



August 8, 2017

*Submitted via electronic mail*

Mr. Theodore Brown,  
Chief, Policy and Planning Division  
U.S. Army Corps of Engineers  
441 G Street NW  
Washington, DC 20314-1000

Re: Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal &  
Industrial Water Supply  
Notice of proposed rulemaking

Dear Mr. Brown:

The American Exploration & Production Council (“AXPC”) read with interest the publication of the notice of proposed rulemaking, *Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply* (“Proposal”) in the federal register on December 16, 2016 (Volume 81, Number 242). AXPC member companies may not be directly affected by this rulemaking, however, as water users within states, AXPC is concerned that this Proposal would impair states’ ability to develop, use, and distribute its surface water resources and submits the following response.

The principles of federalism are evident throughout the Proposal and AXPC commends the U.S. Army Corps of Engineers (USACE) for recognizing and stating the division of governmental responsibilities. Yet, through a close examination of the Proposal, it appears that USACE is actually positioned to do the opposite, and exceed its authority, by interfering with state primacy over management and allocation of their surface water resources. As an example, USACE, in the Proposal, argues that under the authority of the Flood Control Act (33 U.S. Code §708) and the Water Supply Act (43 U.S. Code §390b), it does not need to obtain water rights for domestic, municipal or industrial purposes as USACE, “makes water in a Corps reservoir available for water supply use by others.” USACE further asserts that it is the *sole responsibility* of the water supply users to “obtain whatever water rights may be necessary...,” thereby exempting itself from complying with any such state water rights requirement. AXPC contends USACE’s assertions under these statutes are likely contrary to existing state water rights laws, especially those laws in the western states where there is a long history of appropriation. This broader concern of interference with state primacy is advanced by several states during this comment period. AXPC fully supports such comments filed by the states of Kentucky, Idaho, Nebraska, Oklahoma, and South Dakota.

In regard to USACE's request for comment concerning the definition of "surplus water," AXPC submits that any promulgated definition expressly exclude natural flows. Quantification of such flows is the responsibility of the states and under their purview to manage (i.e. it is within their authority to determine whether sufficient natural flows exist when granting state water rights). USACE should acknowledge this authority, and defer to states' legal right to allocate, develop, use, and distribute its surface water resources. Thus, natural flows, which would have occurred without the development or designation of a federal water project, should be excluded.

Again, AXPC compliments USACE on recognizing that this notice of proposed rulemaking has a strong federal/state nexus. AXPC encourages USACE to continue its dialogue with the states so that any final rule can be a proper reflection of the realities of state primacy over surface water resources. AXPC appreciates USACE's consideration of the statements presented herein and appreciates the opportunity to participate in this public process.

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AXPC is a national trade association representing 33 of America's premier independent natural gas and oil exploration and production companies. AXPC's members are leaders in developing and applying the innovative and advanced technologies necessary to explore for and produce crude oil and natural gas, and that allow our nation to add reasonably priced domestic energy reserves in environmentally responsible ways.

Respectfully Submitted,



V. Bruce Thompson  
President  
American Exploration & Production Council  
1001 Pennsylvania Avenue, NW – Seventh Floor  
Washington, DC 20004