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Water supply: Is it still a local decision?

THE US ARMY CORPS
OF ENGINEERS HAS BECOME
INCREASINGLY INVOLVED
IN LOCAL AND REGIONAL WATER
SUPPLY PLANNING DECISIONS.

States and localities are traditionally fiercely protective of their jurisdiction over water supply planning. Indeed, section 101 of the Clean Water Act (CWA) of 1972 (P.L. 92-500) states it is the policy of Congress “that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State.” The US Environmental Protection Agency (USEPA) has strictly adhered to this directive, affirmatively taking the position that issues of water supply are not within its domain.

Another federal agency, however, is becoming increasingly involved in issues of water allocation—the US Army Corps of Engineers (COE). In addition to its primary role of managing reservoirs, COE has become increasingly involved with watershed management and related studies, thus playing a key role in water distribution and allocation. Although its involvement is on a piecemeal basis, COE has nonetheless become a key decision-maker on water supply issues across the country. COE involvement in watershed management brings with it the potential for additional federal involvement in water supply decisions, enabling COE to become—in effect—a federal water supply agency.



COE'S WATER SUPPLY ROLE RELATED TO RESERVOIR MANAGEMENT

COE's role in reservoir management is traced back to the 1958 Water Supply Act (P.L. 85-500). The act authorizes COE to partner with state and local entities to provide a water supply source in connection with the construction, operation, and modification of federal navigation, flood damage reduction, or multipurpose projects. Sections 301(a) and 301(b) of the Water Supply Act established a policy of CEO cooperation in development of water supplies for domestic, municipal, industrial, and other purposes in conjunction with federal reservoir projects. COE is authorized to provide storage at multipurpose reservoirs (or to modify existing COE projects to add storage) for municipal and industrial water supply, and for agricultural irrigation, with the cost of storage and associated facilities to be repaid by the

user of the water. COE also has the ability to enter into agreements with states, municipalities, private entities, or individuals for the use of surplus water. For example, COE can agree to provide water for purposes of responding to droughts and other emergencies affecting municipal and industrial water supplies (P.L. 85-500).

COE's emerging role as water provider. The Water Supply Act maintains that water supply is a state and local responsibility. However, by authorizing COE to make the appropriate allocations or reallocations among the multiple-project purposes at each reservoir, COE essentially takes on the role of water provider. As a result of this act, COE has become an important source of water for municipal, industrial, and agricultural use (Carter, 2005). For example, COE provides 36% of the potable water for Texas, 35% for Oklahoma, and 20% for Kansas (US Army Corps of Engineers, 2008). COE reservoirs currently supply water to nearly 10 million people in 115 cities (US Army Corps of Engineers, 2009a).

Conflict over water supply allocation. As water shortages have become more prevalent in the eastern United States, COE has found itself at the center of the controversy relating to water supply. For example, COE decisions relating to water allocation are at the heart of the Georgia-Florida-Alabama conflict over water. COE manages five reservoirs in the Apalachicola-Chattahoochee-Flint (ACF) river basin. According to the Metro Atlanta Chamber of Commerce (2009), these reservoirs provide water for roughly 60% of the population in Georgia, 8% in Alabama, and 1% in Florida. COE's management of water in this area is now the subject of a lawsuit alleging that COE has impermissibly interfered with Georgia's use of state water. The key issue before the court is COE's authority to operate and store water in Lake Lanier.

COE's decisions to reallocate water among competing users or to change the designated purpose for water withdrawn from its reservoirs will likely be the source of conflict in the future.

Other federal agencies' involvement. As a result of COE involvement in state and local water allocation decisions, the federal government has the opportunity to insert itself in other ways. For example, under the National Environmental Policy Act (NEPA) of 1969 (P. L. 91-190), a federal agency taking an action that could significantly affect the environment is required to conduct a review of the environmental consequences of the action that satisfies the statute and related regulations. Likewise, under the Endangered Species Act (ESA) of 1973 (P.L. 93-205), federal agencies must ensure that their nondiscretionary actions are not likely to jeopardize the continued existence of any endangered or threatened species or to adversely modify critical habitat. Again, the conflict between Georgia and Florida highlights such a situation. According to a Congressional Research Service (CRS) Report to Congress (Carter et al, 2008), "... [T]he basin's federal dams regulate the flows of the Chattahoochee and Apalachicola Rivers, thereby shaping the states' water use. Federal laws also shape dam operations. Most recently, protection of species protected under the federal ESA has become a significant factor in ACF dam operations. Additionally, certain federal actions must be reviewed under NEPA."

Pushing COE's secondary role to the forefront. COE involvement is likely to result in misunderstandings between users of water from a COE reservoir who consider COE their water provider and COE's competing goals. COE, at heart, is not a water supply agency. Rather, COE projects are typically designed for a federal purpose, such as navigation or flood protection. The water supply aspects of the project are always

secondary, as the CRS Report (Carter et al, 2008) explains: “COE principally cites the Water Supply Act of 1958 (43 U.S.C. § 390b) as its authorization to make water supply storage space at COE facilities available for M&I [municipal and industrial] purposes. The act does not authorize COE to sell or allocate quantities of water. The contracts are for space in the reservoir and do not guarantee a fixed quantity of water. COE delivers the water if it is available in the storage space without significantly affecting the authorized purposes of COE project. The act also does not authorize COE to make significant modifications to its projects in order to provide for M&I water supply.”

