



August 18, 2017

U.S. Army Corps of Engineers  
ATTN: CECC-L  
441 G Street NW  
Washington, D.C. 20314  
Attn: Docket ID No. COE-2016-0016

Re: Comments in Response to the U.S. Army Corp of Engineers (Corps) Proposed Rule Titled “Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal and Industrial Water Supply”

(91 Fed. Reg. 242 (Dec. 6, 2016)). Docket I.D. Number COE-2016-0016)

Dear Sir/Madam:

This letter provides the public comments of the American Petroleum Institute (“API”) and the National Association of Home Builders (“NAHB”) on the Department of the Army, U.S. Army Corp of Engineers (Corps) proposed rule titled “Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal and Industrial Water Supply” (“proposed rule”). We support cooperation among the States and the Corps to facilitate water supply uses of Corps’ reservoirs consistent with the authorized purposes of those reservoirs. However, a number of states and water management authorities have noted that the proposed rule was developed without following key stakeholder processes - including sufficient state coordination to avoid interference with state primacy in determining allocation or management of state water. We therefore request that the Corps withdraw this proposed rule, conduct the appropriate stakeholder engagement and resubmit a new proposed rule for public comment prior to finalization.

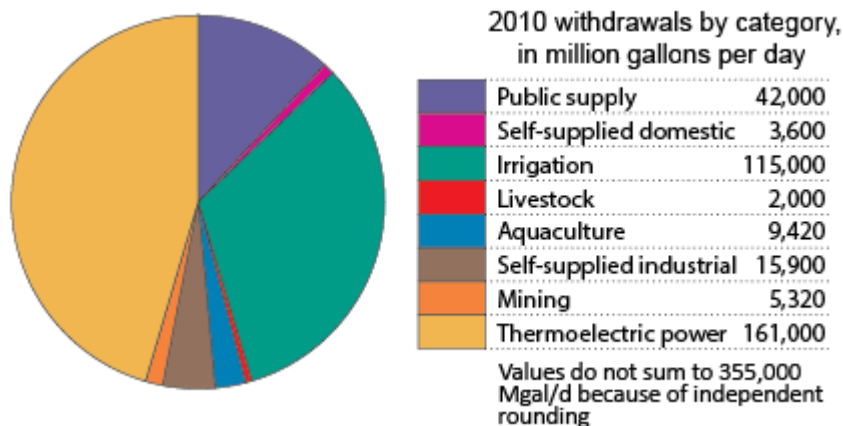
### Signatories

API is a national trade association representing over 600 member companies involved in all aspects of the oil and natural gas industry. API’s members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers. To support these activities, API member companies rely on access to water and follow applicable water use regulations appropriately governed by cooperative federalism.

NAHB is a federation of more than 700 state and local associations representing more than 140,000 member firms nationwide. NAHB’s members are involved in home building, remodeling, multifamily construction, land development, property management, and light commercial construction. Collectively, NAHB’s members employ more than 1.26 million people and construct about 80 percent of all new housing units constructed within the U.S. each year. NAHB’s membership relies upon state and federal water infrastructure projects to provide water supply and flood protection necessary to support residential and commercial construction projects. The guidance issued by the U.S. Army Corps of Engineers (Corps) creates potential conflicts between state sanctioned water authorities, flood control districts, and entities with existing water rights over continued access to water flowing from Corps managed water infrastructure projects.

Comparatively, our two trades represent an extremely small but important amount of annual water withdrawals, as indicated by Figure 1, which represents data from the most recent USGS National Survey.<sup>1</sup>

Figure 1: 2010 Water Withdrawals by Category, in millions of gallons per day<sup>2</sup>



Source: USGS, 2014.

