DEPARTMENT OF DEFENSE

Department of the Army, U.S. Army Corps of Engineers

33 CFR Part 209

[COE–2016–0016]

RIN 0710–AA72

Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply

AGENCY: Army Corps of Engineers, DoD.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of the Army, U.S. Army Corps of Engineers (Corps) proposes to update and clarify its policies governing the use of its reservoir projects for domestic, municipal and industrial water supply pursuant to Section 6 of the Flood Control Act of 1944 and the Water Supply Act of 1958 (WSA). Specifically, the Corps proposes to define key terms under both statutes and to respond to issues that have arisen in exercising these authorities, in order to take into account court decisions, legislative provisions, and other developments. The Corps intends through this rulemaking to explain and improve its interpretations and practices under these statutes, and seeks comment from all interested stakeholders on those interpretations and practices. The proposed rule is intended to enhance the Corps' ability to cooperate with State and local interests in the development of water supplies in connection with the operation of its reservoirs for federal purposes as authorized by Congress, to facilitate water supply uses of Corps reservoirs by others as contemplated under applicable law, and to avoid interfering with lawful uses of water by any entity when the Corps exercises its discretionary authority under either Section 6 or the WSA. The proposed rule would apply only to reservoir projects operated by the Corps, not to projects operated by other federal or non-federal entities, and it would not impose requirements on any other entity, alter existing contractual arrangements at Corps reservoirs, or require operational changes at any Corps reservoir. The Corps intends by this rulemaking proposal to initiate a positive dialogue with stakeholders on these important issues, and to promote program certainty and efficiency by ultimately establishing a uniform understanding of Section 6 and the WSA, and the range of activity authorized thereunder.

DATES: Comments must be received by February 14, 2017.

ADDRESSES: You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) and title, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Email: WSRULE2016@usace.army.mil. Include the docket number, COE–2016–0016, in the subject line of the message.

Mail: U.S. Army Corps of Engineers, ATTN: CECC–L, U.S. Army Corps of Engineers, 441 G St NW., Washington, DC 20314.

Hand Delivery/Courier: Due to security requirements, we cannot receive comments by hand delivery or courier.

Instructions: Direct your comments to docket number COE–2015–0016. All comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through *regulations.gov* or email. The *regulations.gov* Web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an email directly to the Corps without going through *regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment we recommend that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

Docket: For access to the docket to read background documents or comments received, go to *regulations.gov.* All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy.

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SUPPLEMENTARY INFORMATION:

Executive Summary:

The proposed rule would formally set forth the Department of the Army, U.S. Army Corps of Engineers' (Corps') interpretation of its authority under both Section 6 of the Flood Control Act of 1944, 33 U.S.C. 708 (Section 6), and the Water Supply Act of 1958, 43 U.S.C. 390b (WSA), by defining key statutory terms and explaining the differences between the activities authorized under each of these authorities. The proposed rule would also explain the Corps' approach to important policy questions that have arisen nationwide, including the pricing of surplus water agreements under Section 6, the reallocation of storage under the WSA, and accounting of storage usage and return flows under WSA agreements, and would solicit public input and comments on those subjects. The rule will also clarify and simplify processes for approving and entering into water supply agreements at Corps reservoirs, and includes procedures for coordinating with States, Tribes, and other federal agencies to ensure that water rights are protected and the views, expertise, and prerogatives of others are taken into account. The overall intent of the proposed rule is to enhance the Corps' ability to cooperate with State and local interests by facilitating water supply uses of Corps reservoirs in a manner that is consistent with the authorized purposes of those reservoirs, and does not interfere with lawful uses of water under State law or other Federal Law. The proposed rule would apply only to reservoir projects operated by the Corps, not to projects operated by other federal or non-federal entities.

Table of Contents

I. Background 7
A. Purpose of Rulemaking 7
B. Summary of Proposed Rule 15

C. Rationale for Proposed Rule ... 28
1. Authority to Use Corps Reservoirs for Water Supply ... 28
2. Section 6 of the Flood Control Act of 1944, 33 U.S.C. 708 (Section 6) ... 32
(a) Definition of ''Surplus Water'' ... 36
(1) Alternative Definition of ''Surplus Water'' Excluding ''Natural Flows'' (Missouri River Basin Views) ... 46
(b) Definition of ''Reservoir'' Under Section 6 ... 49
(c) Definition of ''Domestic and Industrial Uses'' Under Section 6 ... 50
(d) Avoiding Adverse Effects on ''Then Existing Lawful Uses'' ... 57
(e) Determining ''Reasonable'' Prices for Section 6 Agreements ... 59
(f) Documentation of Surplus Water Agreements ... 71
(g) Duration of Surplus Water Determinations and Agreements ... 72
3. The Water Supply Act of 1958, 43 U.S.C. 390b (WSA) ... 74
(a) Definition of ''Reservoir Project'' and ''Project'' ... 76
(b) Definition of ''Water Supply,'' ''Municipal or Industrial Water'' and ''Municipal and Industrial Water Supply'' ... 77
(c) Meaning of the Phrase ''Storage May Be Included'' for Water Supply ... 79
(d) Determining the Cost of Including Storage for Water Supply ... 82
(e) Limitations on Authority To Modify Projects To Include Water Supply Storage ... 87
(f) Storage Accounting, ''Return Flows,'' and Water Supply Storage Agreements ... 96
4. Policies for Complementary Administration of Section 6 and the WSA ... 103
II. Scope of This Proposed Rule ... 105
III. Administrative Requirements ... 106
A. Executive Order 12866, ''Regulatory Planning and Review,'' and Executive Order 13563, ''Improving Regulation and Regulatory Review'' ... 106
B. Unfunded Mandates Reform Act (Pub. L. 104–4, § 202) ... 116
C. Regulatory Flexibility Act, As Amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 *et seq.* ... 117
D. Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* ... 122
E. Executive Order 13132, ''Federalism'' ... 123
F. Executive Order 13175, ''Consultation and Coordination With Indian Tribal Governments'' ... 126
G. Congressional Review Act, 5 U.S.C. 801 *et seq.* ... 127
H. Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use'' ... 128
I. Plain Language ... 128
J. Environmental Documentation ... 129

I. Background

A. Purpose of Rulemaking

The purpose of the proposed rulemaking is to seek public comment on the Corps' interpretation of key provisions of Section 6 and the WSA, and on the Corps' proposed policies to more clearly and effectively provide for use of its reservoirs within the authority conferred by these two statutes. The Corps has utilized these authorities at different times since their enactment in 1944 and 1958, respectively, to accommodate water supply uses at more than one hundred Corps reservoirs nationwide.[1] However, the Corps has never set forth, in formal, notice-and-comment regulations, a definitive interpretation of these authorities or a complete statement of the policies that govern their use. The Corps' existing water supply policies and practices are generally set forth in an internal publication, Engineer Regulation (ER) 1105–2–100, Planning Guidance Notebook (Apr. 22, 2000). This guidance has not been updated to reflect recent legal opinions, judicial decisions, and legislation affecting Section 6 and the WSA, does not fully articulate the Corps' understanding of the differing Congressional intent behind the two statutes, and does not clearly define the Corps facilities to which the statutes apply, or the types of water uses, that can be accommodated under Section 6 and the WSA.

In the absence of more formal regulations, and in response to different issues that have arisen over time, practices have varied across the Corps' multiple District offices. In the past, some water supply agreements have been based on different or uncertain statutory authority, and have contained unclear or inconsistent terms and conditions. The majority of agreements have been entered into pursuant to the WSA, providing approximately 10 million acre-feet of storage for water supply in Corps reservoirs. These WSA agreements provide for the use of storage, but in many cases do not clearly set forth the amount of water that can be withdrawn under the agreement, or how the availability of water in storage will be determined. Some Corps Districts have developed storage accounting practices to measure storage usage and the availability of water for withdrawal, but those practices have not been formally adopted nationwide. The Corps has only rarely entered into surplus water contracts under Section 6, with fewer than ten such agreements in effect as of 2016. In many cases—approximately 1,600, according to a 2012 audit—the Corps has allowed water to be withdrawn from its reservoirs simply by means of an easement across federal project lands, without formal water supply agreements citing a specific authority, without formal determinations that surplus water is available, and without clear documentation of impacts to other authorized purposes or costs incurred by the Government in authorizing the withdrawals.[2]

Meanwhile, the Corps' operation of reservoir projects in connection with water supply has come under increased scrutiny, as some parties have questioned the authority for those operations in litigation, and others have

[1] *See* U.S. Army Corps of Engineers, Institute for Water Resources, 2014 Municipal, Industrial and Irrigation Water Supply Database Report at 5–6 (August 2015), available at *http://www.iwr.usace.army.mil/Portals/70/docs/iwrreports/2015-R-02_Municipal_Industrial_and_Irrigation_Water_Supply_Database_Report.pdf.* Of the more than 300 water supply agreements currently in effect at Corps reservoirs, the great majority are storage agreements under the authority of the Water Supply Act of 1958, 43 U.S.C. 390b (''WSA''), with only a small number of surplus water agreements—9, as of 2014—pursuant to Section 6 of the Flood Control Act of 1944, 33 U.S.C. 708 (''Section 6'').

[2] The Corps recognizes that water supply uses of Corps reservoirs, including the Missouri River mainstem reservoirs, may be made under separate legislative authority. *See, e.g.,* Flood Control Act of 1944, Public Law 78–534 §§ 8, 9, 58 Stat. 891 (Dec. 22, 1944); Memorandum of Agreement Between the Department of the Interior, Bureau of Reclamation and the Department of the Army, U.S. Army Corps of Engineers for Joint Procedures Regarding Reclamation Water-Related Activities Associated with the Missouri River in Montana and North and South Dakota (Feb. 21, 2014). The proposed rule would not affect implementation of these authorities.

expressed concerns that the Corps' implementation of its water supply authorities may impinge upon other authorized purposes, or sovereign prerogatives to allocate rights to consumptive uses of water. Steadily increasing demands for limited supplies of water at Corps reservoirs, interstate conflicts over water use, and pressures from drought, environmental changes, and aging infrastructure are expected to intensify all of the above concerns.[3] This notice-and-comment rulemaking is intended to bring greater clarity and consistency to the Corps' implementation of Section 6 and the WSA, facilitate access to Corps reservoirs for water supply where water can be made available under Section 6 or the WSA, provide clear documentation of the potential impacts to other authorized purposes, promote more effective cooperation with State and local interests in the development of water supplies, and allow for the development of new policies to address complex issues that have arisen since the statutes were enacted.

Within the Corps' Northwestern Division area of operations, uncertainty over Corps policies and practices has engendered opposition in connection with proposals to enter into surplus water agreements under Section 6, and a proposed WSA reallocation study for the Missouri River mainstem reservoirs. In practice, the Corps has authorized numerous water supply withdrawals by non-federal entities from its mainstem reservoirs without clearly stating the authority for the withdrawals, without entering into separate water supply agreements, and without charging any fee for such agreements. Although the Corps has recently identified, in draft and final Surplus Water Reports for the six mainstem reservoirs, sufficient quantities of surplus water in those reservoirs to accommodate all existing and projected water withdrawals over a ten-year period, some stakeholders have submitted public comments critical of some of the conclusions and recommendations contained in the draft Surplus Water Reports. Some commenters have objected to the Corps' proposal to enter into surplus water agreements (in addition to easements necessary to cross federal project land) when authorizing withdrawals from the mainstem reservoirs, and to impose a charge for those agreements, based on the cost of providing the amount of storage in the reservoir calculated to yield the quantity of water desired. Others have questioned whether surplus water withdrawals from the mainstem reservoirs actually utilize storage, and whether it is reasonable to charge for surplus water withdrawals based upon the cost of storage, if those withdrawals could be made from the natural flow of the river absent reservoir storage. In addition, States and Tribes have expressed concern that proposed actions would interfere with citizens' rights to gain access to Missouri River flows, and limit or impinge upon existing uses of water, State prerogatives to allocate water resources, and Tribal reserved water rights. The Assistant Secretary of the Army (Civil Works) has expressed her intent that the Corps develop a nationwide pricing policy under Section 6 with public input, through notice-and-comment rulemaking, and in the meantime, Congress has enacted legislation precluding charges for uses of surplus water from the Corps' Missouri River mainstem reservoirs for a ten-year period. This background, including the recent legislation, illustrates the need for the Corps to clarify its interpretation and implementation of its Section 6 authority.

In the Corps' South Atlantic Division area of operations, recent litigation has highlighted the need for clearer, more consistent water supply policies under the WSA, and the need to consider issues not addressed by current Corps guidance. In litigation regarding the Corps' operation of reservoir projects in the Apalachicola-Chattahoochee-Flint (ACF) and Alabama-Coosa-Tallapoosa (ACT) River basins, two federal courts found that the Corps' actual or potential operation of Lake Lanier in the ACF basin to accommodate water supply uses in Georgia exceeded the Corps' authority under the WSA. See *Southeastern Federal Power Customers, Inc.* v. *Geren,* 514 F.3d 1316, 1324 (D.C. Cir. 2008); *In re Tri-State Water Rights Litigation,* 639 F. Supp. 2d 1308, 1347 (M.D. Fla. 2009), *rev'd,* 644 F.3d 1160 (11th Cir. 2011). That litigation culminated in a decision by the U.S. Court of Appeals for the Eleventh Circuit in 2011, reversing and vacating a district court judgment and directing that the case be remanded to the Corps to make a final determination as to its legal authority under several statutes, including the WSA, to accommodate water supply from the Lake Lanier project. *In re MDL–1824 Tri-State Water Rights Litigation,* 644 F.3d 1160 (11th Cir. 2011). In issuing that remand order, the Eleventh Circuit encouraged the Corps to consider a number of policy issues not addressed in the Corps' existing guidance, including the optimal methodology for determining whether a proposed action is within the authority of the WSA, ''whether percent reallocation of storage is the correct or sole measure of operational change'' under the WSA, or whether increases in water supply use over time ''constitute a 'change' of operations at all''; the relationship of multiple authorized purposes and statutory authorities; and whether and how to account for ''return flows'' in connection with water supply uses of a Corps reservoir. *Id.* at 1196 n. 31, 1200–1206.

In response to the Eleventh Circuit remand order, the Corps' Chief Counsel prepared a legal opinion, building on a 2009 legal opinion that had addressed the authority for then-current withdrawals from Lake Lanier, clarifying the Corps' interpretation of its authority under the WSA. Earl H. Stockdale, Chief Counsel, Memorandum for the Chief of Engineers, Subject: Authority to Provide for Municipal and Industrial Water Supply from the Buford Dam/Lake Lanier Project, Georgia (June 25, 2012) (2012 Chief Counsel Legal Opinion), available at *http://www.sam.usace.army.mil/Portals/46/docs/planning_environmental/acf/docs/2012ACF_legalopinion.pdf.* That opinion applied to Lake Lanier and the federal ACF system of projects specifically. It examined the legislative history of the WSA, as well as the authorizations for the federal ACF projects, set forth the Corps' understanding of the limits of its authority under those statutes, and identified certain technical considerations that must be analyzed in order to determine the legal authority for proposed inclusions of storage at Lake Lanier pursuant to the WSA. The opinion was filed with the court in compliance with the remand order, and led to the entry of final judgment in the *Tri-State Water Rights Litigation.* However, the Chief Counsel's legal opinion did not resolve a number of outstanding policy issues, including methods of accounting for storage usage and return flows; and the Corps' internal water supply policies contained in ER 1105–2–100 have not been updated to take account of the general legal tenets set forth in the opinion. The Assistant Secretary of the Army (Civil Works) has indicated that outstanding issues under the WSA should be addressed through a nationwide, notice-and-comment rulemaking.

The proposed rule would address the specific issues that have arisen most notably in the Corps' Northwestern and

[3] *See generally* U.S. Army Corps of Engineers, Institute for Water Resources, Status and Challenges for USACE Reservoirs (May 2016), available at *http://www.iwr.usace.army.mil/Portals/70/docs/iwrreports/2016-RES-01.pdf.*

South Atlantic Divisions, but is also intended to provide greater clarity, consistency, and efficiency in implementing Section 6 and the WSA nationwide. Numerous parties have urged the Corps to undertake rulemaking to address water supply issues, and the Administration has included this rulemaking initiative in its Unified Agenda of Regulatory and Deregulatory Actions published by the Office of Management and Budget. The Corps solicits comments on the proposed rule and suggestions for improvements that could be made to Corps policies and practices in this area. The Corps intends, through this rulemaking process, to initiate a positive dialogue with all interested parties, resulting in a final rule that will more effectively accomplish Congressional intent regarding the utilization of Corps reservoirs for water supply. We are not proposing to require changes to current Section 6 and WSA agreements. All new agreements entered into after the effective date of the final rule, as well as new agreements for users with expiring water supply agreements, will comply with the rule. Current uses that are occurring pursuant to easements only, without water supply agreements, will be reassessed when the easements expire, or within five years of the effective date of the final rule, whichever is earlier. If those withdrawals are found to require a Section 6 surplus water contract or a WSA storage agreement, the appropriate agreement shall be required in order for the withdrawals to continue. We are soliciting comment on the effective date and transition period.

The proposed rule is not intended to upset the balance between federal purposes and State prerogatives, or to assert greater federal control over water resources, or to interfere with the responsibilities of other federal agencies under other laws, such as the federal reclamation laws implemented by the Department of the Interior, or the marketing of federal hydropower by the Department of Energy through the four federal Power Marketing Administrations (PMAs). It is also not intended to interfere with or preempt the Environmental Protection Agency's Clean Water Act (CWA) authorities and responsibilities to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. The proposed rule would apply only to reservoir projects operated by the Corps, not to projects operated by other federal or non-federal entities.[4]

Nor would the proposed rule itself result in any physical changes or changes to operations at Corps reservoirs. The Corps constructs and operates its reservoir projects pursuant to specific Congressional authorization, and adopts water control plans and manuals to govern operations for authorized purposes. Operating manuals are reviewed periodically and may be updated for a variety of reasons, including changing requirements resulting from developments in the project area and downstream, improvements in technology, changes in hydrology, opportunities for enhanced coordination with other federal reservoirs, new legislation and other relevant factors. *See* 33 CFR 222.5(f); Engineer Regulation (ER) 1110–2–240, Water Control Management at 3–3 (May 30, 2016). Before promulgating or revising water control manuals, or including storage for water supply, or finalizing a surplus water determination, the Corps solicits public comment, prepares all required documentation, and complies with applicable law, including but not limited to the CWA, the Endangered Species Act (ESA), and the National Environmental Policy Act (NEPA). When proposing to reallocate storage for water supply under the WSA and prior to issuance of a final surplus water determination, the Corps prepares, and considers public comments on, reports evaluating such proposals, including evaluation of environmental impacts, effects on operations for authorized purposes, and continued compliance with applicable law. *See* ER 1105–2–100 at E–214 to E–216. The proposed rule would reinforce these practices by defining key terms under both statutes, clarifying policies, and providing for improved coordination with the public and other federal agencies prior to taking final action pursuant to Section 6 or the WSA. The proposed rule would bring greater clarity and consistency to the Corps' implementation of Section 6 and the WSA, but would not itself cause particular decisions to be made or actions to be taken at particular projects. Decisions or actions for a particular project would be made only after the reporting and documentation requirements described above are met for that project.

