



August 22, 2019

The Honorable Mick Mulvaney  
Director  
Office of Management and Budget  
725 17<sup>th</sup> Street, N.W.  
Washington, D.C. 20503

Dear Director Mulvaney:

We write to express our collective and continued concerns with the U.S. Army Corps of Engineers' proposed rulemaking, Policy for Domestic, Municipal, and Industrial Water Supply Uses of Reservoir Projects Operated by the Department of the Army, U.S. Army Corps of Engineers (Proposed Rule).<sup>1</sup> The Proposed Rule threatens to interfere with states' sovereign authority to manage and allocate water resources within their boundaries. The Spring 2019 Unified Agenda of Regulatory and Deregulatory Actions lists "Final Action" on the Proposed Rule for August 2019 and "Final Action Effective" for October 2019.<sup>2</sup>

To date, the Corps has failed to meaningfully consult with states during the development and finalization of the Proposed Rule, despite repeated requests to do so from Governors and state officials. Additionally, the comments received by the Corps through its rulemaking docket<sup>3</sup> overwhelmingly demonstrate that, through its Proposed Rule, the Corps has failed to recognize, acknowledge, and address a multitude of substantive concerns expressed by states, local governments, federally recognized Indian tribes, water and power utility districts, industry stakeholders, and environmental organizations. These concerns stem from the effects the Proposed Rule would have on the administration of states' water laws and the traditional balance of state and federal authorities. Commenters across various sectors and political affiliations have largely expressed the same general concerns to the Corps regarding the Proposed Rule, including:

- The Proposed Rule does have federalism implications which trigger the expanded state consultation requirements of Executive Order 13132 despite the Corps' unsupported assertion to the contrary and failure to consult with states;

<sup>1</sup> 81 Fed. Reg. 91556 (Dec. 16, 2016).

<sup>2</sup> RIN: 0710-AA72, available at:

<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=0710-AA72>.

<sup>3</sup> Docket ID: COE-2016-006, available at: <https://www.regulations.gov/docket?D=COE-2016-0016>.

- The Proposed Rule would have preemptive effects on, and interfere with, state laws and regulations governing the management, allocation, and protection of water resources; and
- Natural flows (*i.e.*, waters that would have existed within the state despite the existence of the Corps reservoir) must be excluded from any Corps definition of “surplus water,” as such waters remain under state authority.

### **State Authority over Water Resources**

No federal laws cited by the Corps that may be applicable to the Proposed Rule preempt state authority to manage and allocate water resources. Rather, the two federal statutes relied upon by the Corps in its Notice of Proposed Rulemaking (NPRM)<sup>4</sup> – the Flood Control Act of 1944 and the Water Supply Act of 1958 – clearly recognize and defer to state law and expressly incorporate Congress’ policy of “purposeful and continued deference to state water law.”<sup>5</sup> Section 1 of the Flood Control Act of 1944 begins:

[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.<sup>6</sup>

Similarly, the Water Supply Act of 1958 states Congressional intent:

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, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation’s rivers.<sup>7</sup>

The Senate further stated that the Water Supply Act:

prescribes a sound division of water supply responsibility between the Federal Government and State and local interests by declaring it to be the policy of Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, and other purposes.<sup>8</sup>

### **Definition and Treatment of Surplus Waters**

Under the Proposed Rule, the Corps would assert authority over natural flows by defining “surplus water” to mean any water available at a Corps reservoir that is not required during a specified time period to accomplish an authorized purpose or purposes of that reservoir. This proposed definition is beyond the scope of the Corps’ statutory authority and would usurp states’ well-established sovereign authority over the natural flows of water through Corps reservoirs. As a result, the

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<sup>4</sup> 81 Fed. Reg. 91556 (Dec. 16, 2016).

<sup>5</sup> *California v. United States*, 438 U.S. 645, 653 (1978).

<sup>6</sup> 43 U.S.C. § 701-1.

<sup>7</sup> 43 U.S.C. § 390b.

<sup>8</sup> S. Rep. No. 1710 (85th Cong., 2d Sess.) (Jun. 14, 1958) at 132-33.

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Proposed Rule would conflict with the clear intent of Congress to preserve state water law. Any Corps definition of “surplus water” must plainly exclude natural historic flows from any quantification of waters subject to the Proposed Rule. Additionally, natural flows should be exempt from any monetary charges imposed by the Corps for water storage, as such waters would exist within the streambed in the absence of Corps reservoirs and would not be subject to federal management or the imposition of federal fees.

### **Failure to Consult with States**

In addition to the substance of the Proposed Rule, we are concerned by the process under which the Proposed Rule was developed. The Corps has failed to engage with states in meaningful government-to-government consultation throughout the development of the Proposed Rule, even after extensive comments calling for such consultation were submitted to the Corps’ docket. Executive Order 13132, Federalism, requires federal agencies to, “have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications.”<sup>9</sup> These policies include:

regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.<sup>10</sup>

In its NPRM, the Corps declares that it “do[es] not believe that the proposed rule has Federalism implications.”<sup>11</sup> For the reasons stated above, we disagree with this unsupported assertion. The Proposed Rule clearly qualifies for further review under Executive Order 13132, as its provisions would have substantial direct effects on the states and their authority over the management and allocation of their waters. The Proposed Rule would also have a preemptive effect on state water laws (*i.e.*, a substantial effect “on the distribution of power and responsibilities among the various levels of government”).

### **Conclusion**

We urge you to consider our substantive and procedural concerns as you analyze the Proposed Rule before its finalization. Any Corps definition of “surplus water” in the Proposed Rule must account for, and exclude, natural flows of the river from waters that would be subject to Corps control. Corps reservoir operations must follow Congressional directives not to impair or usurp states’ sovereign authority over the management and allocation of their water resources. Additionally, the Corps has failed to meaningfully consult with states, on a government-to-government level, during the development of the Proposed Rule, contrary to the directives of Executive Order 13132. We are ready to assist the Administration to ensure that all Corps reservoirs are operated in compliance with federal and state law.

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<sup>9</sup> 64 Fed. Reg. 43255 (Aug. 10, 1999).

<sup>10</sup> *Id.*

<sup>11</sup> 81 Fed. Reg. 91556 (Dec. 16, 2016).

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Sincerely,



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