

From: [Tonya Bilderbeck](#)
To: [WSRULE2016](#)
Cc: [Niki Iverson](#); [Glick, Rick](#)
Subject: [Non-DoD Source] Docket Number COE-2016-0016
Date: Wednesday, May 10, 2017 6:15:43 PM
Attachments: [Docket Number COE-2016-0016.pdf](#)

To whom it may concern,

Attached you will find the City of Hillsboro Water Departments comments on proposed Rules for Use of Corps Reservoir Projects for Domestic, Municipal & Industrial Water Supply (Docket No. COE-2016-0016, RIN 0710-AA72). We have also submitted a hard copy via US Postal Service.

Thank you,

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May 1, 2017

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

Re: Proposed Rules for Use of Corps Reservoir Projects for Domestic, Municipal & Industrial Water Supply (Docket No. COE-2016-0016, RIN 0710-AA72)

Dear Sir or Madam:

On behalf of the City of Hillsboro, Oregon, we are pleased to offer the following comments on the referenced rules. The City is one of the fastest growing communities in the state, and its water service delivers over 24,000 households and businesses. A significant amount of our supply is delivered to industrial customers, and our area is a driver for economic development and job growth in the state. Further, the City is a leader in municipal water supply planning, including in discussions with the Corps on reallocation of stored water in the Corps' Willamette River projects for municipal and industrial (M&I) purposes.

The City commends the Corps for trying to bring national consistency and clarity to how the Corps treats allocation of storage space in its reservoirs for M&I use. In particular, there is a need for better understanding of the Corps' interpretation and implementation of its two bases of authority with regard to allocation of stored water. First, Section 6 of the Flood Control Act of 1944, 33 USC 708 (Section 6) authorizes short-term allocations of "surplus" storage. However, this provision has been underutilized and surplus water contracts are rare. Second, the Water Supply Act of 1958, 43 USC 390b (WSA) authorizes changing project purposes to allow reallocation for M&I purposes so long as the original project purpose is not overly compromised. The Corps has implemented WSA, but practices vary across different Divisions and Districts.

Section 6 Surplus Water Determinations

The City understands that "surplus" determinations will in many cases involve a fact specific technical and legal determination. However, the City supports the concept in the proposed rules of a minimum or *de minimis* threshold amount of water that would meet the "virtually no effect" requirement in the statute. A *de minimis* threshold will streamline surplus determinations, reducing transaction costs and the time required for the Corps to make short-term allocations, the need for which is often time sensitive. Similarly, the City supports the proposal to eliminate the requirement for both an easement and surplus water contract.

To realize these benefits, however, expedited NEPA review in such circumstances is necessary. Therefore, we urge the Corps to add *de minimis* determinations and the issuance of any needed real estate instrument to the list of categorical exclusions from the need to prepare an Environmental Assessment or Environmental Impact statement under section 9 of ER-200-2-2. Further, the categorical exclusion under ER-200-2-2 should address situations where the applicant has existing water supply intake infrastructure in place, regardless of whether short-term allocation of surplus water is sought under Section 6 or longer-term reallocation under the WSA.

Access to Stored Water

The City acknowledges statements in the proposed rule that the Corps, under Section 6 and the WSA, makes storage available but does not “sell or guarantee fixed quantities of water.” However, neither existing policy nor the proposed rules explain how and when the Corps will determine the point at which stored water is not available and how its contractors will be so notified.

In fact, the Corps has worked with its contractors to access stored water even during drought conditions. For example, the Corps has allowed extending intakes deeper into the reservoir to accommodate water withdrawals. The City urges the Corps to add provisions in rules for both Section 6 and WSA contracts to clarify how the Corps will determine water is not available, how it will notify contractors, and circumstances in which the Corps will work with contractors to facilitate access to water.

The preamble to the proposed rules properly note that the Corps does not administer water rights and suggests it will not attempt to allocate stored water in accordance with the prior appropriation doctrine applicable in most Western states, including Oregon. During droughts or other periods of shortage, the states regulate water rights in accordance with their relative priorities. The rules should make clear, both for Section 6 and WSA contractors that the Corps will defer to state regulation amongst water right holders, and its contracts should make clear that access to stored water is not guaranteed for that reason.

Further, Corps policy should support state policy that domestic water supply to meet public health needs for our communities should be a priority during shortages. The Bureau of Reclamation follows this policy in its management of some dams and reservoirs, including Scoggins Dam in Washington County, Oregon.

The WSA includes limitations on physical or operational changes that would prohibit storage contracts. The rules define these limitations to mean that contracts will not be allowed where the changes “would fundamentally depart from Congressional intent” as expressed in the project’s authorizing legislation. The Corps asks for comment on whether the definition should include a maximum amount of storage that may be reallocated. This definition is consistent with prior Corps practice and legal interpretations, and continues to leave plenty of discretion. The City believes that a discretionary determination by the Corps is preferable to a prescribed, fixed capacity, which by its nature is somewhat arbitrary.

Pricing of Stored Water under Section 6

The proposed rules provide that contract pricing is based on the actual, full separable costs, if any, that the Corps would incur, including administrative and legal costs. The rules make clear that the price would not include paying a share of construction or Operation, Maintenance, Repair, Rehabilitation and Replacement (OMRR&R) costs. The Corps invites comments on whether the price should include the “economic value” of the water supply storage value, e.g. enhanced reliability.

The City urges the Corps to base pricing on actual cost to the Corps, and not inject an “economic value” component. The purpose of providing storage capacity for M&I use is not to turn a profit for the Government or to influence behavior of water utilities. Rather, such contracts should be seen as enhancing a complementary public purpose, to optimize water operations for the greatest public good at no additional cost to the Corps and consistent with the authorized purpose of the reservoir.

Pricing of Stored Water under the WSA

The new rules would carry forward existing methodology for determining the amount and cost of storage reallocation. Costs include the amortized value for construction and OMRR&R.

Determination of the cost of reallocated storage should reflect the depreciated value of the specific project and varying OMRR&R costs. Cost share should be lower for older projects with shorter remaining lives, including the cost of replacements. Again, contract pricing should be based on the actual cost to the Corps for storage reallocation to M&I use.

Storage Availability Determinations under Both Section 6 and WSA

The rules would require a written report to document the determination that storage may be included in a Corps reservoir, or that surplus storage is available. Public notice and opportunity to comment would be provided. The determination would then require approval of the Assistant Secretary of the Army (Civil Works).

Development of the report should involve stakeholders, including municipal utilities, prior to release for public comment. This would provide early constructive input and streamline the approval process. The determination should be by the Assistant Secretary *or his/her designee*, as is the case under the rules for approval of agreements. Determinations in many cases could be made at the Division or District level, which would speed approvals.

Thank you for the opportunity to comment.

Sincerely,

Kevin Hanway
Director