B. Summary of Proposed Rule

The proposed rule seeks to clarify the Corps' understanding of the Congressional intent behind Section 6 and the WSA, define key statutory terms, more clearly delineate the authority conferred under each statute, and establish policies that would improve efficiency and coordination with States, federal agencies, and other stakeholders regarding water supply uses of Corps reservoirs. The proposed rule is intended to ensure that the Corps carries out its authority under Section 6 and the WSA in a manner that does not interfere with State, Tribal, or other water rights, and that recognizes related responsibilities and authorities under the CWA, ESA, NEPA, and other federal law. Section 6 and the WSA are discretionary statutes that authorize the Secretary of the Army to make Corps reservoirs available for water supply uses, under different terms as set forth in the statutes. The proposed rule would acknowledge that when the Corps acts pursuant to either Section 6 or the WSA, the Corps does not issue, sell, adjudicate, or allocate water rights for domestic, municipal, industrial, or other consumptive uses. Rather, under both statutes, the Corps makes water in a Corps reservoir available for water supply use by others. These users are exercising their separately-derived water rights, and they bear the sole responsibility to acquire and defend any water rights necessary to make withdrawals, in accordance with State or other applicable law.

Section 6 authorizes the Secretary of the Army to enter into agreements ''for domestic and industrial uses of surplus water that may be available at any [Corps] reservoir,'' provided that use does not ''adversely affect then existing lawful uses of such water.'' The term ''surplus water'' is not defined in the statute, but plainly refers to water that is already present at a Corps reservoir at a particular moment in time, and which could be withdrawn without conflict with other lawful uses of water. Section 6 does not make water supply a purpose of any Corps reservoir project, but does enable the Corps to allow individual users to make withdrawals from any Corps reservoir if surplus water is available. The WSA, on the other hand, authorizes the Corps to ''include storage'' in a reservoir project ''to impound water'' for municipal and industrial water supply uses, effectively making that water supply storage an authorized purpose of the project, on the condition that State or local interests agree to pay a share of reservoir costs, on the principle that project costs shall

[4] The Corps recognizes that certain provisions of the WSA authorize actions by the Secretary of the Interior, and apply to reservoir projects of the Department of the Interior, Bureau of Reclamation. This proposed rule is intended only to interpret the WSA authority as it pertains to the Department of the Army and Corps facilities. It would have no effect on the authorities governing projects operated by the Bureau of Reclamation, or on the Bureau of Reclamation's discretion to determine whether and how to apply the WSA to its projects.

be allocated among the authorized purposes of the reservoir in proportion to the benefits realized for those purposes. The WSA therefore envisions making water supply an authorized purpose of a Corps reservoir project, so that storage in the reservoir is available for long-term, current and future water supply needs. The proposed rule would provide clearer distinctions between the two statutory authorities, while also providing consistent definitions of terms that are common or similar in the two statutes.

The proposed rule would provide a common definition of the terms ''reservoirs,'' ''projects'' and ''reservoir projects'' that are employed in Section 6 and the WSA, to clarify which Corps facilities are subject to those acts. The Corps believes that the terms employed in both statutes should be read expansively to include any Corps facility that impounds water and is capable of being operated for multiple purposes and objectives. Any other Corps water resource development facility that does *not* impound water, or that may *not* be operated for multiple purposes and objectives, could not reasonably be expected to serve as a source of water supply for others, and therefore would not be included within the proposed definitions. The proposed definitions would also acknowledge that these terms may comprise individual facilities or a system of improvements, depending on Congressional intent expressed in the relevant authorizing legislation.

The proposed rule would also include parallel definitions of the terms ''domestic and industrial uses,'' for which surplus water can be made available under Section 6, and ''municipal and industrial water supply,'' for which storage can be included under the WSA. The proposed rule would define these terms broadly, to encompass all uses of water under an applicable water rights allocation system other than irrigation uses as provided under 43 U.S.C. 390. These definitions are intended to enable the Corps to accommodate withdrawals of water from Corps reservoirs by individuals or entities that hold rights to the use of that water, without interfering with other lawful uses of that water, and without interfering with the authority of the U.S. Department of the Interior pursuant to the federal reclamation laws. The Corps believes that these interpretations are respectful of the rights of States and Tribes, consistent with other Federal interests, rights and authorities, and consistent with Congressional intent, as expressed through the text of both Section 6 and the WSA.

With regard to Section 6 specifically, the proposed rule offers new definitions of ''surplus water'' and ''then existing lawful uses.'' The proposed rule would define the term ''surplus water,'' as used in Section 6, as water that is not required during a specific time period to accomplish an authorized purpose or purposes of that reservoir. As explained below, the Corps interprets this to mean water available at a Corps reservoir that is not needed for (*i.e.,* is surplus to) federal project purposes, because the authorized purpose or purposes for which such water was originally intended have not fully developed; because the need for water to accomplish such authorized purpose or purposes has lessened; or because the amount of water to be withdrawn, in combination with any other such withdrawals during the specified time period, would have virtually no effect on operations for authorized purposes. The consideration of how much water is needed for authorized purpose depends in each case on the Congressional authorization for the project in question, and on the particular facts and circumstances. Accordingly, as explained below, the proposed rule would recognize that surplus water determinations require both technical and legal analysis of the circumstances and project authorization. We invite comments on whether there may be a minimum or *de minimis* threshold amount of water that could meet these requirements, particularly the ''virtually no effect'' requirement.

Additionally, at projects with a hydropower purpose, under the proposed rule, the Corps would coordinate surplus water determinations in advance with the applicable federal PMA, and utilize in its determinations any information that the PMA provides regarding potential impacts to the federal hydropower purpose, including revenues and benefits foregone. To the extent that water is determined to be required for a federal purpose, it would not be considered ''surplus'' under the proposed rule. The revised definition of ''surplus water'' would conform to the statutory language and help to distinguish the Corps' authority to make ''surplus water'' available under Section 6 from its authority to include storage for water supply as a project purpose under the WSA.

We also invite comments on monitoring procedures that the Corps might implement to assess whether withdrawals under a surplus water contract either cause an exceedance of the amount of water determined to be surplus or utilize reservoir storage that is allocated to another active purpose.

The proposed rule would define the phrase ''then existing lawful uses'' to mean ''uses authorized under a State water rights allocation system, or Tribal or other uses pursuant to federal law, that are occurring at the time of the surplus water determination, or that are reasonably expected to occur during the period for which surplus water has been determined to be available.'' The proposed rule would also require coordination before decisions are made, to foster more effective communication with States and Tribes, and to ensure that State water rights prerogatives and reserved water rights of Tribes are protected. The proposed rule would simplify the process for approving access to surplus water by eliminating the need for multiple documents (*e.g.,* a real estate easement as well as a separate surplus water contract) to provide the approvals for access and withdrawal of surplus water, and would enable surplus water uses to continue for a term not to exceed the duration of the surplus water determination. Taken together, these revised definitions and policies under Section 6 are intended to maintain the viability of the Congressionally authorized purposes of Corps reservoirs and facilitate access to and use of water in those reservoirs by others.

The Corps also proposes to establish a new methodology for determining a ''reasonable'' price for surplus water contracts under Section 6. The proposed rule would base the price of surplus water contracts on the actual, full, separable costs, if any, that the Government would incur in making surplus water available during the term of the surplus water agreement, such as by administering and monitoring the contract, or by making temporary changes to reservoir operations to accommodate the surplus water withdrawals. The Corps expects that these costs would be small or non-existent in most cases, since surplus water by definition is not needed for federal purposes, and typically would not require any operational changes. But to the extent that the Government may incur costs in making surplus water available, it is reasonable that such costs should be borne by the users on whose behalf they are incurred. Depending on the terms or complexities of the contract, the costs could be more significant. For those surplus water contracts where Federal law provides that no charges may be assessed, including the Missouri River mainstem reservoirs until June 2024, pursuant to Section 1046(c) of the Water Resources

Reform and Development Act of 2014, Public Law 113–121, 128 Stat. 1193 (June 10, 2014) (WRRDA 2014), no charges will be assessed. We solicit comments on whether the price of surplus water contracts should include the economic value of the water supply storage benefit these contracts provide (*e.g.,* greater reliability in withdrawing water from a reservoir), or reimbursement of indirect costs such as foregone hydropower revenue. We solicit comments on these potential alternative pricing structures.

The proposed rule for pricing of surplus water contracts would differ from the methodology currently set forth in ER 1105–2–100, which indicates that surplus water contracts should include charges equivalent to the annual price that a water supply user would pay if the Corps had permanently reallocated storage to water supply at that project under the WSA. However, when making surplus water available, the Corps is not permanently reallocating storage to water supply as it would be under the WSA, and the Corps is not choosing to use storage to provide surplus water at the expense of Congressionally authorized project purposes. Rather, under Section 6, the Corps is authorizing the withdrawal, for a limited term on a provisional basis, of water that it determines is not needed for authorized purposes. Accordingly, the proposed rule would not adopt the annual-cost-of-storage methodology presently set forth in ER 1105–2–100 for surplus water contracts. The Corps does not anticipate that the new proposed methodology, based on the full, separable cost (if any) incurred by the Government, would result in significant costs to surplus water users, or revenues or benefits foregone by the United States. In practice, the few surplus water contracts currently in existence that cite Section 6 (nine contracts, as of July 2016) do not fully apply the ER 1105–2–100 methodology; and by law, the Corps cannot charge any price for surplus water uses at the Missouri River mainstem reservoirs for a ten-year period ending in 2024.

The proposed rule would not affect existing contracts or impose any charges for Missouri River surplus water withdrawals before 2024. Under the proposed rule, the Corps would require formal documentation, through a combined easement and contract document, for all users of surplus water at a Corps reservoir. Current withdrawals that are occurring pursuant to easements only, without water supply agreements, will be reassessed when the easements expire, or within five years of the effective date of the final rule, whichever is earlier. This will ensure that all uses of surplus water at Corps reservoirs, and any impacts from such uses on reservoir operations, are formally evaluated; and that all withdrawals are documented and authorized, whether under Section 6, the WSA, or another authority. The Corps would coordinate surplus water determinations in advance with federal PMAs and other entities, and would utilize in its determinations any information provided regarding impacts to authorized purposes and revenues or benefits foregone, to ensure that the water is truly surplus to federal requirements. Assuming that it is, then by making such water available for withdrawal under Section 6, the Corps would not be foregoing any revenues or benefits that Congress expected to be realized from an authorized purpose at the project, or any substantial payments from future surplus water contracts that are reasonably likely to be executed.

With regard to the WSA specifically, the Corps proposes in this rule to formalize its view that the WSA authorizes modifications to make water supply a purpose by ''including'' storage for water supply at any stage in pre-authorization or post-authorization project development, by changing the design plan, physical structure, or operation of a reservoir project (or system of projects, if authorized as a system). This is consistent with the Corps' longstanding practice and interpretation of the WSA since the time it was enacted in 1958, and with recent legal opinions of the Corps' Chief Counsel. The proposed rule would also formally adopt the legal interpretation set forth in those opinions that the statutory limitations on modifications under the WSA that would involve ''major structural or operational changes,'' or that would ''seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed,'' refer to actions that would fundamentally depart from Congressional intent, as expressed through the authorizing legislation relevant to the project or system of projects. Such determinations require both legal analysis of the legislation applicable to the project (or system of projects, if authorized as a system), and technical assessment of the effects of the proposed change on operations of that project or system for its authorized purposes, in light of the particular circumstances, and are not susceptible to bright-line, numerical or percentage limits applicable to all projects. When Congress has authorized Corps projects, it has done so by approving reports of the Chief of Engineers that set forth the plans of improvement, and the purposes those improvements will serve. Those documents, and any other direction that Congress provides through legislation, serve to define the authorized project purposes. The proposed rule would clarify that the touchstone for analysis of whether a proposed modification is ''major'' or ''serious'' is the extent to which the modification would depart from Congressional intent for the structure, operation, and purposes of the particular project in question, as expressed in the relevant legislation. Although the determination whether to undertake an action pursuant to the WSA will ultimately be made by the Department of the Army, the proposed rule would expressly require that the basis for such determinations be set forth in a written report, which would be coordinated with interested Federal, State, and Tribal agencies, with public notice and opportunity for comment, prior to a final decision. At projects with federal hydropower as an authorized purpose, the proposed rule would require the Corps to coordinate any proposal to include storage pursuant to the WSA in advance with the PMA that is responsible for marketing power from those projects. The Corps would utilize in its determinations any information provided by the PMA in its evaluation of the impacts of the proposed action.

The Corps invites comments on the proposed interpretation of the statutory limitations on modifications that would ''seriously affect'' authorized purposes or involve ''major structural or operational changes.'' We also invite comments on whether it may be appropriate to adopt in the proposed rule a maximum threshold percentage or amount of storage that may be reallocated within the limits stipulated by the WSA.

The proposed rule also would carry forward the current principles by which the Corps determines the amount of storage to include for a given water supply demand, and allocates a cost to that storage. Generally, under the WSA, the Corps includes an amount of storage that the Corps believes will be sufficient to yield the gross amount of water to be withdrawn or released under projected hydrologic conditions. Costs are then allocated to that amount of water supply storage in a manner that is reflective of the benefit being afforded—storage with a dependable yield to meet a projected water supply demand—consistent with standard economic evaluation practices for federal water resources development projects, and with the requirement in the WSA that water supply storage costs

''be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction,'' 43 U.S.C. 390b(b). At projects with federal hydropower as an authorized purpose, the Corps currently coordinates with federal PMAs regarding the delivery of power and the allocation of costs to hydropower. The proposed rule would expressly provide that whenever the Corps proposes to include storage for water supply under the WSA at such projects, the Corps will coordinate that proposal in advance with the PMA that is responsible for marketing that federal power. The Corps considers this information, including evaluation of hydropower impacts and cost information regarding revenues foregone and replacement power costs, in determining the cost of storage to be charged to the prospective water supply user. The proposed rule would continue and formalize these policies and practices, and further the collaboration by utilizing the PMA information in the Corps' determinations. The proposed rule would not address or affect the rates that PMAs may establish for hydroelectric power, nor any credits that might apply to the hydropower purpose for revenues foregone and replacement power costs, as those determinations are made through separate administrative processes.

Additionally, in response to issues that have arisen over time in the Corps' administration of water supply storage agreements, the proposed rule would adopt new policies to more clearly indicate how much water will be available for a user to withdraw from that storage, and the relationship of any ''return flows'' and other inflows to those withdrawals. The Corps' WSA storage agreements typically allocate to water supply an amount of storage estimated to yield the user's desired withdrawal amount during projected hydrologic conditions, including the worst drought of record—that is, the dependable yield, or firm yield. These agreements entitle the water supply user to make withdrawals from the allocated storage, so long as water is available. Because storage yields change over time, the amount of water that can be withdrawn from storage also changes, and the Corps' storage agreements have not generally specified fixed or not-to-exceed withdrawal amounts. Although consistent with the principle that under the WSA, the Corps makes storage available, and does not sell or guarantee fixed quantities of water, these practices have contributed to disputes over the amount of water supply use that can be made from Corps reservoirs, especially during times of drought and in the context of water rights disputes among third parties.

Moreover, the Corps' past policies and practices have not clearly or consistently addressed questions related to ''return flows''—that is, water that is withdrawn from and later flows back into a reservoir, such as treated wastewater returns—and other ''made inflows'' that may be directed into a reservoir by a particular entity in connection with water supply withdrawals from the reservoir. The Corps does not have a universal policy or practice regarding return flows, but generally has not distinguished particular inflows and credited them solely to water supply storage allocated to particular uses. Instead, the Corps has generally accounted for return flows and other additive inflows in the same manner as it accounts for all inflows to a reservoir, that is, as water that is available for storage or release for all purposes, including but not limited to water supply. In contrast, in some states, water rights may be based on net withdrawals, as opposed to gross withdrawals, and take into account made inflows. Some entities have advocated directly crediting return flows or other made inflows to water supply users who provide those flows, arguing that such flows increase storage yield, that users may have a right to make withdrawals from such flows under state law, or that crediting return such flows could create incentives for improved water conservation. Others oppose such crediting, on the grounds that it could impinge upon other project purposes, or upon other users' rights. Virtually all parties agree that more clarity is needed with respect to the amount of water that can be withdrawn under water supply storage agreements, and the Corps acknowledges these concerns.

The proposed rule would address issues regarding storage allocation, storage accounting, and return flows in several ways. First, the proposed rule would require the Corps to more accurately and consistently consider return flows or other made inflows when determining storage allocations for water supply, and the effects on operations for authorized purposes, and on the environment, of including such storage for water supply. Thus, to the extent that return flows or other made inflows could reasonably be anticipated and expected to affect operations, the Corps would take those effects into account. Second, the proposed rule would require the Corps to incorporate storage accounting in all new WSA storage agreements, to make clear to all parties how the availability of water for withdrawal from storage, as well as return flows, will be measured. This would eliminate uncertainty and reduce the potential for disputes about water supply usage over time. Third, the proposed rule would codify the Corps' generally prevailing practice of accounting for return flows and other made inflows in the same manner as all other inflows, that is, establish that, in utilizing storage accounting, the Corps will credit return flows proportionally to all storage accounts, rather than crediting them fully to the particular entity that might provide the inflows, where those inflows have been artificially made and can be reliably measured. We would like to solicit public comment on including made inflows, and net accounting, in the water supply storage agreements and storage accounting.

Thus, under the proposed rule, both the initial allocation of storage to water supply and the accounting of storage usage under a WSA storage agreement would be based on the principles that Corps reservoirs are operated to serve multiple purposes; that the Corps makes storage available, but does not allocate, measure or determine any user's water rights under State law; and that storage usage over time should remain generally proportional to the share of costs and benefits that are allocated among the authorized purposes, consistent with Congressional intent. The Corps seeks public input on the proposed storage accounting policies.

The policies that are proposed in this rulemaking are intended to clarify, improve, and make more transparent the Corps' implementation of Section 6 and the WSA. In pursuing this rulemaking, the Corps hopes to invite a thoughtful and positive dialogue with the public. The development of water supply policies is a matter of broad national interest. As such, the Corps invites and welcomes the public's input on the subjects covered in the proposed rule. The Corps looks forward to this exchange of views and appreciates the opportunity to develop these policies in cooperation with the public.

C. Rationale for Proposed Rule

1. Authority To Use Corps Reservoirs for Water Supply

The Corps operates its water resource development projects in accordance with legislation that Congress has enacted pursuant to Article I, § 8, cl. 3 of the U.S. Constitution, ''[t]o regulate Commerce with foreign Nations, and among the several States, and with the

Indian Tribes.'' This Constitutional power has long been recognized to include the power to regulate navigation and navigable waters. *Gibbons* v. *Ogden,* 22 U.S. 1, 193, 6 L. Ed. 23 (1824); *United States* v. *Appalachian Electric Power Co.,* 311 U.S. 377, 405 (1940). Unlike other federal reservoirs that are operated for different purposes under other authority, such as reservoirs operated by the Department of the Interior pursuant to the federal reclamation laws, Congress has typically authorized the Corps to operate projects, through River and Harbors Acts and Flood Control Acts, for nonconsumptive purposes such as navigation, flood control, and hydropower generation. The operations of Corps projects for those purposes are not expected to interfere with the prerogatives of the States to allocate waters within their borders for consumptive use. Indeed, Congress has expressed its intent, in several legislative provisions of general application, ''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.'' Flood Control Act of 1944, Public Law 78–534, 1, 58 Stat. 888 (Dec. 22, 1944), 33 U.S.C. 701–1. In addition, Congress has recognized and expressly enacted into law the expectation that the Corps will adjust the operation of its water resource development projects for federally authorized purposes, to the maximum extent practicable, to effectuate water allocation formulas developed through interstate Compacts.[5]

In accordance with this Congressional intent, the Corps endeavors to operate its projects for their authorized purposes in a manner that does not interfere with the States' abilities to allocate consumptive water rights, or with lawful uses pursuant to State, Federal, or Tribal authorities. The Corps develops water control plans and manuals through a public process, affording all interested parties the opportunity to present information regarding uses that may be affected by Corps operations, and the Corps takes that information into account in determining operations for authorized purposes of its projects. See 33 U.S.C. 709 (statute directing the Secretary of the Army to prescribe regulations for the use of storage for flood control or navigation at certain reservoirs); 33 CFR 222.5; ER 1110–2–240 (policies and procedures for establishment and updating water control plans for Corps and non-Corps projects). Because purposes such as flood control, navigation, and hydropower at Corps reservoirs are carried out pursuant to the Commerce power, and are non-consumptive in nature, the Corps does not secure water rights for those operations.

