothing in the preamble would suggest that the Corps has primacy in allocating water, permitting water rights, or determining the beneficial uses of water in a state and clarifying that the Corps provides and sells storage and not water. Section 1 of the 1944 FCA states “[I]t is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control...”² In the 1958 WSA, Congress declared its policy “to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with States and local interests...”³ Other federal statutes also recognize state primacy in water allocation including Section 101(g) of the Clean Water Act, which states “the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act.”

- 3. 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 recommends that, if the Corps continues to feel the need to impose a nationwide method of storage accounting, the alternate proposal which provides for a user to receive full credit for *made inflows* (water that is directed into a reservoir by a specific entity, including return flows) should be adopted. The alternate proposal should be further modified to include that in order for a user to get credit for *made inflows*, the user must have a state issued water right for those *made inflows*.

The Corps specifically requested comment on the circumstances where it would be appropriate to directly credit *made inflows*. 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. The Corps’ 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

² 33 USC § 701-1

³ 43 USC § 390b

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. Section 1 of the 1944 FCA states “[I]t is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control...”⁴ In the 1958 WSA, Congress declared its policy “to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with States and local interests...”⁵ Likewise Section 101(g) of the Clean Water Act states “the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act.” Therefore, TCEQ recommends that the alternate proposal, modified to state that credit for *made inflows* can only be given to a user with a state issued water right for those *made inflows*, be adopted to ensure that state primacy in allocating water is recognized in the Corps water supply storage accounting procedures.

4. 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.

As discussed specifically in TCEQ’s comments above, 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

⁴ 33 USC § 701-1

⁵ 43 USC § 390b

Texas water right holders of water authorized under their state issued water rights. Therefore, there are significant federalism implications for the proposed rule.