Substantive Comments

*As part of the greater community of water users, we echo many of the significant concerns raised by states, water management authorities, and other trade organizations.* These include, but are not limited to the following groups: states such as Idaho, North Dakota, and South Dakota; state water-regulating groups such as the Texas Commission on Environmental Quality, Kentucky Division of Water, Nebraska Department of Natural Resources, and the State of Oklahoma Water Resources; regional entities such as the Trinity

<sup>1</sup> Maupin, M.A., Kenny, J.F., Hutson, S.S., Lovelace, J.K., Barber, N.L., and Linsey, K.S., 2014, Estimated use of water in the United States in 2010: U.S. Geological Survey Circular 1405, 56 p., <https://pubs.usgs.gov/circ/1405/>

<sup>2</sup> Id., image also available at: <https://water.usgs.gov/watuse/wuto.html>

River Authority of Texas, the Upper Trinity Regional Water District, the Tarrant Regional Water District, and the North Texas Municipal Water District; and trade organizations such as the Association of Metropolitan Water Agencies, American Water Works Association, and the Domestic Energy Producers Alliance.<sup>3</sup>

***First, we emphasize that this proposed rule could have important and far-reaching consequences for water users.*** As written, it could impact the designation of surplus water and water pricing,<sup>4</sup> restrict the ability to modify projects,<sup>5</sup> and create new ambiguities in the process of reassessing existing uses.<sup>6</sup> We have grave concerns that important ambiguities remain and that sufficient stakeholder engagement was not followed.<sup>7</sup>

***Second, we underscore the importance of cooperative federalism in water management.*** We believe that the Corps is well aware of the distinction between its responsibilities and those of the states under the current practices. To this end, Section E of the proposed rule notes, “Congress did not intend for the Corps to interfere with State allocation of water when exercising its discretion under Section 6 or the WSA;” (81 Fed Reg. 91556, 1587).<sup>8</sup>

While the Corps has the right to store water, the right of water allocation belongs to the State, as noted by the comments issued by the Association of Metropolitan Water Agencies and the American Water Works Association:

“By definition, the Corps provides storage space in its reservoirs. It is the states that have jurisdiction over the allocation of water within the bounds of established water allocation agreements/contracts.”<sup>9</sup>

In fact, the states of Idaho, North Dakota, and South Dakota, as well as water-regulating groups including the Texas Commission on Environmental Quality, Kentucky Division of Water, Nebraska Department of Natural Resources, and State of Oklahoma Water Resources Board have all submitted voluminous comments underscoring how the proposed rule would interfere with their rights to manage water allocations. As water users depend on clear boundaries for water management, this poses a grave concern.

***Third, we highlight that a multitude of the aforementioned stakeholders have indicated difficulty understanding the actual scope of the proposed rule – possibly due to the absence of a definition for the key term ‘storage’.*** While the proposed rule provides some definitions similar to the 1944 Flood Control Act and Water Supply Act of 1958, it fails to provide a definition for the word ‘storage,’ although the term is used throughout the proposed rule. The

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<sup>3</sup> See <https://www.regulations.gov/document?D=COE-2016-0016-0041>, <https://www.regulations.gov/document?D=COE-2016-0016-0043>, <https://www.regulations.gov/document?D=COE-2016-0016-0027>, <https://www.regulations.gov/document?D=COE-2016-0016-0036>, <https://www.regulations.gov/document?D=COE-2016-0016-0064>, <https://www.regulations.gov/document?D=COE-2016-0016-0061>, <https://www.regulations.gov/document?D=COE-2016-0016-0004>, <https://www.regulations.gov/document?D=COE-2016-0016-001>, <https://www.regulations.gov/document?D=COE-2016-0016-0014>, <https://www.regulations.gov/document?D=COE-2016-0016-0063>, <https://www.regulations.gov/document?D=COE-2016-0016-0013>, <https://www.regulations.gov/document?D=COE-2016-0016-0059>, <https://www.regulations.gov/document?D=COE-2016-0016-0059>, and <https://www.regulations.gov/document?D=COE-2016-0016-0051>.