Section 6 and the WSA also do not involve consumptive uses by the Corps. Rather, Section 6 and the WSA authorize the Corps to make its reservoirs available for water supply use by others. Congress did not intend for the Corps to secure water rights under those authorities, or to interfere with State, Federal, or Tribal allocations of water when exercising its discretion under Section 6 or the WSA. Section 6 provides that ''no contracts for [the use of surplus] water shall adversely affect then existing lawful uses of such water,'' 33 U.S.C. 708, and the WSA expressly ''recognize[s] the primary responsibility of the States and local interests in developing water supplies,'' while reaffirming the general statement of intent to recognize the interests and rights of States in the development of waters, expressed in 33 U.S.C. 701–1. 43 U.S.C. 390b(a), (e).

Thus, when exercising its authority under Section 6 or the WSA, the Corps does not determine how water supply needs should be satisfied within a region, allocate water rights, or sell water. Nor does the Corps take on the role of a water distributer, treating or actually delivering water to end users. Instead, the Corps facilitates the exercise of water rights held by others, and the efforts of States and local interests to develop their own water supplies through nonfederal conveyance systems, in connection with the operation of Corps reservoir projects. Under Section 6, the Corps enters into contracts with non-federal entities for the withdrawal of ''surplus water,'' for so long as it has been determined to be available at a Corps reservoir. Such contracts reflect the Corps' determination that the withdrawal of the surplus water will not interfere with any then existing lawful use of the water during the term of the contract. Under the WSA, the Corps has broader discretion to construct additional storage at a reservoir, or to change reservoir operations to allow additional uses of existing storage, in order to facilitate water supply withdrawals or releases from reservoir storage. The Corps does not construct or operate water supply treatment or delivery systems under the WSA. Under either statute, it remains the sole responsibility of the water supply users to construct works for the withdrawal, treatment, and/or distribution of water from a Corps reservoir, and to obtain whatever water rights may be necessary towards that end. The Corps' authorities under both Section 6 and the WSA relate to the use of the Corps reservoir facility as a source of that water.

2. Section 6 of the Flood Control Act of 1944, 33 U.S.C. 708 (Section 6)

Section 6, as codified at 33 U.S.C. 708, provides as follows:

> The Secretary of the Army is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the Department of the Army: *Provided,* That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.

Congress's intent in enacting Section 6 was to provide a means of enabling water to be withdrawn from a Corps reservoir so that it may be put to beneficial use by those who hold the rights to the use of that water, when that use would not interfere with the authorized purposes of the Corps project. In deliberations regarding the 1944 Flood Control Act, Congress recognized that Corps reservoirs, when operated to store waters for non-consumptive authorized purposes such as flood control, navigation, or hydropower generation, may at times contain water not needed in order to accomplish those purposes. Congress intended to give authority to the Secretary of the Army to facilitate uses of that ''surplus water'' by others,

[5] *See, e.g.,* WRRDA 2014, § 1051(b)(1) (finding that ''States and local interests have primary responsibility for developing water supplies for domestic, municipal, industrial, and other purposes,'' and expressing the sense of Congress that the Secretary of the Army ''should adopt policies and implement procedures for the operation of reservoirs of the Corps of Engineers that are consistent with interstate water agreements and compacts.''). *See also* Apalachicola-Chattahoochee-Flint River Basin Compact, Public Law 105–104, arts. VII, X, 111 Stat. 2219 (Nov. 20, 1997) (recording intent of the United States to comply with water allocation formula to be worked out among the States of the Apalachicola-Chattahoochee-Flint River Basin, and to exercise authorities in a manner consistent with that formula, to the extent not in conflict with federal law); WRRDA 2014, § 1051(a), codified at 43 U.S.C. 390b(f) (expressing sense of Congressional Committees of jurisdiction that interstate water disputes should be resolved ''through interstate water agreements that take into consideration the concerns of all affected States including impacts to other authorized uses of the [federal] projects,'' and pledging Committees' ''commitment to work with the affected States to ensure prompt consideration and approval of'' possible new Apalachicola-Chattahoochee-Flint and Alabama-Coosa-Tallapoosa River System compacts).

pursuant to water rights they held or would separately obtain.[6] Under applicable law at that time, 33 U.S.C. 701h, the Secretary of War was only authorized ''to provide additional storage capacity for domestic water supply or other conservation storage'' by modifying the ''plans'' for a Corps reservoir—*i.e.,* by identifying water supply needs prior to construction—and only if local agencies contributed funds to pay for the cost of ''such increased storage capacity.''[7] That authority does not authorize the Corps to meet water supply needs from its reservoirs unless additional storage capacity has been added at non-federal expense, and in 1944, Congress recognized that it was not practical for many communities to contribute funds in advance of construction, and that there would be water supply needs that would develop only after construction. See H.R. Rep. 78–1309 at 7 (Mar. 29, 1944) (noting that ''small communities have experienced difficulty in providing the large lump-sum contributions prior to construction required by existing law,'' or have requested water supply storage only ''after a dam reservoir project has been completed''). Congress responded to these concerns in 1944, not by authorizing the construction of additional storage capacity in an existing reservoir, but rather, by authorizing the Corps to make water in its reservoirs available for withdrawal, when that could be done without interfering with authorized purposes (*i.e.,* if the water is ''surplus'' to those purposes), for existing, lawful uses of the water, ''at such prices and on such terms as [the Secretary] may deem reasonable.''

The authority conferred under Section 6 does not involve the sale of water, nor the issuance of water rights.[8] To the contrary, the language of Section 6 was carefully crafted to respond to concerns of representatives of western States and others that by contemplating that the Corps would ''sell water,'' the proposed legislation could impair water rights granted under state law, interfere with the prerogatives of the States to exercise control over water resources within their boundaries, or undermine the principles of the federal reclamation laws, as implemented by the Department of the Interior.[9] Earlier drafts of Section 6 did include the phrase ''sale of [surplus] water,'' but this language was changed after it was pointed out that the Army, in the operation of its projects—in contrast to the Department of the Interior, in the operation of its projects pursuant to federal reclamation laws—does not take title to the water itself, and ''does not engage in the business of selling stored water.''[10] Accordingly, the text of the draft Section 6 was modified to authorize the Secretary of the Army to dispose of surplus water by entering into ''contracts'' for its use, rather than by ''selling'' the water itself.[11]

Recognizing that the Corps does not own or obtain consumptive use rights for the water it impounds for Commerce Clause purposes in its reservoirs, Congress included language in Section 6 to ensure that ''no contracts for such water shall adversely affect then existing lawful uses of such water,'' 33 U.S.C. 708. This protected the existing lawful uses of that water, and also recognized ''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.'' Flood Control Act of 1944, § 1, 33 U.S.C. 701–1; see also 90 Cong. Rec. 8231 (Nov. 21, 1944) (statement of Sen. Overton that the proposed Section 6 ''protects the existing lawful uses of the water''). Congress also understood that the Corps exercises operational control over its reservoirs, and therefore must give approval for water supply withdrawals from those reservoirs, by persons with lawful rights to the use of the water. The purpose of Section 6 was to give the Secretary of the Army that authority to issue such approvals. See 90 Cong. Rec. 8231 (Nov. 21, 1944) (statement of Sen. Overton that ''when a dam is constructed and water is impounded in it and there is nearby a lawful user of that water, we do not want to deprive him of his rights. Therefore, he is permitted to take water from the dam, but of course, he does it under the direction of the Secretary of War.''). Thus, in enacting Section 6, Congress provided a new authority to the Secretary of the Army to enable individuals or entities to access water to which they hold the lawful water rights, when that water is available at an existing Corps reservoir and could be withdrawn without interfering with the authorized federal purposes of that reservoir, with then existing lawful uses, or with the federal reclamation laws.

In summary, Section 6 authorizes the Secretary of the Army to enter into contracts for the use of surplus water, when it may be available at a Corps reservoir, without requiring that users pay in advance of construction for the cost of including storage in the reservoir. It does not authorize the Corps to ''sell water,'' or to interfere with lawful uses of water, or to construct systems for the delivery of irrigation water that would impinge upon the authority of the Secretary of the Interior under the Reclamation laws. In enacting Section 6, Congress did not define the statutory terms ''surplus water,'' ''reservoir,'' or ''domestic and industrial uses,'' and the proposed rule provides the Corps' interpretations of those terms. The proposed rule also gives meaning to the phrase ''then existing lawful uses'' and set forth a proposed methodology for determining ''reasonable'' pricing and other contract terms, as provided in Section 6.

a) Definition of ''Surplus Water''

The Corps' interpretation of the statutory term ''surplus water'' has evolved over time. Prior to 1986, internal Corps guidance recognized that Section 6 provides an independent source of authority for contracts for the use of surplus water. However, that

[6] *See* 90 Cong. Rec. 8548 (Nov. 29, 1944) (statement of Sen. O'Mahoney that ''if [Corps reservoirs] store surplus waters, such waters should be made available for any purpose, domestic irrigation or otherwise, which residents in the neighborhood or in the vicinity affected may desire'').

[7] War Department Civil Appropriations Act of 1938, ch. 511, 50 Stat. 518 § 1 (July 19, 1937), codified at 33 U.S.C. 701h (authorizing the Secretary of the Army to modify the plans for any Corps reservoir to include additional storage capacity for water supply, but only ''on condition that the cost of such increased storage capacity is contributed by local agencies and that the local agencies agree to utilize such additional storage capacity in a manner consistent with Federal uses and purposes.'').

[8] The heading of 33 U.S.C. 708 reads ''Sale of surplus waters for domestic and industrial uses; disposition of moneys.'' However, the phrase ''sale of surplus waters'' does not appear in the text of Section 6. Compare S. Rep. No. 82–1348, Reviving and Reenacting Section 6 of the Flood Control Act, Approved December 22, 1944 at 1 (Mar. 24, 1952) (''The bill would revive legislation concerning the *disposal* of surplus water from dams constructed by the Corps of Engineers.'') (emphasis added).

[9] *Id.* at 1–2 (''Section 6 was carefully developed by Congress in 1944 in order to provide a means of permitting the disposal of surplus water for domestic and industrial uses with the specific limitation that no contracts for such water shall adversely affect then existing lawful uses of water. This language met with the approval of groups in the West where water rights and the conservation and use of water is of the greatest importance. All of those who are interested in this matter have requested prompt restoration of the original legislation.'').

[10] *See* 90 Cong. Rec. 4126 (May 8, 1944); 90 Cong. Rec. 8231 (Nov. 21, 1944) (statements of Sens. Overton, White, and Milliken).

[11] *See* S. Rep. No. 82–1348 at 1–2 (Mar. 24, 1952) (noting that Section 6 was inadvertently repealed along with obsolete Government property laws, ''apparently upon the understanding that [Section 6] dealt with a matter of surplus property of the Corps of Engineers,'' and that ''[s]ubsequently, information has come to the attention of the Congress that [S]ection 6 is not a matter of surplus property of the Corps of Engineers since the Corps of Engineers has no title to the surplus water which may be impounded by these dams.'').

guidance did not define the term ''surplus water,'' or distinguish that authority substantially from the WSA. In practice, the clear preference in policy and in practice was to utilize the latter authority, and not Section 6, to accommodate requests for municipal and industrial water supply from Corps reservoirs. In 1986, the General Counsel of the Department of the Army issued a legal opinion analyzing the statutory text and legislative history of Section 6, and concluded that Congress intended to confer broad discretion to make surplus water available to individual users, even if that water might otherwise be used for authorized purposes, so long as surplus water withdrawals would not impair the efficiency of the project for its authorized purposes. Citing the Congressional debates on Section 6, the Army General Counsel concluded that Congress intended to confer upon the Secretary of the Army a degree of discretion comparable to that of the Secretary of the Interior under certain provisions of Reclamation law to make water available at a reservoir when doing so ''will not impair the efficiency of the project'' for its authorized purposes. Susan Crawford, General Counsel, Department of the Army, Memorandum for the Assistant Secretary of the Army (Civil Works), Subject: Proposed Contracts for Municipal and Industrial Water Withdrawals from Main Stem Missouri Reservoirs 4 (Mar. 13, 1986) (1986 Army General Counsel Legal Opinion) (citing 43 U.S.C. 485h(c)); see also *ETSI Pipeline Project* v. *Missouri et al.,* 484 U.S. 495, 506 & n.3 (1988) (citing and commenting favorably on Army General Counsel interpretation of ''surplus water'' under Section 6).

Since the late 1980s, the Corps has interpreted the term ''surplus water'' to mean, for purposes of Section 6:

(1) water stored in a Department of the Army reservoir that is not required because the authorized use for the water never developed or the need was reduced by changes that occurred since authorization or construction; or

(2) water that would be more beneficially used as municipal and industrial water than for the authorized purpose and which, when withdrawn, would not significantly affect authorized purposes over some specified time period.

ER 1105–2–100 at E–214.

This definition is derived from the 1986 Army General Counsel Legal Opinion, which was quoted favorably by the Supreme Court in its *ETSI Pipeline Project* decision, and we believe it is fundamentally sound. It reflects the fact that Congress has entrusted the Secretary of the Army with the authority to ''control'' Corps reservoirs, as well as the discretion to approve withdrawals from them, in consideration of the reservoirs' operation for federal purposes. See *ETSI Pipeline Project,* 484 U.S. at 505–06 (citing Flood Control Act of 1944, §§ 4–6, 8). However, the wording in the Corps' guidance contains certain terms that may unintentionally cause confusion, and that are not essential to the concept of ''surplus water.'' The Corps' current definition refers to ''stored'' water, which some have claimed is distinguishable from water that would have been available from the natural flow of the river prior to construction of the Corps dam (see discussion on relationship between ''natural flows'' and ''surplus water,'' below). This in turn has led to criticism of the Corps' proposals in the past to impose a fee for surplus water agreements that is based on the cost of reservoir storage, when surplus water withdrawals may not depend upon storage above and beyond the natural flow. In response to these pricing concerns, the Corps proposes to change the pricing methodology under Section 6 to avoid charging surplus water users for storage costs of Corps reservoirs (see the discussion of Section 6 pricing, below).

With regard to the definition of ''surplus water'' under Section 6, the Corps acknowledges that nothing in the text of Section 6 expressly refers to ''storage'' or ''stored water.'' The Corps also recognizes that some withdrawals that it may authorize from a Corps reservoir pursuant to Section 6 could have been made from the river in the absence of the Corps reservoir project, and in that sense may not be dependent on reservoir storage. The absence of the term ''storage'' in Section 6 is a significant distinction from the WSA, which expressly authorizes the Corps to include storage for water supply (on the condition that water supply users agree to pay for the cost of including storage in the reservoir). Instead, Section 6 refers only to ''surplus water that may be available at any [Corps] reservoir.''

We believe that Congress intended, in enacting Section 6, that the Corps would authorize withdrawals for domestic or industrial uses of *any* amounts of water, if such withdrawals could be made in accordance with the terms of Section 6. Congress expected that the Corps would use this authority to authorize withdrawals, consistent with state allocations of water for beneficial uses, by persons or entities that had not previously agreed to pay for storage in a Corps reservoir (as required under applicable law, 33 U.S.C. 701h, that preceded enactment of Section 6). We believe that narrowly interpreting the term ''surplus water'' to enable the Corps to authorize only those withdrawals from its reservoirs that may be determined to utilize storage, as opposed to those withdrawals that could potentially have been accommodated from the natural flow of the river had the reservoir never been constructed, would frustrate Congress's intent that the Corps should make surplus water available when doing so would not impair operations for authorized purposes or interfere with then existing lawful uses including the CWA, the ESA, and other federal statutes. Thus, we believe the appropriate inquiry under Section 6 is whether the amount of water to be withdrawn is ''available at'' a Corps reservoir, and whether that water is not needed in order to accomplish an authorized purpose of the reservoir. In considering whether water is ''needed'' for a purpose, the touchstone for analysis depends in each case upon the specific legislation by which Congress authorized the project in question, and the Congressional expectations, with regard to the purposes set forth in the documents that Congress incorporated or approved in the authorizing legislation. Under the proposed rule, if the amount of water considered as ''surplus water'' could be withdrawn without impairing operations for authorized purposes—that is, if the water is not needed in order to accomplish the authorized purposes, consistent with Congressional expectations set forth in the authorizing legislation—then the water may be considered ''surplus water,'' and the Corps is authorized to exercise its discretion under Section 6 to approve the withdrawal of that water for domestic and industrial use.

Additionally, the phrase ''more beneficially used'' in the definition contained in the current Corps guidance is also unnecessary, and may contribute to misunderstandings about the Corps' surplus water authority. When exercising its authority under Section 6, the Corps does not make judgments about beneficial uses of water, as that is a prerogative of the States. (The proposed rule recognizes this, and would more clearly provide for coordination of surplus water determinations with other federal agencies, States, Tribes, and the public, to respect their prerogatives and to ensure that proposed surplus water withdrawals will not interfere with any then existing lawful uses.) The phrase ''more beneficially used'' in the existing

guidance was intended to mean that the Corps may exercise its judgment when determining whether water is needed in order to accomplish an authorized federal purpose, and, if not, whether it should be made available for domestic and industrial use as ''surplus water'' within the meaning of Section 6. It was not intended to suggest that the Corps would determine the relative priority that should be assigned to individuals' requests for surplus water for different beneficial uses.

The Corps proposes to offer a new definition of ''surplus water'' in order to correct these potential misunderstandings, to more clearly distinguish uses of surplus water under Section 6 from the inclusion of storage under the WSA, and to reaffirm the Corps' intention not to interfere with State, Tribal, or other federal reserved water rights when it provides for surplus water uses by others. The proposed rule would define ''surplus water'' to mean water, available at any Corps reservoir, that is not required during a specified time period to accomplish an authorized purpose or purposes of that reservoir, for any of the following reasons—

(i) because the authorized purpose or purposes for which such water was originally intended have not fully developed; or

(ii) because the need for water to accomplish such authorized purpose or purposes has lessened; or

(iii) because the amount of water to be withdrawn, in combination with any other such withdrawals during the specified time period, would have virtually no effect on operations for authorized purposes.

This proposed definition would focus more closely on the precise language of Section 6, beginning with the term ''surplus'' itself. Defining ''surplus water'' to mean water that is not required in order to accomplish an authorized purpose is a reasonable construction of the statutory language, in light of its ordinary meaning as well as the legislative history that indicates Congressional intent. The term ''surplus'' has a common meaning of ''the amount that remains when use or need is satisfied.'' Merriam-Webster Online Dictionary (2013), *available at http://www.merriam-webster.com/dictionary/surplus.* The U.S. Supreme Court found the meaning of ''surplus water'' in Section 6 ''plain enough'' on its face, *i.e.,* referring to ''all water that can be made available from the reservoir without adversely affecting other lawful uses of the water.'' *ETSI Pipeline Project,* 484 U.S. at 506 & n.3. Under that reasoning, even though certain water might currently be used to benefit other authorized purposes—*e.g.,* increased recreational opportunities or greater hydroelectric generation—if it is not needed in order to accomplish those purposes, it may reasonably be considered ''surplus'' within the meaning of Section 6. The proposed definition of ''surplus water'' recognizes that water might not be needed under several different circumstances. As previously mentioned, the Corps would like to solicit comment on whether there could be a minimum or *de minimis* threshold amount of water that could be removed from a reservoir and defined as having virtually no effect on reservoir operations, *i.e.,* surplus water.