Users of water from COE reservoirs may not understand this, in part because COE’s role as water supplier has been evolving over time and increasing as water shortages become more prevalent. COE’s involvement has become more prominent in recent years because it is only recently that significant and sustained water shortages have occurred in the eastern United States. An earlier CRS Report (Carter, 2005) states: “Before 1992, COE generally was not involved with environmental infrastructure projects; since 1992, Congress has authorized more than 220 environmental infrastructure projects [projects for municipal water supply and wastewater or surface water resource protection].” As the demand for more water from COE reservoirs increases, users will continue to push COE’s secondary role of water supplier to the forefront. With an increasing need for alternative water supply sources comes mounting pressure to expand the purposes of COE’s projects in a manner that competes with its more traditional purposes of navigation, flood control, and environmental protection (Carter, 2005).

COE’s inconsistent approach. COE itself has been inconsistent in its approach to water supply issues.

For example, despite the fact that the authorizing legislation minimizes or makes COE’s role as water supplier a secondary one, COE declares itself a water supply agency on its website (US Army Corps of Engineers, 2009b). The US Army Corps of Engineers’ brochure, *Water Supply, Value to the Nation* (2009c), states: “As one of the nation’s largest water management agencies, the US Army Corps of Engineers plays an important role in ensuring that Americans have enough water to meet their needs.” Although COE reservoirs are obviously important to the nation’s water supply, sending this message furthers the confusion of water users as to COE’s role in water allocation and the purpose of COE reservoirs and projects.

COE’S INVOLVEMENT IN WATER SUPPLY UNRELATED TO RESERVOIRS

The US Army Corps of Engineers Civil Works Strategic Plan for Fiscal Year 2004 through Fiscal Year 2009 (2004) states that its highest priority is providing “sustainable development and integrated management of the nation’s water resources.” This goal is an offshoot of COE’s authority to assist states and localities with developing comprehensive plans for use and protection of their water resources. Section 22 of the Water Resources Development Act (WRDA) of 1974, (P.L. 93-251) states: “The Secretary of the Army, acting through the Chief of Engineering, is authorized to cooperate with any state in the preparation of comprehensive plans for the development, utilization, and conservation of the water and related resources of drainage basins, watersheds, or ecosystems located within the boundaries of such states and to submit to Congress reports and recommendations with respect to appropriate Federal participation in carrying out such plans.” It should be noted that COE’s directive is not tied to participation

solely in watersheds where COE manages a reservoir.

Watershed studies and water supply decisions. Through this mandate, COE has become involved in watershed studies throughout the United States. Decisions about water supply and water allocation are made and implemented as part of the watershed study process. COE has also become increasingly involved in state water supply planning efforts. For example, Virginia is putting together its first statewide water supply plan. As part of that process, COE has offered to assist in studies of state water resources by (1) facilitating discussions with stakeholders and (2) determining appropriate river flows and allocations (Virginia Code 62.1-44.38:1). Although the flow calculations are largely scientific, allocations are inherently related to policy decisions. Thus COE’s involvement potentially leads to influencing a state’s allocation decisions in accordance with the COE’s goals for water supply.

Watershed studies related and unrelated to COE projects. COE is authorized by law to conduct watershed studies to determine the success of projects it constructed. Section 216 of the River and Harbor and Flood Control Act of 1970 (P. L. 91-611) allows COE to review and report to Congress on the status of such projects when there has been a physical or economic change in the watershed. Through such studies, COE may evaluate the range of water resources problems, needs, and opportunities in the watershed. Additionally, under the Water Resources Development Act of 2007 (P.L. 110-114), COE is authorized to conduct reimbursable comprehensive watershed assessments unrelated to a COE project.

Although COE involvement in water supply planning has traditionally been invited by states, COE is now becoming more aggressive in proposing such studies itself, as with the Virginia water supply plan. Again, COE involvement brings with it the potential for additional federal

involvement and competing goals and objectives for the use of the water.

IS COE'S INVOLVEMENT A BAD THING?

As previously noted, there is some question about the scope of COE's authority to make water supply allocation decisions, and its involvement may pose confusion regarding its role. Nonetheless, there may be some advantages to COE involvement in water supply planning:

- **Catalyst for cooperation on a broader level.** COE may provide resources and further cooperation on a broader level, enabling interstate and regional effects of local water supply decisions to be considered. As seen in the Georgia-Florida-Alabama situation, water supply decisions can have effects beyond the local or even regional planning level.

- **Additional funding, support, and streamlining of permits.** COE involvement could provide additional funding for the necessary watershed studies and support for—and possible streamlining of—the permitting process for water supply projects. Thus when COE has been involved in determining water allocation decisions, there are likely to be benefits for future permitting decisions.

- **Broader planning approach to reduce conflict among jurisdictions.** A holistic and regional planning approach to address water quantity, quality, and associated distribution issues would be more efficient and more sustainable in the long term. Friction points among jurisdictions, special interests, and the public could be addressed on a larger scale early on, as part of a unified strategy for a watershed, one would hope reducing conflicts at the time that specific individual projects are proposed.

THE BOTTOM LINE: WATER PROVIDERS MUST EDUCATE THEMSELVES

Water shortages are likely to continue in the United States. As a result, the management of water

supply resources will become more complicated and local decisions will have increasingly broad consequences. The Availability of water is an emotional issue, requiring objective oversight or mediation of water allocation. However, oversight cannot be effective if it is based on a patchwork of authority with competing and often conflicting purposes.

Although COE involvement is necessary and helpful in many cases, it is inconsistently applied and without a clear directive. Moreover, COE's interests may conflict with those of other water users given COE's charge to ensure certain water uses. Regardless of the ultimate outcome of federal involvement in local water management decisions, water providers must educate themselves about COE's potential role in water supply decisions. COE can be an effective partner in water supply planning, as long as all parties have a clear understanding of their roles,

goals, and the implications of their involvement.

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