<sup>4</sup> See, e.g., <https://www.regulations.gov/document?D=COE-2016-0016-0059>

<sup>5</sup> See, e.g., <https://www.regulations.gov/document?D=COE-2016-0016-0017>

<sup>6</sup> See, e.g., <https://www.regulations.gov/document?D=COE-2016-0016-0059>

<sup>7</sup> See <https://www.regulations.gov/document?D=COE-2016-0016-0013> and See <https://www.regulations.gov/document?D=COE-2016-0016-0014>

<sup>8</sup> *Id.*

<sup>9</sup> See <https://www.regulations.gov/document?D=COE-2016-0016-0059>

term ‘storage’ can either be defined as the capacity to store water or simply stored water. As a result of this ambiguity, other stakeholders have interpreted this proposal as the Corps commandeering the state-held right to allocate water.<sup>10</sup>

To clarify, the Tarrant Regional Water District (TRWD) offered an analogy to explain the relationship between the Corps and States regarding water allocation. “In essence, the Corps constructs a bucket, and the State determines how much water can be withdrawn from that bucket,” noted the TRWD. “As long as the withdrawal does not impact other authorized uses (e.g. hydropower, food control) or violate operating rules, the amount withdrawn by the water supply user is governed by the state, not the Federal government. It is practical to view the water supply storage as a ‘reservoir within a reservoir’, that can be modeled separately to determine and manage the water supply yield.”<sup>11</sup>

***Therefore, because reasonable minds may differ as to the interpretation of the proposal as currently written, we respectfully request that it be clarified and re-submitted for public comment after a more complete, open, meaningful, and substantive stakeholder engagement process.*** To this end, we respectfully echo similar requests made by states (e.g., North Dakota, Idaho, and South Dakota), state regulatory agencies (e.g., the Texas Commission on Environmental Quality and the State of Oklahoma Water Resources Board), and water authorities (e.g., TRWD, North Texas Municipal Water District, Upper Trinity Regional Water District, and Trinity River Authority Of Texas).

***Additional stakeholder engagement prior to re-proposal would also help address the concerns raised by some groups.*** For example, state regulatory agencies, such as the Texas Commission on Environmental Quality, as well as entities, such as the Trinity River Authority of Texas, North Texas Municipal Water District, and Upper Trinity Regional Water District, stated that the proposed rule, as currently written, is unnecessary because it applies a national solution to a regional problem. Beyond this concern, additional stakeholder engagement with the necessary state and regional water authorities would help to provide a broader perspective to more completely evaluate the extent of challenges currently facing Corps-administered waters. It would aid in the determination of whether an additional regulatory action, such as this proposed rule, is indeed necessary or whether this challenge can be remedied through better coordination within the Corps and certain regional offices.<sup>12</sup> Further, it could even be incorporated into the Corps’ current regulatory reform efforts.

In summary, we respectfully reiterate our request that this proposed rule be rescinded and redrafted after appropriate stakeholder engagement. As rationale, we echo the concerns of states, key water management authorities, and influential water-related trades that 1) the proposed rule could have significant implications on water users (affecting the designation of surplus water, the ability to modify projects, and the process of reassessing existing uses); 2) the proposed rule may infringe upon state water management rights; and 3) the proposed rule contains ambiguities (most notably the lack of definition for the term “storage”) requiring clarification. In light of these factors, we encourage the Corps to conduct the appropriate

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<sup>10</sup> See <https://www.regulations.gov/document?D=COE-2016-0016-0043>

<sup>11</sup> See <https://www.regulations.gov/document?D=COE-2016-0016-0063>

<sup>12</sup> See <https://www.regulations.gov/document?D=COE-2016-0016-0017>, <https://www.regulations.gov/document?D=COE-2016-0016-0013>, and <https://www.regulations.gov/document?D=COE-2016-0016-0014>

stakeholder engagement process and resubmit a proposed rule for public comment prior to finalization.

Thank you for your consideration of our comments on this proposed rule. We hope you will not hesitate to contact us with any comments or questions that may arise and we look forward to working with you as it evolves, during appropriate points in the regulatory process.

Sincerely,



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