Water may be available because a Corps reservoir was intended to serve a purpose that has not yet fully developed; in the meantime, water is not needed for that purpose. Similarly, if the need for water to accomplish an authorized purpose or purposes decreases over time, water might be available for withdrawal without impairing any authorized purpose. Under these circumstances, while the water may not be needed in order to accomplish authorized purposes, it is conceivable that water has been used to provide additional benefits for authorized purposes, and making the water available for domestic and industrial use could result in certain reductions in benefits (including revenues or benefits foregone) or for other authorized purposes. But so long as the water is not needed in order to accomplish the authorized purposes, consistent with Congressional expectations set forth in the authorizing legislation, the water may still be considered ''surplus water.'' See 1986 Army General Counsel Opinion. And as the U.S. Supreme Court noted in *ETSI Pipeline Project* v. *Missouri,* ''[t]his view is consistent with the language of the Act, for if the term 'surplus water' could never include any of the water stored in the reservoirs themselves, then the caveat Congress enacted in § 6—that this grant of authority shall not 'adversely affect then existing lawful uses of such water'—would have been irrelevant because this grant of authority could never adversely affect any existing or projected uses of such water.'' [12]

In other circumstances, the amount of withdrawals for domestic or industrial use that are proposed might be so small, both individually and collectively, that the withdrawals would have virtually no effect on any authorized purpose; in that sense too, the water would not be ''needed'' for an authorized purpose, and could be considered ''surplus.'' In any of these examples, the withdrawal of the water for domestic or industrial use would not impair the efficiency of the project for its authorized purposes, nor would the grant of provisional authority to withdraw the water require a permanent reallocation of storage, as under the WSA.[13] If, on the other hand, water proposed to be withdrawn under Section 6 is determined to be needed for an authorized federal purpose, such as hydropower generation, or releases to comply with downstream flow requirements that may be necessary to comply with federal law such as the CWA or ESA, the water would not be ''surplus'' within the meaning of Section 6. The proposed rule would require that surplus water determinations specify the time period in which an amount of surplus water has been determined to be available, taking into account the requirements of authorized project purposes. The Corps solicits comments on monitoring procedures that the Corps might implement to assess whether withdrawals under a surplus water contract either cause an exceedance of the amount of water determined to be surplus or utilize reservoir storage that is allocated to another active purpose.

In addition, the newly proposed definition of ''surplus water'' would clarify the Corps' authority to accommodate certain categories of withdrawals by non-federal parties that the Corps has previously allowed under other authorities, or has simply facilitated without citing any specific authority. A 2012 review of withdrawals from Corps reservoirs suggested that many water withdrawals are occurring without a formal water supply agreement, clear statement of authority for the withdrawals, or reimbursement to the Treasury for costs incurred by the Government in accommodating those uses. In the past, the Corps sometimes accommodated such uses under

[12] *ETSI Pipeline Project* v. *Missouri et al.,* 484 U.S. 495, 506 n.3 (1988). As noted, the proposed rule would include provisions for coordination with federal Power Marketing Administrations when determining surplus water and evaluating impacts to the authorized hydropower purpose.

[13] The Corps' authority under Section 6 to determine whether water is not needed for an authorized purpose and is therefore ''surplus water'' within the meaning of Section 6 is also consistent with Congress's longstanding recognition that the Corps has inherent discretion to determine how its projects should be operated for their authorized purposes, and to make certain adjustments in the operation of projects over time, provided that the Corps does not add or delete authorized purposes, or change any other requirements imposed by law. *See Environmental Defense Fund* v. *Alexander,* 467 F. Supp. 885, 900–01 (D. Miss. 1979) (citing Report on the Civil Functions Program of the Corps of Engineers, United States Army, 82d Cong., 2d Sess. 1 (1952)).

authorities such as the Independent Offices Appropriations Act (IOAA), charging an amount that was considered appropriate to offset the federal cost in providing the water service. ER 1165–2–105, Change 10 (February 18, 1972). That practice ended after a 1986 Army General Counsel opinion called into question whether the IOAA was truly intended to serve as a water marketing statute. Susan Crawford, General Counsel, Department of the Army, Memorandum for the Assistant Secretary of the Army (Civil Works), Subject: Proposal to Withdraw Water from Dworshak Dam for Use by the City of Orofino (23 May 1986); ER 1105–2–100 at 3–34, ¶ 3–8.b(7); E–212, ¶ E–56(d). In other cases, the Corps simply granted easements to water users to make withdrawals from Corps reservoirs, without requiring a separate water supply agreement or charging any fee in connection with the water supply use. See ER 1165–2–105 (September 18, 1961); (ER) 1165–2–119 at ¶ 8.d (Sept. 20, 1982); and Major General William F. Cassidy, Assistant Chief of Engineers for Civil Works, to Major General Frank M. Albrecht, U.S. Army Engineer Division, South Atlantic, Dec. 29, 1959 (opining that it was not practical at that time to enter into contractual agreements for small withdrawals, but recognizing that over time, such withdrawals could aggregate and ''get out of hand''). In 2008, the Corps updated its real estate policies to clarify that easements supporting water supply agreements should not be issued before a water supply agreement has been executed; but that guidance did not determine the circumstances in which a water supply agreement is required, or what specific authority would apply to a particular withdrawal. To the extent that water may be withdrawn from a Corps reservoir without affecting operations for authorized purposes, for any of the reasons set forth in the proposed definition, Section 6 provides an appropriate authority for the Corps to approve the withdrawal.

Finally, the proposed definition of surplus water would omit the phrase ''water that would be more beneficially used as municipal and industrial water than for [another] authorized purpose,'' which appears in the existing ER 1105–2–100 definition of ''surplus water.'' The Corps does not determine beneficial uses; such determinations are made through water rights allocation systems, and the Corps operates its reservoirs for federal purposes in a manner that does not interfere with beneficial uses of water under those systems. Nor does the Corps trade off authorized federal purposes against beneficial uses when it makes surplus water available under Section 6: Instead, the determination that water is ''surplus'' rests on the premise that the water can be withdrawn for beneficial use without interfering with the accomplishment of the authorized federal purposes of the reservoir and applicable federal laws such as the CWA and ESA. The proposed rule would recognize that surplus water determinations require both technical and legal analysis of the circumstances and project authorization. The proposed rule would require that before making surplus water determinations, the Corps will coordinate with States, Tribes, and federal agencies, and will provide notice and opportunity for public comment. At projects with a hydropower purpose, under the proposed rule, the Corps would coordinate surplus water determinations in advance with the applicable Federal PMA, and utilize in its determinations any information that the PMA provides regarding potential impacts to the federal hydropower purpose, including revenues and benefits foregone. To the extent that water is determined to be required for a federal purpose, it would not be considered ''surplus'' under the proposed rule.

(1) Alternative Definition of ''Surplus Water'' Excluding ''Natural Flows'' (Missouri River Basin Views)

In response to proposed Corps actions in the Missouri River basin, representatives of a number of States have expressed their views that the ''natural flows'' (*i.e.,* waters which would have been available even without the Corps' reservoirs) of the Missouri River remain subject to the States' authority to allocate for beneficial use; that the Corps should not deny access to such ''natural flows'' within Corps reservoirs; and that the Corps should not charge storage fees to users who are making withdrawals of ''natural flows.'' *See* U.S. Army Corps of Engineers, Omaha District, Final Garrison Dam/Lake Sakakawea Project, North Dakota, Surplus Water Report, Vol. 2, App. B (March 2011) (finalized July 13, 2012), available at *http://cdm16021.contentdm.oclc.org/cdm/ref/collection/p16021coll7/id/37.* (comments submitted by representatives of Montana, North Dakota, and South Dakota); *see also* Letter from the Western States Water Council to the Assistant Secretary of the Army (Civil Works) (August 6, 2013) (on file). These stakeholders have advocated that the Corps should adopt a policy that distinguishes between ''stored water'' and ''storage capacity'' and ensures that the ''natural flows'' are not considered to be stored water. Accordingly, these stakeholders believe that the Corps' definition of ''surplus water'' should be limited to waters that are stored in a Corps reservoir, and should exclude the natural flows that would be available absent the reservoir. They believe that citizens of the Missouri River basin States should have unlimited access to the ''natural flows'' of the Missouri River, and not be required to enter into a water supply contract or charged a fee for the water allocated from the ''natural flows.'' They cite to state and federal law in support of the alternative definition, including their State constitutions and Section 1 of the 1944 Flood Control Act. *See generally* The Law of the Missouri, 30 S.D. L. Rev. 346 (1984–1985).

Although the Corps has considered these views, it is not convinced that the alternative definition suggested by upper-basin stakeholders is the most supportable reading of the 1944 Flood Control Act and its pertinent amendments. Rather, the Corps is proposing clarifications and changes to the agency's interpretation of the statutory term ''surplus water'' and the pricing methodology for contracts under Section 6 (discussed below). The Corps acknowledges that the allocation of waters for beneficial use is a prerogative of the States, and the Corps may not deviate from Congressional direction—in its existing practice, or under the proposed rule—by interfering with beneficial uses authorized by the States when it makes contracts for surplus water uses from Corps reservoirs. Section 6 refers to water that is ''available at'' a Corps reservoir, and does not distinguish between flows that would exist with or without the reservoir. Accordingly, the Corps' proposed definition of ''surplus water'' would no longer refer to ''stored'' water, and the Corps' pricing methodology under Section 6 would no longer include charges associated with the cost of providing or maintaining reservoir storage. Under the proposed rule, as long as surplus water is available at a Corps reservoir, and its withdrawal would not interfere with any then-existing beneficial use (including water uses determined under state law), the Corps may authorize its withdrawal under Section 6, and will not require the user to enter into a separate water supply agreement or pay for reservoir storage costs. Instead, under the proposed rule, the Section 6 authorization would be incorporated into the real estate easement that is already required, and there would be no additional cost for surplus water storage (see section I.C.2(e), below).

As further discussed below, the Corps believes that its implementation of Section 6 under the proposed rule would enable the Corps to more easily authorize uses of surplus water where it is available, without interfering with state prerogatives to determine beneficial uses, and without requiring

users to pay for storage costs if they do not need or desire reservoir storage. Additionally, the proposed changes are intended to clearly distinguish the Corps' accommodation of surplus water uses under Section 6 from the Corps' inclusion of storage for water supply uses under the WSA. For those reasons, the Corps believes that its proposed definitions and policies under Section 6 are consistent with the statutory text and Congressional intent behind Section 6.

The Corps specifically invites all interested parties to comment on the proposed definition of ''surplus water,'' as well as an alternative definition of ''surplus water'' that would exclude the ''natural flows'' from stored water in the Missouri River mainstem reservoirs thereby precluding the ''natural flows'' from being considered surplus waters for purposes of Section 6.

b) Definition of ''Reservoir'' Under Section 6

Section 6 applies to ''any reservoir under the control of the Department of the Army.'' In Section 6, Congress did not specifically define the term ''reservoir,'' but was evidently concerned with Corps impoundments of water that might be made available to States, municipalities, private concerns, or individuals for domestic and industrial use, a concept that is consistent with common understandings of the term ''reservoir''—*e.g.,* ''a usually artificial lake that is used to store a large supply of water for use in people's homes, in businesses, etc.'' [14] Thus, the Corps interprets the term ''reservoir'' in Section 6 broadly to include any facility, under the operational control of the Corps, that impounds water and is capable of being operated for multiple purposes and objectives. Any other Corps water resource development facility that does *not* impound water, or that may *not* be operated for multiple purposes and objectives, could not reasonably be expected to serve as a source of water supply for others, and therefore would not be included within the proposed definition of ''reservoir'' under Section 6. A similar definition has been proposed for projects subject to the WSA.

c) Definition of ''Domestic and Industrial Uses'' under Section 6

As discussed above, Congress deliberately employed the phrase ''make contracts . . . for domestic and industrial uses for surplus water'' in Section 6 in place of other language that could have suggested that the Corps owned, and was literally selling, the water in its reservoirs. Congress did not define the phrase ''domestic and industrial uses.'' However, the structure of the Flood Control Act of 1944 (including comparison of Sections 6 and 8), and the legislative history, support the conclusion that the phrase was intended to distinguish beneficial uses that could be accommodated by the Secretary of the Army under Section 6 from ''irrigation purposes'' that could be accommodated under the Reclamation laws, through a different process involving the Secretary of the Interior and Congress, under Section 8. In enacting Section 6, the Senate considered and ultimately settled on the phrase ''make contracts . . . for domestic and industrial uses for surplus water'' in order to clarify that the authorization to the Secretary of Army to make contracts for surplus water uses would neither modify the federal reclamation laws, including the repayment provisions under those laws, nor interfere with the authority of the Secretary of the Interior under the federal reclamation laws.[15] Section 6 was enacted at the same time as Section 8 of the Flood Control Act of 1944, which authorizes the Secretary of the Interior to ''construct, operate, and maintain, under the provisions of the Federal reclamation laws,'' ''additional works . . . for irrigation purposes'' at Corps reservoirs, with the approval of the Secretary of the Army, and after specific authorization by Congress of the additional works. Public Law 78–534 § 8, 58 Stat. 891 (Dec. 22, 1944) (codified as amended at 43 U.S.C. 390). Section 8 further provided that Corps reservoirs ''may be utilized after December 22, 1944, for irrigation purposes only in conformity with the provisions of this section.'' *Id.*

Read together, in the context of the Flood Control Act of 1944, Sections 6 and 8 make clear that Congress assigned different authorities and responsibilities to the Department of the Interior and the Department of the Army. The Secretary of the Interior was authorized under Section 8 to construct and operate federal irrigation works, in accordance with the federal reclamation laws, pursuant to specific authorizations by Congress. The reclamation laws, like the WSA, generally provide for the recovery of federal investment costs by end users. The Secretary of the Army was given a different authority under Section 6, to enter into contracts for surplus water for domestic and industrial uses, when surplus water is available at a Corps reservoir. Section 6 does not require the recovery of federal investment costs, but rather, authorizes the Secretary of the Army to establish a ''reasonable'' price. If Section 6 had been interpreted to authorize the Secretary of the Army to store and deliver irrigation water to users for whom Congress had authorized the Secretary of the Interior to construct separate irrigation works, the potential would have existed for the Corps to dispose of ''surplus water'' in a manner that would defeat the purpose of the separate, federal irrigation works.[16] Moreover, because Section 6 grants broad discretion to the Secretary of the Army to establish prices for contracts for uses of surplus water at Corps reservoirs, members of Congress expressed concern that those prices could undermine the objective under the federal reclamation laws of reimbursing the Treasury for the cost of constructing federal irrigation works, if both Secretaries were selling water for the same purposes on different terms.[17]

These problems may be avoided, and the two sections harmonized, by an interpretation of the ''domestic and industrial uses'' under Section 6 that clearly distinguishes those uses from irrigation uses under the federal reclamation laws. The definition of

[14] *See http://www.merriam-webster.com/dictionary/reservoir.*

[15] *See* 90 Cong. Rec. 8545–8549 (Nov. 29, 1944); *id.* at 8548 (text of proposed amendment by Sen. O'Mahoney that would authorize the Secretary of War ''to contract for water storage for any beneficial uses or purposes''; statement of Sen. O'Mahoney that proposed amendment would enable the Secretary to make surplus waters ''available for any purpose, domestic irrigation or otherwise, which residents in the neighborhood or in the vicinity affected may desire,'' but would also require the Secretary ''to take into account the fundamental principles which have governed the distribution and use of water in the West,'' *i.e.,* the Reclamation laws); *id.* (statement of Sen. Hayden that to enable ''the Secretary of War also to sell water for irrigation uses on such terms and conditions as he may prescribe'' would ''change the basis of the reclamation law''); *id.* at 8548–49 (statement of Sen. Hatch expressing concern that proposed O'Mahoney amendment could authorize the Secretary of the Army to ''construct dams and reservoirs, and to supply water for purposes which would be entirely removed from the reimbursable features, as well as the acreage limitations and the other basic foundations of our irrigation law''); *id* at 8549 (statement of Sen. Millikin that ''section 4 [*i.e.,* the later renumbered Section 6], the [O'Mahoney] amendment we have been considering, and the succeeding amendment [Section 8] to be offered have the combined purpose of not subjecting all of the detail of the reclamation law to projects where the Army engineers have a reservoir in the middle of an existing privately owned irrigation system, where those who have that private irrigation system are in independent position to take the water and therefore should not be required to go through all the incidents of a reclamation project started from grass roots'').

[16] *See* 90 Cong. Rec. 8549 (Nov. 29, 1944) (statement of Interior Secretary Harold Ickes and ensuing debate).

[17] *Id.*

''domestic and industrial uses'' in the proposed rule therefore excludes irrigation uses that Congress intended to be provided for pursuant to the federal reclamation laws under 43 U.S.C. 390. The phrase does not, however, clearly exclude other uses of water for agricultural or other purposes in accordance with State law, in circumstances where Congress did not intend those particular uses to be provided for through the construction of federal irrigation works. Given Congress's clear concern that uses of surplus water should not adversely affect any then existing lawful use, it does not seem reasonable to interpret the term ''domestic and industrial uses'' in a manner that would preclude a user from exercising a lawful right to use water for agricultural purposes, when that right could be facilitated through withdrawals of surplus water from a Corps reservoir in the absence of federal irrigation works, or to exclude all uses for activities that might be deemed commercial and therefore not encompassed within the phrase ''domestic and industrial uses.''

Accordingly, the Corps proposes to define the term ''domestic and industrial uses'' under Section 6 to mean ''any beneficial use under an applicable water rights allocation system, other than irrigation uses as provided under 43 U.S.C. 390.'' We believe this definition is consistent with the plain text of Sections 6 and 8, their relationship in the Flood Control Act of 1944 and its legislative history, and the Congressional intent manifested therein that the authority of the Secretary of the Army to make contracts for surplus water uses under Section 6 should remain distinct from the authority of the Secretary of the Interior under Section 8 to provide for irrigation uses of Corps reservoirs pursuant to the reclamation laws and subsequent Congressional authorizations. To interpret the phrase otherwise, as excluding all agricultural uses of surplus water, is not mandated by the plain language of the statute and would, in the Corps' view, be inconsistent with Congress's intent that persons holding valid water rights should be able to withdraw surplus water from a Corps reservoir, when doing so would not interfere with authorized federal purposes or with any then existing lawful use, and when no federal irrigation works of the Department of the Interior are available to accommodate the particular use of surplus water. Under this proposed definition of ''domestic and industrial uses,'' certain agricultural uses of surplus water could be accommodated under Section 6. However, if a potential surplus water need could be satisfied through authorized irrigation works of the Department of the Interior, pursuant to 43 U.S.C. 390, the Corps would not consider that water need to constitute a ''domestic [or] industrial use,'' and would not enter into a surplus water agreement for direct withdrawals by a nonfederal entity from a Corps reservoir to satisfy that need. Under such circumstances, the use would constitute an ''irrigation use'' within the meaning of 43 U.S.C. 390, and that provision of law, not Section 6, would be the appropriate vehicle for the federal government to accommodate the water need.[18]

In proposing this definition, the Corps recognizes that today, water is used for many purposes, and hence questions can arise as to what uses are covered by the phrase ''domestic and industrial uses.'' For example, the Corps recognizes that water has been withdrawn by private individuals and entities from the Corps' Missouri River mainstem reservoirs for a variety of uses, and that this has generated questions about whether these uses should be classified as ''domestic'' or ''industrial.'' Some of the withdrawals are for domestic household uses, and some in furtherance of activities which more aptly might be characterized as commercial in nature. Other withdrawals are in aid of agricultural activities that are taking place in areas where no other irrigation delivery system exists. Previous Corps guidance suggests that ''crop irrigation'' is not a use that can be accommodated under Section 6 (or the WSA), but does not define that term or elaborate on its meaning.[19] The Corps considers a definition of ''domestic and industrial uses'' that would exclude all agricultural and commercial uses of water to be unduly rigid and undesirable from practical and policy perspectives. Interpreting ''domestic and industrial uses'' in a manner that would preclude the Corps from making surplus water available to an individual who is entitled under an applicable water rights system to use that water for commercial or domestic agricultural needs, in circumstances where the user would not otherwise be able to access that water, does not seem reasonable. In addition, federal reclamation projects and facilities exist only in the Western States, and it is unreasonable to assume that Congress intended to preclude any agricultural or commercial uses of water from a Corps reservoir in other States, where no federal irrigation works have been constructed pursuant to the federal reclamation laws.[20] The Corps believes that some agricultural and commercial uses can be accommodated within ''domestic and industrial uses'' of surplus water, provided that those uses do not conflict with the meaning of ''irrigation purposes'' under 43 U.S.C. 390.

Moreover, the Corps recognizes that States define beneficial uses and water rights differently, and what might constitute an irrigation use under the water rights allocation system of one State might be considered a public or domestic use under applicable systems in another State. When it exercises its authority under Section 6, the Corps does not determine water supply needs, or allocate consumptive water use rights. Instead, the Corps is simply making a determination that a particular amount of water is not required for an authorized federal purpose. Upon making that determination, the Corps may enter into an agreement with a surplus water user to enable that user to withdraw that water, provided that the user has a valid water right. The determination and approval of beneficial uses is made separately, under an applicable water rights allocation system, not by the Corps itself. By defining ''domestic and industrial uses'' under Section 6 to mean ''any beneficial use under an applicable water rights allocation system, other than irrigation uses under 43 U.S.C. 390,'' the Corps would respect

[18] 43 U.S.C. 390 also provides for the interim irrigation use of storage that has been allocated to municipal and industrial water supply in a Corps reservoir but is not under contract for delivery. *See* Water Resources Development Act of 1986, Public Law 99–662, § 931, 100 Stat. 4082 (Nov. 17, 1986) (codified at 43 U.S.C. 390). Under such circumstances, which do not involve any determination of ''surplus water'' pursuant to Section 6, the Corps may enter into interim contracts for irrigation uses under 43 U.S.C. 390, not Section 6. As of 2012, three such interim irrigation agreements were in effect at Corps reservoirs. *See* 2011 M&I Water Supply Database at 4.

[19] *See* ER 1105–2–100 at E–214 (Section 6 agreements ''may be for domestic, municipal, and industrial uses, but not for crop irrigation.'').

[20] This provision is reinforced by Congress's enactment of separate legislation in 1982, 43 U.S.C. 390ll, which makes clear that provisions of federal reclamation law apply only to Corps reservoirs where ''(1) the project has, by Federal statute, explicitly been designated, made a part of, or integrated with a Federal reclamation project; or (2) the Secretary, pursuant to his authority under Federal reclamation law, has provided project works for the control or conveyance of an agricultural water supply for the lands involved.'' *See also* S. Rep. No. 97–373 at 16 (April 29, 1982) (noting that ''court decisions and sporadic efforts . . . have served to create a shadow extending over all agricultural lands involved with Corps projects,'' and that purpose of 43 U.S.C. 390ll is to clarify that reclamation laws shall apply to Corps reservoirs only where Congress has expressly so provided).

the States' ability to define and allocate lawful uses within their boundaries, and would be able to make surplus water in its reservoirs available for the broadest possible extent of such uses, while respecting Congressional intent and avoiding interference with federal irrigation works or other activities of the Department of the Interior pursuant to the federal reclamation laws.[21]

d) Avoiding Adverse Effects on ''Then Existing Lawful Uses''

The proposed rule defines the term ''then existing lawful uses'' in Section 6 to mean ''uses authorized under a State water rights allocation system, or Tribal or other uses pursuant to federal law, that are occurring at the time of the surplus water determination, or that are reasonably expected to occur during the period for which surplus water has been determined to be available.'' The Corps has not previously defined this statutory term, but has recognized that in order to avoid interference with then existing lawful uses (including the CWA and the ESA), individuals or entities entering into surplus water agreements with the Corps must obtain and defend all necessary water rights. See ER 1105–2–100 at 3–32, E–202. The reference to ''Tribal or other uses pursuant to federal law'' is intended to recognize and protect Tribal reserved water rights, including reserved water rights that have not yet been quantified, or any other federal reserved water rights, such as those associated with military installations, or withdrawals pursuant to interstate compacts or other provisions of federal law (including the CWA and ESA).[22]

The proposed rule would require that before making surplus water determinations, the Corps will coordinate with States, Tribes, and federal agencies, and will provide notice and opportunity for public comment, to ensure that surplus water uses during the period under consideration will not interfere with any water rights that are already in place, or are expected to be in place during that period. This early coordination will enable responsible water resource agencies to verify that the proposed surplus water withdrawals are consistent with applicable water rights. The Corps is not authorized under Section 6 to enter into any contracts for surplus water uses that would interfere with any then existing lawful use. In addition, the proposed rule recognizes that it is the responsibility of private water supply users to secure any state water rights necessary to use water withdrawn from a Corps reservoir, further ensuring that there will be no tension between a contract for surplus water uses under Section 6 and any lawful use of water that may occur during the period of the Corps' surplus water determination.

e) Determining ''Reasonable'' Prices for Section 6 Agreements

Section 6 affords wide latitude to the Secretary of the Army to establish the terms of surplus water agreements, requiring only that the Secretary determine ''such prices and . . . such terms as [the Secretary] may deem reasonable.'' The term ''reasonable'' is not defined in Section 6, and Congress has provided no specific guidance on how the Secretary should make that determination. Congress has expressed its sense that when an agency provides ''a service or thing of value . . . to a person,'' that provision ''is to be self-sustaining to the extent possible.'' 31 U.S.C. 9701(a). And it is federal government policy that ''[w]hen a service (or privilege) provides special benefits to an identifiable recipient beyond those that accrue to the general public, a charge will be imposed (to recover the full cost to the Federal Government for providing the special benefit, or the market price).'' Office of Management and Budget (OMB) Circular No. A–25 Revised (July 8, 1993), *available at https://www.whitehouse.gov/omb/circulars_a025* (OMB Circular A–25).

Past Army guidance has suggested different approaches to determining reasonable prices for surplus water agreements, including the possibility of a standard minimum charge or a unit charge for relatively small amounts of surplus water. Since 1977, the Corps' internal guidance has indicated that surplus water agreements should include an annual charge that is equivalent to the cost that would be assessed annually in a long-term WSA agreement, that is, an annual charge equivalent to the cost of providing the amount of storage calculated to yield the desired withdrawals, amortized over a multi-year term, plus a share of operation and maintenance costs, and a share of any repair, rehabilitation, or replacement costs. See Engineer Regulation (ER) 1165–2–105, Change 15 (March 1, 1977); ER 1105–2–100, app. E and E–215 (April 22, 2000). This annual charge would be applied to each year of the contract term. Since the cost allocated to water supply in a WSA storage agreement is typically repaid over a thirty-year period, with interest, and since Section 6 contracts are typically for a shorter period, the cost of storage paid under a Section 6 agreement under this policy would be less than the total cost of storage that would be recovered under a WSA agreement. Current Corps policy provides that Section 6 agreements shall normally be limited to five years, although in practice, some Section 6 contracts have lasted longer than that. The Corps does not have an established practice of applying the ER pricing methodology, as the few surplus water contracts currently in existence that cite Section 6 (nine contracts, as of July 2016) do not fully apply that methodology, and only one involves annual fees.

In response to concerns raised by stakeholders in the Missouri River basin associated with surplus water reports at the Corps' mainstem reservoirs, and upon further consideration of the statutory text of both Section 6 and the WSA, the Corps has reconsidered its pricing methodology under Section 6. The current pricing policy set forth in the ER effectively conflates the provision of surplus water under Section 6 with the inclusion of storage under the WSA, and the Corps recognizes that this may not result in the most appropriate price for surplus water agreements, given the Congressional intent behind Section 6. The WSA authorizes the Corps to include storage in a reservoir project for water supply uses, making water supply an authorized purpose of the project, on the condition that State or local interests agree to pay the of share of project

[21] The Corps' proposed definition is also consistent with the definitions of the term ''irrigation water'' in 43 U.S.C. 390bb (''water made available for agricultural purposes from the operation of reclamation project facilities pursuant to a contract with the Secretary [of Interior]'') and in U.S. Department of the Interior, Bureau of Reclamation regulations at 43 CFR 426.2 (''water made available for agricultural purposes from the operation of Reclamation project facilities pursuant to a contract with Reclamation''). The use of ''irrigation water,'' as defined in those provisions, would not be a ''domestic [or] industrial use'' of surplus water under the Corps' proposed definition in these regulations.

[22] The definition and quantification of Tribal reserved water rights are beyond the scope of the proposed regulations. However, the Corps recognizes that Tribal reserved water rights enjoy a unique status under federal law, and that the exercise of such rights does not require the exercise of discretion by the Department of the Army to include storage in a reservoir under the WSA, or to make surplus water available under Section 6. The Department of the Interior is the federal agency charged with implementing the trust obligations of the United States with respect to Native American reservations. The Corps will coordinate surplus water determinations with the Department of the Interior and Tribal water resource agencies in order to identify any potential issues regarding lawful uses involving Tribes. Further, the Corps will grant access across federal lands controlled by the Corps when necessary to facilitate the exercise of Tribal reserved rights, without requiring a Section 6 or WSA agreement.

construction and operation costs allocated to that purpose. Under Section 6, water supply is not made an authorized purpose of the project, the Corps does not need to include storage in the project in order to allow surplus water withdrawals, and the statute does not require that surplus water users reimburse the Corps for a share of project construction and operation costs. Section 6 requires only that the Secretary determine a ''reasonable'' price, with no indication that Congress intended that price to include reimbursement of project costs in the same manner as water supply storage under the WSA.

Moreover, many stakeholders have questioned whether current or projected withdrawals from the Missouri River mainstem reservoirs utilize ''storage'' at all, and have objected to proposals to charge for surplus water withdrawals under Section 6 based on a share of the updated cost of storage. In the 1980s, the Assistant Secretary of the Army (Civil Works) considered changes to the Corps' then-existing Section 6 pricing policy, and expressed the view that ''withdrawals from the mainstem Missouri River reservoirs for municipal and industrial uses that do not depend upon storage for the level of dependability necessary to satisfy municipal and industrial demands should not require that a charge be assessed for such storage.'' [23] Those changes were never formally adopted, and the Corps' internal guidance has continued to indicate that surplus water agreements should be priced on the same annual basis as WSA storage agreements. Meanwhile, the Corps has continued to allow withdrawals from the Missouri River mainstem reservoirs without entering into surplus water contracts or charging for surplus water withdrawals.

In 2012, in connection with the Corps' final Surplus Water Report for Lake Sakakawea, the Assistant Secretary of the Army (Civil Works) determined that no charge should be made for surplus water uses proposed in that report, pending the outcome of notice and comment rulemaking to establish a nationwide Section 6 pricing methodology, with input from all interested stakeholders. In 2014, Congress enacted legislation precluding the Corps from charging for surplus water uses from its Missouri River mainstem reservoirs for a ten-year period beginning June 10, 2014. WRRDA 2014, § 1046(c). The legislation is expressly limited to the ten-year period and to the Missouri River mainstem reservoirs, and does not affect the application of Section 6 to surplus water stored elsewhere.

In reviewing the statutory language of Section 6, more recent legislation and legislative proposals, and in considering comments that have been offered on the Missouri River Surplus Water Reports, the Corps acknowledges that charging for Section 6 agreements on the same basis as WSA storage agreements (*i.e.,* by charging users an annual fee based on the higher of benefits foregone, revenues foregone, or the updated cost of constructing reservoir storage) is neither required by the statute, nor the best approach in all circumstances. The principles that make such charges reasonable under the WSA—statutory language requiring users to pay for storage costs, the physical inclusion of storage for water supply, and the addition of water supply as a new, long-term authorized purpose of the federal project—do not apply in the case of surplus water withdrawals that are provisionally approved for limited time periods under Section 6. The Corps has no statutory duty under Section 6, as it does under the WSA, to recover storage costs, and the Corps is not foregoing benefits that Congress expected the Corps to deliver for other authorized purposes when it authorizes surplus water withdrawals, if the surplus water has been determined not to be required in order to accomplish those purposes, or to comply with responsibilities under other federal law, such as the CWA or ESA.. Thus, the statutory text of Section 6 does not require that a ''reasonable'' price under Section 6 must include charges for benefits foregone, revenues foregone, or the updated cost of storage.

Moreover, the Corps is aware of the observations by some in the Upper Missouri River Basin that many existing and proposed withdrawals from mainstem reservoirs do not rely upon reservoir storage, and could be satisfied by the natural flow of the Missouri River absent the flow regulation and storage capacity afforded by the Corps' mainstem system. The Corps has previously acknowledged the principle that users should not be required to pay for benefits that they do not receive. While it may be technically possible, as the Assistant Secretary of the Army (Civil Works) observed in 1986, to evaluate whether particular surplus water withdrawals do or do not rely upon storage, Section 6 does not require the Corps to undertake such an analysis, and the time and cost required to perform such an analysis on a continuing basis may be considerable. Further, the federal government requires information about the quantity and volume of such withdrawals, in order to best manage the reservoirs. As discussed below, the proposed rule would clarify the Corps' view that long-term and permanent water supply needs that require the dependability afforded by storage should be accommodated by including storage as an authorized project purpose, as provided in the WSA, and not by making contracts for surplus water. When storage is allocated under the WSA to water supply, at the expense of other authorized purposes, the proposed rule would provide for appropriate allocation of storage costs to water supply. For withdrawals that are (individually or cumulatively) utilizing surplus water, as defined in the proposed rule, without any reallocation of storage from other purposes to water supply, a pricing methodology that seeks to recover only the costs incurred by the Corps in authorizing those withdrawals would be simpler to implement than determining a hypothetical cost of storage, and would be fully consistent with the statutory language of Section 6.

Accordingly, the proposed rule provides a new pricing policy to establish a ''reasonable'' price under Section 6, which would apply to all surplus water uses unless specific federal law provides otherwise (*i.e.,* the Water Resources Reform and Development Act of 2014 (WRRDA 2014), for Missouri River mainstem reservoirs until June 2024). For new Section 6 agreements at Corps reservoirs, prices for Section 6 surplus water contracts would include only the full, separable costs incurred by the

[23] Assistant Secretary of the Army for Civil Works Robert K. Dawson to Senator Quentin Burdick, March 5, 1986; S. Rep. No. 99–126 at 30 (July 16, 1985). The ASA(CW) made these observations at a time when Congress considered, but ultimately rejected, legislative proposals that would have precluded ''any payment for waters withdrawn by a State, or its political subdivisions, or by a nonprofit entity, for municipal or industrial uses . . . from a [Corps] Missouri River mainstem reservoir . . . if the existence of the reservoir involved will not enhance the dependability of the withdrawal under conditions of one hundred year, seven day low flow in the Missouri River.'' 99th Congress, 1st Session, S. 1567, sec. 236 (Jan. 8, 1986); S. Rep. No. 99–126 at 30. The ASA(CW) further observed, in a letter to Sen. Burdick, that a successful legislative proposal would have to (1) clarify the Corps' authority to allow water supply withdrawals from Corps reservoirs (2) provide a ''fair and equitable formula for allowing natural flows of the Missouri River to be withdrawn at no charge,'' and (3) recognize and protect the Corps' continuing obligation to operate for authorized project purposes. The ASA(CW) reiterated in this correspondence that ''we continue to be guided by the principle that beneficiaries of Federal water resources development projects should share in the costs of such projects in accordance with the guidance of Congress, [but] agree strongly with [Sen. Burdick's] position that there should be no payments where no benefit is received.'' ASA(CW) Dawson to Sen. Burdick, March 5, 1986.

Government in making surplus water available during the term of the surplus water agreement. These costs would be measured by estimating the full, separable costs that the Corps may incur by accommodating the surplus water withdrawals, such as expenses associated with administering and monitoring the contract, or by making temporary changes to reservoir operations to accommodate the surplus water withdrawals. Separable costs are those attributable solely to making the surplus water available. Congress has used separable cost pricing when Corps operations for water supply do not amount to a right to water storage. See, *e.g.,* Section 308 of the Water Resources Development Act of 1996 (Pub. L. 104–303); Section 110 of the Energy and Water Development Appropriations Act, 2005 (Division I of Pub. L. 108–447). The proposed rule adapts this concept to the criterion of ''full cost,'' as defined in OMB Circular A–25, to meet the Section 6 requirement for reasonable pricing of surplus water as follows. ''Full cost,'' as defined in OMB Circular A–25, ''includes all direct and indirect costs to any part of the Federal Government of providing a good, resource, or service'':

> These costs include, but are not limited to, an appropriate share of: (a) Direct and indirect personnel costs [. . .][;] (b) Physical overhead, consulting, and other indirect costs including material and supply costs, utilities, insurance, travel, and rents or imputed rents on land, buildings, and equipment [. . .][;] (c) [M]anagement and supervisory costs [ ][;] and (d) the costs of enforcement, collection, research, establishment of standards, and regulation, including any required environmental impact statements. (e) Full cost shall be determined or estimated from the best available records of the agency, and new cost accounting systems need not be established solely for this purpose.[24]

Based on the available information from existing surplus water contracts and estimated surplus water uses, the Corps expects that full costs incurred in connection with surplus water withdrawals would ordinarily be insubstantial. The service being provided when the Corps makes surplus water available pursuant to Section 6 is not (in contrast to storage included under the WSA) the allocation or reallocation of storage from another purpose or purposes to water supply, but rather, the authorization to withdraw, for a limited time period, surplus water that is already available at a reservoir. Because ''surplus water'' would be defined under the proposed rule as water that is not required during a specified time period to accomplish any authorized purpose of the project, and because the withdrawal infrastructure is provided by the non-federal water supply user, at no cost to the Government, the Corps does not expect to incur additional, direct or indirect personnel costs, physical overhead or other indirect costs, management and supervisory costs, or enforcement costs, associated with the withdrawals themselves. Certain of these costs may be incurred by the Corps when it makes determinations related to, but distinct from, the surplus water withdrawals, such as granting real estate easements to access a Corps reservoir, or evaluating and issuing regulatory permits for intake construction. Those costs, and those separate actions, would not be affected by this proposed rule, and would not be assessed in connection with the surplus water contract itself. Only the additional costs, if any, that the Government incurs as a result of the surplus water withdrawals—the full, separable costs of making surplus water available—would be included in the full cost charged in connection with surplus water contracts.

To the extent that such costs do occur, we consider it eminently reasonable, and consistent with OMB Circular A–25 and 31 U.S.C. 9701, that costs that the Government incurs in exercising its discretion should be borne by the users for whom the changes are being made. Any other costs directly attributable to surplus water withdrawals, such as construction and operation of intake facilities and pipelines, would continue to be the responsibility of the user, not the Corps, as provided under existing guidance. This proposed pricing methodology is intended to ensure that surplus water users pay only for costs that the Government incurs in making surplus water available, and to distinguish that pricing methodology from the methodology that is used for WSA agreements to conform to statutory requirements of the WSA. In most cases, the Corps expects that the amount charged for surplus water agreements under this methodology would be small, as surplus water withdrawals generally are not expected to involve significant costs to the Government.

The proposed rule would not apply retroactively to current contracts or to other uses that are currently authorized under separate authority. For current contract holders, any new contract following expiration of the current contract would adopt the new pricing criteria included in the final rule. Current surplus water withdrawals that are occurring pursuant to easements only, without a surplus water contract, would be reassessed when the easements expire, or within five years after the effective date of the final rule, whichever is earlier. Continued withdrawals after that time would need to be authorized under a combined easement and contract document. This will ensure that all uses of surplus water at Corps reservoirs, and any impacts from such uses on reservoir operations, are formally evaluated; and that all surplus water withdrawals are properly documented and authorized under Section 6. For surplus water uses where the Corps has been prohibited from charging a few for surplus water contracts, *e.g.,* the Missouri River mainstem reservoirs until June 2024, the Corps will not charge for surplus water contracts. Study costs associated with Section 6 surplus water reports would continue to be addressed in accordance with applicable law, which would not be affected by this proposed rulemaking; however, where consistent with applicable law, if water supply users are concerned about expediting a surplus water determination, they may opt to contribute funds to complete a study, similar to water supply storage reallocations.

The proposed Section 6 pricing methodology, while different from the methodology currently set forth in ER 1105–2–100, would not result in significant costs to surplus water users or to the United States Treasury. ER 1105–2–100 currently indicates that surplus water contracts should include charges equivalent to the annual price that a water supply user would pay if the Corps had permanently reallocated storage to water supply at that project under the WSA. That WSA price is based upon the cost that the Government would incur in constructing equivalent storage, or the revenues or benefits that the Government would forego by permanently reallocating the storage from another authorized purpose to water supply. However, in entering into contracts for surplus water, as defined in the proposed rule, the Corps would not be permanently reallocating storage to water supply, and would not be incurring the costs that would accompany such a reallocation under the WSA, or foregoing long-term revenues or benefits that would otherwise be realized in connection with authorized purposes. Instead, the Corps would only be entering into contracts allowing entities to withdraw water already available at a Corps

[24] Office of Management and Budget (OMB) Circular No. A–25 Revised ¶ 6.d(1) (July 8, 1993), *available at https://www.whitehouse.gov/omb/circulars_a025.*

reservoir, and not required in order to fulfill any authorized project purpose, for a limited time period. Under the proposed rule, surplus water users would be charged only the full, separable cost to the Government of making the surplus water available during that period.

The proposed rule would recognize the need for both technical and legal analysis of the circumstances and project authorization to determine whether water is required for an authorized purpose or to meet the requirements of the CWA, ESA or other federal mandates. Additionally, for projects with a federal hydropower purpose, the Corps would coordinate surplus water determinations in advance with the applicable Federal PMA, and utilize in its determinations any information that the PMA provides regarding potential impacts to the federal hydropower purpose, including revenues and benefits foregone. As provided in the proposed definition of ''surplus water,'' to the extent that water is determined to be required to fulfill the hydropower purpose, or any other authorized purpose, it would not be considered ''surplus'' under the proposed rule.

We believe that the proposed pricing methodology is both objectively reasonable and consistent with Congressional intent, given the differences between Section 6 and the WSA. It is also consistent with the policy that user charges will be sufficient to recover the full cost to Federal Government of providing service, resource, or good when the Government is acting in its capacity as sovereign, in this case, operating and maintaining the reservoir and adjacent lands where the water supply withdrawals are occurring. With regard to the Missouri River mainstem reservoirs in particular, we believe that the proposed rule would be consistent with past practice in authorizing surplus water withdrawals without charges, responsive to concerns that have been raised, and would avoid disruption and costs in connection with existing and anticipated withdrawals. Specifically, we anticipate that the proposed pricing methodology, and the proposed incorporation of Section 6 authorizations with real estate instruments required for reservoir access under separate law, would result in withdrawals continuing to occur from Missouri River mainstem reservoirs at no cost before June 2024, and at minimal or no cost thereafter. New surplus water users at the Corps' Missouri River mainstem reservoirs, and at any other Corps reservoirs where surplus water may be determined to be available, would not be required to pay for the cost of reservoir storage in connection with surplus water withdrawals. Withdrawals of surplus water as defined in the proposed rule would be unlikely to result in any significant direct costs to the Corps, and so we anticipate that any charges associated with surplus water agreements under the proposed rule would be minimal.[25]

Further, the proposed rule would increase standardization of Corps practice by ensuring that all uses of surplus water at a Corps reservoir are formally evaluated and authorized by the Corps. This would improve the Corps' operations of its reservoirs, by ensuring greater knowledge about the ongoing and potential withdrawals, including withdrawals for which storage is not allocated under the WSA. We invite comments from all interested parties on this pricing proposal.

The Corps acknowledges that in concept, there are multiple benefits conferred to those users making Section 6 withdrawals from Corps reservoirs, including an increased level of dependability to ensure that withdrawals can be made, and there could be a market value associated with such benefits. It is federal policy that user charges will be based on market prices (meaning the price for a good, resource, or service that is based on competition in open markets, and creates neither a shortage nor a surplus of the good, resource, or service) when the Government, not acting in its capacity as sovereign, is leasing or selling goods or resources, or is providing a service. Thus, as an alternative to the proposed pricing methodology, the Corps could incorporate the market price of water supply reliability or other benefits into its surplus water pricing policy. We solicit comments on whether the price of surplus water contracts should include the economic value of the water supply storage benefit these contracts provide (*e.g.,* greater reliability in withdrawing water from a reservoir), or reimbursement of indirect costs such as foregone hydropower revenue

(f) Documentation of Surplus Water Agreements

In response to issues raised by those who have expressed concerns about the requirement to execute multiple documents, the Corps proposes to simplify and streamline administrative processes under Section 6. Currently, ER 1105–2–100 envisions entering into a Section 6 surplus water agreement that is separate from any real estate instrument that is necessary to provide access to the reservoir for the purpose of making withdrawals. The granting of real estate interests occurs pursuant to separate statutes and regulations, and is not governed by Section 6 (or the WSA). The proposed rule would not alter those statutes and regulations, but it would combine the approval to withdraw surplus water (the surplus water contract required under Section 6) with the real estate instrument in a single document that would memorialize the agreement between the Corps and a nonfederal entity for access to a Corps reservoir to withdraw surplus water. That document would include charges pursuant to the proposed Section 6 surplus water pricing policy, and it would also include any applicable charges for the real estate interest. Charges for such real estate instruments are determined under other laws, regulations and policies, and would not be affected by this proposed rule.

By combining the surplus water contractual terms with the real estate instrument, the Corps expects to simplify and streamline the administrative processes associated with surplus water withdrawals, potentially avoiding delays and some transactional costs, compared to a process in which both a surplus water contract and a separate real estate easement would be required. Additionally, combining the two documents ensures greater consistency between them, avoiding past circumstances in which water supply

[25] In its final Surplus Water Report for Lake Sakakawea, for example, the Corps' Omaha District concluded that making 100,000 acre-feet of surplus water available for withdrawal over a ten-year period would not result in any changes to Missouri River mainstem system operations. U.S. Army Corps of Engineers, Omaha District, Final Garrison Dam/Lake Sakakawea Project, North Dakota, Surplus Water Report, Vol. 1 at ii (March 2011), available at *http://cdm16021.contentdm.oclc.org/cdm/ref/collection/p16021coll7/id/37*. Draft surplus water reports prepared for the other five mainstem reservoirs also indicated that no operational changes would be required for the surplus water withdrawals contemplated there. *See http://www.nwo.usace.army.mil/Missions/CivilWorks/Planning/PlanningProjects.aspx* (draft surplus water reports for Fort Peck Dam, MT, Oahe Dam, SD, Big Bend Dam, SD, Fort Randall Dam, SD, and Gavins Point Dam, SD). The pricing for surplus water agreements contemplated in those reports has been superseded by Section 1046(c) of the Water Resources Reform and Development Act of 2014, Public Law 113–121, 128 Stat. 1193 (June 10, 2014), which provides that no charges will be assessed under contracts for uses of surplus water stored in the Corps' Upper Missouri River reservoirs for ten years after June 10, 2014. If, under the proposed regulations, charges were imposed for surplus water uses after that ten-year period based on the full, separable costs incurred by the Corps by accommodating the withdrawals, such charges would be expected to be minimal, based on the figures contained in the Surplus Water Reports.

agreements have expired prior to easements, or vice versa. This new policy would also help prevent recurrences of situations where easements to support water supply withdrawals have been granted without execution of an underlying water supply agreement under either Section 6 or the WSA. This will help ensure that all uses of surplus water at Corps reservoirs are documented and authorized, and that any impacts from such uses on reservoir operations are formally evaluated.

(g) Duration of Surplus Water Determinations and Agreements

Finally, the proposed rule addresses the duration of surplus water determinations and surplus water agreements. The current Corps policy guidance does not specify any particular time period for surplus water determinations. The guidance states only that contracts for surplus water uses under Section 6 (surplus water agreements) should be made on a provisional or short-term basis, normally limited to five-year periods, noting that ''[w]hen [a] user desires long term use, a permanent storage reallocation should be performed under the authority of the Water Supply Act.'' ER 1105–2–100, app. E at E–214 to 215. The proposed rule would afford greater flexibility to designate the availability of surplus water based on the particular circumstances, and would conform the terms of surplus water agreements to the duration of the applicable surplus water determination.

Congress did not expressly limit the time period within which surplus water could be utilized under Section 6, leaving that and other contractual terms to the discretion of the Secretary of the Army, ''as [the Secretary] may deem reasonable.'' However, because hydrology, operations for authorized purposes, and other circumstances inevitably change over time, determinations of ''surplus water'' availability are inherently provisional, and the period of availability may vary depending upon the circumstances. Therefore, some time limitations are necessary for contracts for surplus water uses under Section 6.

The proposed rule would acknowledge the inherently provisional nature of surplus water determinations under Section 6, but would not impose any fixed, universally-applicable time limitation on surplus water agreements. Instead, the proposed rule would provide that determinations of the availability of surplus water must specify the time period in which surplus water is determined to be available, and contracts for the use of surplus water shall be for a term not to exceed the duration of the applicable surplus water determination. The Corps envisions that contracts could be for a shorter period than the length of time considered in the surplus water determination, and may, at the discretion of the Assistant Secretary of the Army (Civil Works), be extended or renewed upon request, if a surplus water determination is still applicable, or if a new surplus water determination is made. This would provide flexibility to accommodate surplus water uses for longer periods of time, if that were determined to be appropriate in particular cases, and if surplus water continues to be available.

As noted above, the proposed rule would allow the approvals that would be included in a Section 6 contract for surplus water uses to be incorporated into the real estate instrument that is necessary to provide access to a Corps reservoir for the purpose of making withdrawals. A single document would therefore memorialize the agreement between the Corps and a nonfederal entity for access to a Corps reservoir to withdraw surplus water. The duration of such agreements would be consistent with the duration of the applicable surplus water determination. The rule would continue to express the Corps' view that it is more appropriate to accommodate long-term or permanent water supply needs, such as those of communities that are served by public utilities or wholesale providers, under the WSA.

3. The Water Supply Act of 1958, 43 U.S.C. 390b (WSA)

The WSA authorizes the Secretary of the Army, acting through the Corps, to either add or expand water supply storage as an authorized purpose of a reservoir project, and encourages consideration of current and long-term water supply needs in the planning, design, and operation of federal reservoirs. Whereas Section 6 enabled the Corps to make water available at an existing Corps reservoir during any period in which surplus water is determined to be available, the WSA increased the Corps' flexibility to provide a greater role for water supply at all stages of project development, from planning, design and construction to continuing operations.[26] Congress, while recognizing the ''primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes,'' declared a national policy ''that the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple use projects.'' 43 U.S.C. 390b(a). Toward this end, the WSA authorizes the Secretary to make water supply an authorized purpose by including storage at any planned or existing Corps reservoir, for current or future municipal and industrial water supply needs, provided that ''State or local interests'' agree to pay for the cost of providing such storage, ''on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction as determined by the Secretary of the Army.'' 43 U.S.C. 390b(b).

The proposed rule would codify the Corps' interpretation of the ''reservoir projects'' to which the WSA authority applies; the terms ''water supply,'' ''municipal or industrial water,'' and ''municipal and industrial water supply''; the term ''include'' storage; and the limitations on modifications that would involve ''major structural or operational changes'' or that would ''seriously affect authorized purposes.'' In addition, the proposed rule would clarify how the Corps evaluates the effects of including storage for water supply, how the Corps allocates costs to water supply storage, and how the Corps considers return flows in connection with water supply withdrawals pursuant to WSA storage agreements.

(a) Definition of ''Reservoir Project'' and ''Project''

The proposed rule would define the terms ''reservoir project'' and ''project,'' as those terms are used in the WSA with respect to the Corps, to mean any facility surveyed, planned, or constructed, or to be planned, surveyed, constructed, or operated, by the Corps to impound water for multiple purposes and objectives. This definition incorporates the same, broad definition of ''reservoir'' that the Corps is proposing under Section 6, as discussed above. The Corps believes that this is

[26] *See* H.R. Rep. No. 85–1122 at 77 (1957) (recognizing ''need for more comprehensive authority for the inclusion of storage for water supply in reservoirs constructed by the Corps of Engineers''); 104 Cong. Rec. 11497 (June 17, 1958) (statement of Sen. Case that the Water Supply Act ''establishes a sort of new field on water supply''); S. Rep. No. 85–1710 at 133 (1958) (noting that proposed Water Supply Act ''makes possible provision of water-supply storage in reservoirs where it is apparent that there will be a future demand for such storage but where the demand is not pressing at the time of construction'').

the most faithful interpretation of the concept of a ''reservoir project,'' and is consistent with the text of the WSA, which refers to the inclusion of ''storage . . . to impound water,'' and provides that the cost of including water supply ''shall be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of *multiple purpose construction,*'' 43 U.S.C. 390b(b) (emphasis added).

In addition, the proposed definition of the terms ''reservoir project'' and ''project'' with respect to the Corps under the WSA would encompass either a single dam-and-reservoir facility (*i.e.,* a single ''reservoir'') or a system of improvements, depending on how the improvement or improvements are ultimately authorized by Congress. In this respect, the definition emphasizes the need to consider the Congressional intent for the facility in question, not solely as an isolated facility, but in light of the overall plan of improvement, if any, that Congress approved when authorizing the specific facility. This overall Congressional intent is critical when considering the statutory limitation on modifications under the WSA that would ''seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed,'' 43 U.S.C. 390b(e). The interpretation of the WSA authority to include storage for water supply in multipurpose Corps reservoir projects, including projects that are authorized, constructed, and operated as part of a system, is in conformity with the Corps' practice in implementing the WSA since 1958 and with opinions of the Corps' Chief Counsel.

(b) Definition of ''Water Supply,'' ''Municipal or Industrial Water'' and ''Municipal and Industrial Water Supply''

The WSA specifically authorizes the Corps to include storage to meet demands for ''municipal or industrial water,'' by including ''municipal and industrial water supply storage'' in its reservoirs. These terms and the term ''water supply'' itself are not defined in the WSA or in existing Corps guidance. The Corps proposes to define the terms ''water supply,'' ''municipal or industrial water,'' and ''municipal and industrial water supply'' for purposes of the WSA broadly to encompass all uses of water under an applicable water rights allocation system, other than irrigation uses as provided under 43 U.S.C. 390. This definition is consistent with the proposed definition of ''domestic and industrial uses'' for purposes of Section 6, and with generally accepted definitions of water supply.[27] It has additional support in the declaration of Congressional policy in the WSA that the Corps should cooperate with State and local interests ''in developing water supplies for domestic, municipal, industrial, and other purposes,'' 43 U.S.C. 390b(a). This statement evinces Congressional intent that the Corps should work collaboratively with State and local interests to make storage available for a broad range of water supply needs, and generally recognizes that the Corps does not allocate water rights or determine what beneficial uses are made of water that is withdrawn from its reservoirs.

As with the proposed definition of ''domestic and industrial uses'' under Section 6, the proposed definition of ''water supply,'' ''municipal or industrial water,'' and ''municipal and industrial water supply'' under the WSA excludes irrigation uses provided for under 43 U.S.C. 390, but does not foreclose all agricultural, commercial, or other uses that may be made of water withdrawn from Corps reservoirs. In this respect, the proposed definition recognizes the fact that Congress has placed the responsibility for delivery of irrigation water through federal facilities with the Department of the Interior through the federal reclamation laws. Further, the Corps typically enters into water supply storage agreements with public or private water suppliers, not with individuals or private corporations, and those water suppliers, not the Corps, treat and distribute the water withdrawn from Corps reservoirs to multiple users. The Corps does not regulate the end uses of that water, after it has been withdrawn from the Corps reservoir, and some agricultural water uses may be accommodated from public water supplies, without the construction of federal irrigation works. It is reasonable to conclude that some agricultural uses can be accommodated under the WSA within the definition of ''municipal and industrial water supply,'' provided that direct irrigation withdrawals that could be satisfied through authorized irrigation works of the Department of the Interior, or through an interim allocation of irrigation storage by the Corps, pursuant to 43 U.S.C. 390, are excluded from the definition of ''municipal and industrial water supply'' under the WSA. This ensures that the Corps' exercise of its authority under the WSA, like its exercise of its authority under Section 6, will not interfere with other federal authorities that specifically address irrigation uses.

(c) Meaning of the Phrase ''Storage May Be Included'' for Water Supply

The WSA authorizes the Secretary of the Army to add water supply as a purpose of a Corps project by providing that ''storage may be included in any reservoir project surveyed, planned, constructed, or to be planned, surveyed, and/or constructed'' by the Corps. The proposed rule would clarify and codify the Corps' longstanding interpretation of the term ''storage may be included'' to reflect the broad latitude that Congress afforded the Department of the Army to accommodate water supply needs through the planning, construction and operation of Corps reservoir projects, making water supply an authorized project purpose. Congress understood that storage could be made available for water supply at different stages of the development of a Corps reservoir project, and in different ways: By modifying the plans for an as-yet unconstructed project; by changing the physical structure of an existing project; or by changing the operations of an existing project. The term ''included'' encompasses all of these possibilities, and thus, both structural changes and operational changes to include water supply are expressly contemplated in the text of the WSA.

When the Corps evaluates a water supply request and determines that it can accommodate the request, the Corps considers operational changes that may be necessary, and determines an amount of storage that must be included in the reservoir in order to yield the amount of water to be withdrawn. This evaluation takes into account projected hydrologic conditions over a lengthy period of analysis, including projected inflows and losses from all sources, as well as other constraints such as flow requirements for water quality or other authorized purposes during that period. See ER 1105–2–100, app. E at E–225, tab. E–31 n.2; Engineer Manual (EM) 1110–2–1420, Hydrologic Engineering Requirements for Reservoirs (Oct. 31, 1997) §§ 11–2, 12–13. The storage necessary to yield the requested water supply withdrawals may be included either by adding additional storage capacity, or by changing operations to

[27] *See* U.S. Geological Survey, National Handbook of Recommended Methods for Water Data Acquisition, Ch. 11, sec. 11.C, ''Public Water Supply,'' available at *http://pubs.usgs.gov/chapter11/chapter11C.html* (citing Standard Industrial Classification (SIC) code 4941); *see also* U.S. Geological Survey, National Handbook of Recommended Methods for Water Data Acquisition, Ch. 11, sec. 11.C (defining ''public water supply'' to include water delivered by public and private suppliers ''to domestic, commercial, and industrial users, to facilities generating thermoelectric power, for public use, and *occasionally* for mining and irrigation'').

utilize existing storage differently. When water supply needs are accommodated under the WSA through operational changes, without structural modifications—that is, when the existing storage is used differently to accommodate new or additional water supply withdrawals—the Corps refers to this action as ''reallocating'' storage to water supply, either from storage that was previously designated for a particular purpose, or from a multipurpose, conservation storage pool that serves multiple purposes. The Corps uses the term ''reallocation'' to reflect the fact that storage will be used differently, and that costs associated with that storage, including operational costs, will be reallocated to water supply, and borne by the water supply user.

Thus, the proposed rule would clarify that the authority to ''include'' storage in a Corps reservoir under the WSA means making storage available for water supply by modifying the plans for an as-yet unconstructed project; by changing the physical structure of an existing project; or by changing the operations of an existing project. Whether an amount of storage is physically added for water supply, or is reallocated from within existing storage for water supply, the amount of storage included for water supply reflects the Corps' technical, engineering judgment that the reservoir project, as modified, can satisfy the projected water supply withdrawals during reasonably foreseeable circumstances. The inclusion of storage does not guarantee that water will actually be available to meet a given need at all times (since, for example, droughts more severe than the worst on record could occur). But the amount of storage included for water supply is intended, consistent with the design concept of a reservoir, to provide a dependable water supply, based on available information and reasonable projections of future conditions. The amount of storage included for water supply should be sufficient to yield the gross amount of water to be withdrawn or released, which also approximates the water supply benefit being afforded—the reference point for allocating project costs to water supply under the WSA.

When including storage under the WSA, the Corps does not determine how water supply needs should be satisfied within a region, allocate water rights, or sell water. Nor does the Corps take on the role of a water distributer, treating or actually delivering water through federal facilities to end users. Instead, the Corps facilitates the efforts of States and local interests to develop their own water supplies through nonfederal conveyance systems, in connection with the operation of a Corps reservoir project. Under the WSA, the Corps has broad discretion to make structural or operational changes to a Corps reservoir, in order to facilitate water supply uses of reservoir storage (subject to the limitations within the WSA, and compliance with other applicable laws and regulations). The proposed definition of the statutory phrase ''storage may be included'' for water supply makes clear that the Corps' role under the WSA is limited to making storage available in its reservoir projects, not constructing or operating water treatment or delivery systems, or obtaining water rights or permits on behalf of water supply users. It remains the sole responsibility of the water supply users to withdraw, treat, and deliver water from a Corps reservoir to end users, and to obtain whatever water rights may be required under State law.

(d) Determining the Cost of Including Storage for Water Supply

The WSA requires, as a condition of including storage to make water supply an authorized purpose of a Corps reservoir, that State or local interests must agree to pay for ''the cost of any [such] construction or modification,'' and that such cost ''shall be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction, as determined by the Secretary of the Army.'' The WSA enables users to repay the initial cost of including storage over a period of up to thirty years, with interest, and also requires payment of all operation, maintenance, and replacement costs allocated to water supply on an annual basis.[28] To effectuate these statutory requirements, Corps policy currently provides that entities contracting for the use of storage space in a Corps reservoir under the WSA must pay a share of project costs allocated to water supply, as well as a share of annual, joint-use operation, maintenance, repair, rehabilitation, and replacement costs (OMRR&R) for the project. ER 1105–2–100, app. E at E–201 to E–202. The Corps' existing guidance for determining an appropriate share of allocated project costs, including an annual share of OMRR&R, varies depending upon the method by which storage is to be included for water supply.

Where water supply is included in the plans for a reservoir prior to construction of that reservoir, the Corps employs the separable cost-remaining benefit (SCRB) method of cost allocation to determine the share of project costs allocated to water supply. This methodology allocates to each purpose included in a project its separable costs, which are the incremental costs associated with including that purpose in the project, as well as a share of the residual or remaining joint costs, which are equitably apportioned among all purposes in proportion to the share of overall project benefits that are expected to be realized for each purpose. ER 1105–2–100, app. E, app. E at E–239. Thus, a water supply user is required to pay all separable water supply costs (including any direct or specific costs due to water supply features), plus a share of the remaining, joint costs of the project. Water supply users are also required to pay a proportional share of annual OMRR&R costs thereafter. See *id.* at E–201, E–212, E–217–218, E–242, E–246–249.

Where water supply storage is added to an existing project through structural modifications, the non-federal sponsor is responsible for the direct costs of those modifications. In addition, current Corps regulations employ a willingness-to-pay concept, requiring the water supply user to pay an amount equal to fifty percent of the savings compared to the cost of the most likely alternative that could service the water supply need, in lieu of the proposed modification to the Corps reservoir.[29] The user is also required to pay a proportional share of annual OMRR&R costs. ER 1105–2–100 at 3–34, App. E at E–222 to E–223.

In cases where existing storage is to be used for water supply instead of for some purpose for which it was previously used, and no construction or structural modifications are necessary in order to include storage—*i.e.,* when existing storage is reallocated to water

[28] 43 U.S.C. 390b(b). As originally enacted, the WSA allowed the cost of water supply storage to be repaid over a period of up to fifty years, but for Corps of Engineers projects, this repayment period was later reduced to thirty years. *See* Water Resources Development Act of 1986, Public Law 99–662, Title IX, § 932(a), 100 Stat. 4196 (Nov. 17, 1986). *See also* Water Resources Reform and Development Act of 2014, Public Law 113–121, 1046(b) (June 10, 2014) (providing for notification, before each fiscal year, to non-Federal interests of estimated operation and maintenance expenses for that fiscal year and each of the subsequent four fiscal years).

[29] The Corps has identified only one instance in which it made a structural modification to an existing reservoir project under the WSA applying this cost-sharing concept. That modification for water supply was made in connection with modifications for ecosystem restoration at an existing project, and the project modifications and the Chief of Engineer's recommendations were specifically approved by Congress.

supply, without constructing new storage—the Corps determines the cost of storage based on the higher of benefits or revenues foregone, or the updated cost of storage. Revenues foregone consist of actual reductions in revenues to the U.S. Treasury as a result of the proposed action. Benefits foregone reflect any other reductions in benefits that would result from the proposed action, as evaluated in accordance with applicable evaluation criteria.[30] The updated cost of storage consists of a share of the original construction costs, in proportion to the percent of usable storage reallocated to water supply, updated to present day price levels. The water supply user also is responsible for paying the same proportional share of annual OMRR&R expenses.[31]

As a general matter, the Corps considers each of these historically utilized cost methodologies to be a reasonable way of allocating costs to a modification to include storage for water supply under the WSA, consistent with the principle stated in the text of the WSA that project costs should be allocated equitably among the authorized purposes in proportion to the benefits received, and consistent with standard evaluation criteria used for federal water resource development projects. Accordingly, the Corps is not proposing changes to these methodologies for allocating costs to water supply storage under the WSA, and would carry them forward in the proposed rule. At the same time, the Corps acknowledges that it is engaged in continuing discussions with federal PMAs regarding how some of the methodologies are applied in determining the federal hydropower impacts (revenues and benefits foregone) associated with a water supply storage reallocation. The Corps further recognizes the important role that PMAs perform in marketing and distributing hydroelectric power that is generated at Corps reservoir projects, and continuing cooperation between the agencies with respect to the operation of Corps projects for hydropower. Therefore, the proposed rule would expressly provide that whenever the Corps proposes to include storage for water supply under the WSA at a reservoir project (or system of projects, if authorized as a system) that has federal hydropower as an authorized purpose, the Corps will coordinate that proposal in advance with the PMA that is responsible for marketing that federal power. The Corps will utilize in its determinations any information provided by the PMA, including its evaluation of hydropower impacts and cost information regarding revenues foregone and replacement power costs, in determining the impacts of the proposed action, and the cost of storage to be charged to the prospective water supply user. The proposed rule would not address or affect the rates that PMAs may establish for hydroelectric power, nor any credits that might apply to the hydropower purpose for revenues foregone and replacement power costs, as those determinations are made through separate administrative processes.

The Corps solicits comments on the proposal to adopt its existing WSA pricing methodology in this proposed rule. Additionally, the Corps solicits comments on whether the Corps should collect data related to the cost of providing water supply storage, including the market price as defined in OMB Circular A–25 Revised, or the opportunity cost of making storage available for water supply, and whether the Corps should include the market price of water supply storage as an alternative pricing metric. The Corps' current pricing policy for water supply storage under the WSA takes into account revenues and benefits foregone, the cost of constructing reservoir storage, and the costs of operating and maintaining storage reservoirs. Consideration of alternative pricing methodologies, incorporating the market price of water supply storage or the opportunity costs associated with water supply storage, would require collection of additional data. Therefore, the Corps invites comments on whether it should collect such data and take that into account in determining the cost of storage under the WSA.

(e) Limitations on Authority To Modify Projects To Include Water Supply Storage

The WSA authorizes the Secretary of the Army to make changes to the plans, structure, or operations of authorized reservoir projects for the purpose of including water supply storage. Inherently, such changes could affect other authorized project purposes. That was a key purpose of enacting the WSA, as earlier law, including Section 6, did not authorize the inclusion of water supply as a purpose at the expense of other authorized purposes, once a project was constructed. Congress intended to confer a ''more comprehensive authority'' to include water supply storage by enacting the WSA, and delegated to the Secretary the discretion necessary to effectuate such changes, unless the effects on authorized purposes would be ''serious,'' or the degree of structural or operational changes would be ''major'':[32]

> (e) Approval of Congress of modifications of reservoir projects. Modifications of a reservoir project heretofore authorized, surveyed, planned, or constructed to include storage . . . which would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve major structural or operational changes shall be made only upon the approval of Congress as now provided by law.

WSA § 301(d), 43 U.S.C. 390b(e) (emphasis added).

The meanings of the key statutory terms ''seriously'' and ''major'' are not defined in the text of the WSA, and the Corps has never promulgated formal regulations interpreting the limitations included in this section. Past policy guidance documents have at times referred to amounts and percentages of usable storage as thresholds for internal, delegated approval authority under the WSA. For example, guidance developed in the mid-1970s indicated that reallocations of less than 50,000 acre-feet or 15 percent of storage ''are considered insignificant'' and do not require Congressional authorization; but that guidance did not address whether reallocations exceeding those thresholds would require Congressional

[30] The currently applicable criteria are set forth in Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies (March 10, 1983), available at *http://planning.usace.army.mil/toolbox/library/Guidance/Principles_Guidelines.pdf.*

[31] *See* ER 1105–2–100, app. E at E–216 to E–218. The Corps' current guidance lists ''replacement costs,'' in addition to benefits foregone, revenues foregone, and updated cost of storage, as an additional consideration when determining a price of reallocated storage. *Id.* at E–216 (cost of reallocated water supply storage ''will normally be established as the highest of the benefits or revenues foregone, the replacement cost, or the updated cost of storage in the Federal project.''). Replacement costs as a possible component of revenues or benefits foregone were noted in earlier Corps guidance (ER 1165–2–105, Change 15 (March 1, 1977), ¶ 11.d(1)(a)), but appear to have inadvertently been broken out as a separate category in the Corps' more recent guidance. As noted in the current ER 1105–2–100, replacement costs, to the extent they could be associated with a reallocation of storage within the Corps' discretionary authority at all, would normally be captured within a benefits or revenues foregone analysis. Generally, the updated cost of storage represents the highest of these costs in any event, and therefore serves as the basis for pricing reallocated storage. Accordingly, as a matter of clarification, the proposed regulations would only reference benefits foregone, revenues foregone, and updated cost of storage. To the extent any replacement costs would be incurred, those costs would be captured in the Corps' analysis, consistent with current guidance and practice.

[32] *See* 2012 Chief Counsel Legal Opinion at 34–35 & n. 151 (citing H. Rep. No. 85–1122, at 77 (1957)).

authorization, or how that determination would be made. *See* EM 1165–2–105, Water Supply Storage in Corps of Engineers' Projects (18 Sept. 1961), Change 15, para. 11.e (1 Mar 77)). Current Corps guidance still does not define what constitutes a ''major'' change or a ''serious'' effect on an authorized purpose, such that Congressional approval would be required. ER 1105–2–100 states only that the Assistant Secretary of the Army (Civil Works) has delegated authority to the Chief of Engineers to approve reallocations of up to 50,000 acre-feet or 15 percent of the ''total storage capacity allotted to all authorized purposes,'' and reallocation of lesser amounts are further delegated within the Corps, provided that the criteria of ''major structural or operational changes'' and ''severe [*sic*] effect[s] on other authorized purposes'' are not violated; but the Assistant Secretary retains authority to approve reallocations of greater amounts of storage, again, subject to the (undefined) statutory criteria. *See* ER 1105–2–100 at E–215 to E–216.

The Corps' current interpretation of the meaning of the terms ''seriously affect [authorized] purposes'' and ''major structural or operational changes'' has been set forth in two recent legal opinions issued by the Corps' Chief Counsel in 2009 and 2012. *See* Earl H. Stockdale, Chief Counsel to the Chief of Engineers, Subject: Authority to Reallocate Storage for Municipal & Industrial Water Supply under the Water Supply Act of 1958 at 7 (Jan. 9, 2009) (2009 Chief Counsel Legal Opinion); 2012 Chief Counsel Legal Opinion. In those opinions, the Chief Counsel examined the statutory language and Congressional intent behind those phrases, and concluded that Congress intended to confer broad authority on the Corps to modify reservoir projects to include storage for water supply, so long as the changes did not fundamentally depart from Congressional intent in authorizing the construction and operation of the project for other purposes. As those legal opinions explain, when Congress authorizes a Corps project for construction, it does so based on an understanding of the Corps' proposal for the construction and operation of the project, and of the purposes that the project would serve. These proposals, set forth in reports of the Chief of Engineers, are incorporated into the authorizing legislation for a project, and serve to define the ''authorized purposes'' of the project. See, *e.g., In re MDL–1824 Tri-State Water Rights Litig.,* 644 F.3d at 1187; 2012 Chief Counsel Legal Opinion at 10. Longstanding Congressional understanding, legal opinions, and caselaw have established that while the Corps has considerable discretion to exercise its engineering judgment to design and operate its projects, the Corps may not add or delete an authorized project purpose, nor materially alter the relative importance of authorized purposes, without the approval of Congress. See *Environmental Defense Fund* v. *Alexander,* 467 F. Supp. 885, 900–02 (D. Miss. 1979) (citing Report on the Civil Functions Program of the Corps of Engineers, United States Army, 82d Cong., 2d Sess. 1 (1952), and legal opinions of the Corps' General Counsel).

However, beyond this long-recognized, general discretion to adjust the design and operations of Corps projects for their authorized purposes, the WSA specifically authorizes the Corps to make structural or operational changes to include water supply as a new or expanded purpose, and to affect existing, authorized project purposes in so doing. Congress did not delegate to the Corps the authority to abandon the original, Congressionally-approved purposes of a project in favor of water supply, but Congress also did not set specific, numerical limits on the Corps' discretion to add water supply at the partial expense of other authorized purposes, or otherwise define the terms ''major'' and ''serious.'' Instead, Congress left the evaluation of what constitutes a ''major structural or operational change,'' or a ''serious'' effect upon an authorized purpose, to the judgment of the Corps. The Corps' definitive interpretation of those statutory terms is that they require the Corps, in each instance where it considers including storage for water supply, to consider whether any necessary structural or operational changes, and the effect of such changes on authorized purposes, would fundamentally depart from what Congress intended when it authorized the project for construction. The touchstone for this analysis depends in each case upon the specific legislation by which Congress authorized the project in question, and the expectations with regard to the project's purposes, design, and operations, that are set forth in the reports and other documents that Congress incorporated or approved in the authorizing legislation. Under the proposed rule, the governing standard for determining whether proposed changes ''would seriously affect the purposes for which the project was authorized, surveyed, planned or constructed,'' or ''involve major structural or operational changes,'' would be whether the proposed changes would fundamentally depart from what Congress expected when it approved the reports and authorized the project for construction. Modifications that cross this threshold would interfere with legislative prerogatives, and would require Congressional approval.

The Corps is not proposing in this rule to adopt fixed percentages or amounts of storage as threshold amounts as a per se rule for determining whether a proposed modification involves ''serious'' effects or ''major'' changes, for several reasons. First, it is unclear on what basis numerical thresholds could be established, and whether the same thresholds would make sense universally, given the wide disparities in the size and function of Corps multipurpose reservoirs nationwide. Earlier Corps guidance that indicated that reallocations of less than 15 percent or 50,000 acre-foot threshold would be considered per se *insignificant,* and therefore within the Corps' authority, was apparently based upon the fact that prior to that date, no discretionary reallocation exceeding those amounts had been carried out by the Corps. *See* 2009 Chief Counsel Legal Opinion at 7; 2012 Chief Counsel Legal Opinion at 38 n. 166. That guidance did not explain what analysis had gone into the prior reallocation decisions, or indicate how future reallocations should be evaluated with respect to the WSA limitations.

Second, the Corps' past statements regarding 15 percent or 50,000 acre-foot thresholds have often been misunderstood and misapplied in a manner that calls into question the usefulness of such thresholds. As noted, the previous guidance stating that reallocations below those amounts are *insignificant* has been misread to suggest that reallocations above those amounts are significant, and therefore ''major'' or ''serious.'' The Corps' current ER 1105–2–100 makes neither determination, but does reference a delegation of authority, from the Assistant Secretary of the Army (Civil Works) to the Chief of Engineers and below, for reallocations not exceeding 15 percent of total usable storage, or 50,000 acre-feet, ''provided that the [statutory] criteria are not violated.'' That delegation threshold, which is plainly not a determination of the statutory criteria (which apply above or below that threshold), has been misinterpreted frequently enough that the Corps' Civil Works Directorate found it necessary to issue further guidance in 2007 clarifying that the

delegation threshold is not a requirement for Congressional approval.[33] And a U.S. Court of Appeals decision, while not applying the ER 1105–2–100 threshold specifically, concluded that a particular, proposed reallocation of storage at one Corps reservoir constituted a ''major operational change'' based on the Court's findings regarding the percent of storage reallocated, but the decision itself cited multiple, conflicting figures to describe the percentage at issue, and did not relate that percent or amount of storage to any actual structural or operational changes, or any effects on authorized purposes.[34] A percentage limitation, particularly if misconstrued or misapplied, could result in arbitrary limits on the authority Congress intended to confer under the WSA.

Finally, it is significant that Congress has enacted fixed, numerical limitations for some purposes, including estimated costs allocated to future water supply under the WSA, but chose not to establish such numerical limitations to define the bounds of the Secretary's authority to make structural or operational changes or affect authorized purposes when including storage under the WSA.[35] Instead, Congress limited the Corps' authority to effects that are not ''serious,'' and changes that are not ''major,'' and left it to the Corps' discretion to interpret those terms, in light of Congressional intent, and the particular circumstances involved. In summary, the Corps has never issued guidance or adopted an absolute rule that allocations of storage in amounts greater than 15 percent of total storage or 50,000 acre-feet, or any other specific amounts, would result in serious effects to authorized purposes, or involve major structural or operational changes. Rather, such determinations have been made based upon technical and legal analysis of the particular circumstances involved, in light of Congressional intent as expressed in the original authorizing legislation and subsequent statutory enactments relevant to that project or system of projects. The relevant inquiry would include an assessment of what structural and operational changes would actually be involved, how these changes would affect authorized purposes, and the extent to which these changes and their effects depart from Congressional understandings when Congress authorized the project or system of projects involved. A simple amount or percent of storage may not be dispositive of any of these considerations.

Therefore, the proposed rule would, consistent with the Corps' legal opinions, interpret the statutory terms ''major'' and ''seriously'' in § 390b(e) to mean changes and impacts that fundamentally depart from Congressional intent for the particular reservoir project, as expressed through the authorizing legislation relevant to that project. If a project was authorized as part of a system of improvements, to achieve multiple purposes throughout that system, Congressional intent regarding the authorized purposes must be interpreted in this light. With respect to effects on authorized purposes, the Corps would need to consider, in light of the factual circumstances and the project authorizing documents, whether a proposed action would adversely affect any authorized purpose of the project, by materially diminishing the benefits that Congress expected to be realized in connection with that purposes. With respect to major structural or operational changes, the Corps would have to consider the degree of change from both a technical and a legal perspective, in light of project operations and Congressional intent for the project in question. The proposed rule would require that the Corps undertake both legal and technical analysis to determine whether a proposed storage reallocation constitutes a ''major structural or operational change'' and whether it ''seriously affects'' an authorized purpose of that project.

The Corps invites comments on the proposed interpretation of the statutory limitations on modifications that would ''seriously affect'' authorized purposes or involve ''major structural or operational changes.'' We also invite comments on whether it may be appropriate to adopt in the proposed rule a maximum threshold percentage or amount of storage that may be reallocated within the limits stipulated by the WSA.

For a project (or a system of projects, if authorized as a system) that has federal hydropower as an authorized purpose, the Corps recognizes the important role that PMAs perform in marketing and distributing hydroelectric power that is generated at Corps reservoir projects, and the need for continuing cooperation between the agencies with respect to the operation of Corps projects for hydropower. Therefore, the proposed rule would expressly provide that whenever the Corps proposes to include storage for water supply under the WSA at a reservoir project (or system of projects, if authorized as a system) that has federal hydropower as an authorized purpose, the Corps will coordinate that proposal in advance with the PMA that is responsible for marketing the federal power from the project. The Corps will utilize in its determinations any information provided by the PMA, including its evaluation and determination of the impacts to the hydropower purpose (revenues and benefits foregone), in determining whether those impacts would ''seriously affect'' the hydropower purpose or involve a ''major structural or operational change'' under the WSA. The proposed rule would not address or affect the rates that PMAs may establish for hydroelectric power, nor any credits that might apply to the hydropower purpose for revenues foregone and replacement power costs, as those determinations are made through separate administrative processes.

In cases where the Corps operates its reservoirs in coordination with the U.S. Department of Interior, Bureau of Reclamation (Reclamation) reservoirs or projects on the same river system, it is understood that whenever the Corps proposes to include storage for water supply under the WSA at a reservoir project or system of projects, the Corps will coordinate its evaluation of that proposal with Reclamation, and consider relevant information provided by Reclamation, including potential

[33] *See* Thomas W. Waters, Chief, Policy and Policy Compliance Division, Directorate of Civil Works, Headquarters, U.S. Army Corps of Engineers, Memorandum, Subject: Water Supply Reallocation Policy (August 30, 2007) (on file); *see also In re MDL–1824 Tri-State Water Rights Litigation,* 644 F.3d 1160, 1173 n.9 (11th Cir. 2011) (''Internal policies required the Corps to obtain the approval of the Secretary of the Army for all storage allocations exceeding 15% of total storage capacity or 50,000 acre-feet, whichever is less. The parties have not made this Court aware of any internal regulations that set a threshold for allocations above which Congressional approval is required.'').

[34] *See Southeastern Federal Power Customers, Inc.* v. *Geren,* 514 F.3d 1316 (D.C. Cir. 2008). In that case, which was subsequently remanded, consolidated, and resolved by the Eleventh Circuit's decision in the case *In re MDL–1824 Tri-State Water Rights Litigation,* 644 F.3d 1160 (11th Cir. 2011), the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion concluding that a settlement agreement that would have allocated 240,878 acre-feet in the Corps' Lake Lanier project would have involved a ''major operational change'' requiring Congressional approval under the WSA. However, the D.C. Circuit opinion alternately describing the 240,878 figure as comprising 22 or 22.9 percent of ''total storage'' in Lake Lanier, and a 9 percent increase over storage previously used for water supply, whereas 240,878 acre-feet actually comprises just 12.6 percent of the 2,554,000 total acre-feet of storage in Lake Lanier. Nothing in the D.C. Circuit opinion indicates why any of these figures would generally constitute ''serious'' effects or ''major'' changes within the meaning of the WSA. *See* 2012 Chief Counsel Legal Opinion at 18–19 & n. 72, 36–38 & nn. 164, 166.

[35] The WSA expressly limits the share of total estimated cost of any project that can be allocated to anticipated future water supply demands to 30 percent. WSA § 301(b), 43 U.S.C. 390b(b).

impacts on coordinated or co-managed reservoir operations.

(f) Storage Accounting, ''Return Flows,'' and Water Supply Storage Agreements

The Corps acknowledges that important questions have been raised regarding how much water may be withdrawn under many existing WSA water supply storage agreements and the relationship of ''return flows'' or other inflows to those withdrawals. Generally, the Corps' WSA storage agreements authorize the use of a particular amount of reservoir storage, sufficient to provide a firm or dependable yield during drought, but without specifying how much water may be withdrawn pursuant to the agreement under different hydrologic conditions, and without addressing return flows. This practice is consistent with the Corps' authority to include storage as an authorized purpose under the WSA, recognizing that reservoir storage is used for multiple authorized purposes, and that storage yields, project operations, and water supply withdrawal amounts can change over time. Without a clear methodology for determining how much water may be withdrawn under the agreement, however, this has led some to question the extent of withdrawals that are occurring, or to propose different methods of accounting for storage use. When broader disputes have arisen over water uses in a multistate river basin, for example in the ACT–ACF basins, some water supply users have requested that WSA agreements provide ''credit'' for return flows, or other ''made inflows'' directed into a reservoir by a particular entity from a source outside the reservoir. These users maintain that such flows should be credited to the water supply users who provide the flows, either in the sense of including less storage than would otherwise be required for the projected withdrawals, or in the sense of increasing the yield of storage previously included for water supply. They contend that crediting return flows could provide incentives for greater water conservation, as water returned to the reservoirs could enhance water supply use. Others have objected to ''crediting'' return flows or other inflows to particular water supply users, fearing that doing so could impinge upon project purposes or other users' rights. The parties expressing views on these matters have all desired greater certainty with regard to how the Corps accounts for water supply storage usage in its reservoirs.

The Corps does not have a universal policy or practice regarding return flows or the accounting of storage use under water supply storage agreements (''storage accounting''). Generally, the Corps has based its WSA storage agreements upon an amount of storage expected to yield the gross amount of water to be withdrawn or released, without clearly addressing the relationship of return flows to the use of storage allocated to water supply, and without specifying how storage availability and usage are to be measured over time. In some cases, Corps Districts have developed storage accounting systems that treat water supply storage allocations as ''accounts,'' and attribute a share of all inflows to and losses from the reservoir to each account, in proportion to each account's share of storage in the reservoir. Under such accounting systems, water supply withdrawals by an individual water supply user are charged fully and directly to that user's water supply storage account; but return flows or other inflows, regardless of their source, are credited to each user's account in proportion to the amount of storage allocated to that account. Under these accounting systems, return flows are not reserved or credited fully to specific users' accounts; but to the extent that return flows are provided, they increase the amount of water available in the reservoir for all users and purposes, including water supply. In accounting for flows in this manner, the Corps is not determining beneficial use rights to any water—as that is a prerogative of the States—but rather, is accounting for the use of storage in a Corps reservoir.

This practice is consistent with the Corps' operation of its reservoir projects for multiple purposes, in which ''commingled or joint-use conservation storage'' is typically used to achieve multiple purposes simultaneously, ''with operational criteria to maximize the complementary effects and minimize the competitive effects'' of the different purposes, providing greater operational flexibility and better service for all purposes.[36]

The Corps recognizes, however, that return flows and other made inflows are important to consider in connection with water supply storage. As explained in the 2012 Chief Counsel's Legal Opinion, return flows, to the extent they occur, are relevant to the Corps' authority to accommodate a proposed request for water supply storage under the WSA, because both withdrawals and returns, like all other inflows and losses, affect operations for authorized purposes. To the extent that they can be ascertained and are reasonably foreseeable, these impacts must be considered for the purpose of determining the agency's authority to accommodate the request, as well as to evaluate environmental impacts as required by NEPA. Thus, when evaluating a request to make water supply withdrawals from a reservoir, the amount, if any, of return flows associated with that request must be taken into account. See 2012 Chief Counsel Legal Opinion at 37–38. In addition, the Corps recognizes that State systems for administering water rights may address return flows or other inflows in different ways, that interstate Compacts, equitable apportionments, or other acts of Congress may allocate flows to specific entities, and that it must adapt its operations for federal purposes to effectuate water allocation formulas developed under such authorities, in accordance with Congressional intent.[37] However, because the Corps does not determine or allocate water rights, the Corps has generally refrained from adopting storage accounting systems that designate particular inflows for the sole use by particular entities, or crediting those inflows solely to particular storage accounts. Instead, the Corps has considered return flows and other additive inflows in the same manner as it considers all inflows to a reservoir: All inflows are assimilated into reservoir storage, and, for purposes of the WSA, a user may withdraw water

[36] Engineer Manual (EM) 1110–2–1420, Hydrologic Engineering Requirements for Reservoirs at 2–2, 3–2 (Oct. 31, 1997). These operations are recorded in water control plans and manuals that are developed in concert with potentially affected interests, with public participation, and which are revised as necessary to conform to changing conditions and requirements. *See* 33 U.S.C. 709; 33 CFR 222.5(f); Engineer Regulation (ER) 1110–2–240, Water Control Management (May 30, 2016). *See also South Dakota* v. *Ubbelohde,* 330 F.3d 1014, 1018, 1027–28 (8th Cir. 2003) (in carrying out statutory charge to manage Missouri River reservoirs, ''the Corps must strike a balance among many interests, including flood control, navigation, and recreation''); Earl H. Stockdale, Chief Counsel, Memorandum for the Chief of Engineers, Subject: Authority to Provide for Municipal and Industrial Water Supply from the Buford Dam/Lake Lanier Project, Georgia at 28 (June 25, 2012) (''2012 Chief Counsel Legal Opinion'').

[37] *See, e.g.,* Apalachicola-Chattahoochee-Flint River Basin Compact, Public Law 105–104, arts. VII, X, 111 Stat. 2219 (Nov. 20, 1997) (recording intent of the United States to comply with water allocation formula to worked out among the States of the Apalachicola-Chattahoochee-Flint River Basin, and exercise authorities in a manner consistent with that formula, to the extent not in conflict with federal law); *see also* Water Resources Reform and Development Act of 2014, Public Law 113–121, 1051(b)(1) (June 10, 2014) (expressing the sense of Congress that the Secretary of the Army ''should adopt policies and implement procedures for the operation of reservoirs of the Corps of Engineers that are consistent with interstate water agreements and compacts.'').

from its allocated water supply storage, consistent with a State water right, so long as water is available within that allocated storage. In concept, these practices enable users to fully utilize their State-recognized water rights by withdrawing water from storage, while also ensuring that uses of water supply storage—that is, withdrawals up to but not exceeding the actual yield of the reallocated storage, under different hydrologic conditions—do not unduly impact the other authorized purposes of the project.

The proposed rule would continue and formalize many of these general practices, and would include new provisions that would clarify and improve the administration of water supply storage agreements, while continuing to provide for proportional crediting of made inflows. The rule would provide that storage will be included for water supply in an amount sufficient to yield the gross amount of water to be withdrawn (or released) under projected hydrologic conditions, taking into account both the projected withdrawals and the projected return flows, if any. Additionally, the rule would require that WSA agreements incorporate a storage accounting methodology that will track the use of that storage and determine how much water is available for withdrawal over time. The proposed rule would not prescribe, in technical detail, any specific storage accounting methodology, as it is expected that different methodologies may need to be adapted to the particular circumstances of each reservoir, or system of reservoirs, where storage is included for water supply. However, the rule would specify that any storage accounting procedures that are adopted in a Corps WSA storage agreement shall be based on the principle that all inflows, regardless of source, will be credited to water supply storage accounts in proportion to their share of storage in the reservoir. Direct water supply withdrawals would continue to be charged to the account of the user making the withdrawal. In this manner, water supply storage agreements would effectively limit withdrawals to the actual yield of the reallocated storage over time, accounting for return flows that actually occur, and changing hydrologic conditions. These storage accounting practices would be set forth in the proposed water supply storage agreement, and in other documents that would be made available for public comment prior to including storage under the WSA, providing notice to prospective water supply users and all other interested parties of the principles that would govern the projected use of water supply storage.

These provisions are intended to make storage accounting practices more transparent, and to reduce the possibility of uncertainty or dispute over how much water may be withdrawn under WSA storage agreements, thereby promoting more efficient administration of such agreements, in concert with operations for all other authorized purposes. These provisions also reflect the basic principle that the Corps does not acquire, adjudicate, or allocate water rights when it accommodates water supply uses from its reservoirs; the Corps merely makes its reservoir storage space available, based on an estimate of the amount of storage necessary to accommodate a gross amount of water to be withdrawn or released, taking into account operations for other authorized purposes, and hydrologic conditions. This does not preclude the ability of a state to determine whether to provide water rights on a gross or net basis, and encourages greater water conservation.

The Corps believes that these proposed policies best reflect the water supply benefits that are being provided: The inclusion of storage with a sufficient dependable yield to meet a projected water supply demand during reasonably foreseeable conditions (such as the drought of record), and the use of that storage consistent with project operations for authorized federal purposes. The proposed rule would not afford a one-to-one credit for return flows to the accounts of particular water supply users, but they would ensure that appropriate consideration is given to return flows in determining the extent of the Corps' authority to accommodate a water supply request and in evaluating the effects of accommodating that request. Under the proposed rule, when return flows do in fact occur, they would benefit the water supply user, by making it even more certain that the user's water supply need will be satisfied from the water supply storage that has been included. Thus, the proposed rule would provide an incentive under many circumstances to conserve water, without disrupting the operation of Corps reservoirs for multiple authorized purposes. In declining to give a credit through storage accounting to an individual user for return flows that such user may provide, the Corps would not deprive that user of any water rights under state law, nor create disincentives for water conservation; the Corps would merely be ensuring, on terms that would be made clear at the outset, that the use of storage for water supply pursuant to a WSA agreement would not be disproportionate to the amount of storage allocated to water supply.

In summary, the Corps' proposed policies on storage accounting and return flows would take into account return flows when they are reasonably projected and do actually occur, provide greater certainty for all interested parties as to the amount of withdrawals that may be made under the agreement, and would promote more efficient administration of water supply storage agreements, in concert with operations for all other authorized purposes. The Corps invites comments on these proposed policies.

Additionally, the Corps solicits comment on an alternative approach to return flows, in which users would receive full credit for ''made inflows.'' Specifically, the Corps solicits comment as to the merits of providing that return flows or other ''made inflows,'' defined as inflows provided by an entity that could choose whether or not to discharge such flows into a Corps reservoir, should be fully credited to the water supply storage account holder responsible for such flows, provided that the flows can be reliably measured. Under this alternative proposal, the proposed rule would be identical in all respects, except that instead of receiving proportional credit for made inflows (in proportion to a user's share of storage allocated under a water supply agreement), the user would receive full credit for made inflows. The Corps is not proposing this approach in the draft rule, but invites comments on this alternative proposal, including whether and under what circumstances it could be appropriate to directly credit made inflows.

4. Policies for Complementary Administration of Section 6 and the WSA

The proposed rule reflects the Corps' view that long-term and permanent water supply needs that require the dependability afforded by storage should be accommodated by including storage as an authorized project purpose, as provided in the WSA. It also reflects the Corps' view that Section 6 should be used to address water supply needs provisionally, for as long as surplus water is determined to be available. This interpretation reflects the different terminology, structure, and intent behind Section 6 and the WSA.

The WSA authorizes the Corps to include water supply storage as a purpose of a Corps reservoir project, provided that State or local interests agree to pay for the costs allocated to

that storage. The WSA by its terms does not limit or define the time period for which water supply storage may be used, but Congress has expressly provided in separate legislation that when State or local interests have contributed to or contracted to pay for the cost of providing water supply storage space in Corps reservoirs, their use may continue during the remaining existence of the facility.[38]

Section 6, by contrast, authorizes the Corps to enter into contracts for uses of surplus water, when surplus water is determined to be available, and on such terms as the Secretary considers reasonable, provided such contracts do not adversely affect then existing lawful uses of such water. The proposed rule would define ''surplus water'' to mean water that may be provisionally available at a Corps reservoir, because it is not required during a specified time period to accomplish an authorized purpose or purposes of that reservoir. Section 6 does not make water supply storage an authorized purpose of a project, and the proposed rule would not require users to pay for storage.

Congress provided two separate, discretionary authorities under Section 6 and the WSA, and expected the Corps to exercise its discretion to use those authorities to accommodate different needs. Consistent with that Congressional intent, the Corps' view is that the WSA should be used to accommodate long-term water supply needs by including storage for that purpose, and Section 6 should be used to accommodate water supply needs provisionally, when surplus water is available at a Corps reservoir.

Finally, the proposed rule would clarify that in implementing either Section 6 or the WSA, the Corps does not sell water or allocate water rights. In taking action pursuant to either statute, the Corps will respect State prerogatives regarding allocation of water resources, and ensure consistency with any applicable interstate water agreements or compacts.

II. Scope of This Proposed Rule

The proposed rule would apply prospectively to actions that the Corps may take at Corps reservoir projects to accommodate uses of surplus water pursuant to Section 6 of the Flood Control Act of 1944, 33 U.S.C. 708, or uses of storage pursuant to the WSA of 1958, 43 U.S.C. 390b. It would not alter the terms of existing water supply agreements with the Corps, but would apply to all water storage agreements, including new agreements for users with expiring agreements, finalized after the effective date of the final rule. Current water supply withdrawals that are occurring pursuant to easements only, without water supply agreements, will be reassessed when the easements expire, or within five years of the effective date of the final rule, whichever is earlier. If those withdrawals are found to require a Section 6 surplus water contract or a WSA storage agreement, the appropriate agreement shall be required in order for the withdrawals to continue.

The proposed rule would apply only to reservoir projects operated by the Corps, not to projects operated by other federal or non-federal entities. It would not apply to uses of water or storage that may be authorized by other federal laws or implementing regulations, or to the exercise of Tribal reserved water rights. It would not establish or determine any consumptive water rights.

Nor would the proposed rule itself result in any physical changes or changes to operations at Corps reservoirs. The proposed rule would bring greater clarity and consistency to the Corps' implementation of Section 6 and the WSA, but would not itself cause particular decisions to be made or actions to be taken at particular projects. Such decisions would be made only after subsequent reports and documentation pursuant to other laws and regulations that are not within the scope of this proposed rule.

III. Administrative Requirements

A. Executive Order 12866, ''Regulatory Planning and Review,'' and Executive Order 13563, ''Improving Regulation and Regulatory Review''

Under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011), the Corps must determine whether the regulatory action is ''significant'' and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Orders. The Executive Orders define ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The Corps has determined that the proposed action is a ''significant regulatory action,'' because it raises novel legal or policy issues. The Corps' water supply practices and lack of formal regulations in this area have resulted in litigation regarding its authority to make operational changes to accommodate water supply under the WSA, and have frustrated the finalization of contractual arrangements for the withdrawal of surplus water from Corps reservoirs under Section 6. In proposing this rule, the Corps seeks to establish a uniform understanding of Section 6 and the WSA and the range of activity that is authorized under each statute. These matters involve novel legal and policy issues. Because the Corps has determined that this proposal involves a ''significant regulatory action,'' we have submitted this action to OMB for review, and any changes made in response to OMB recommendations have been documented in the docket for this action.

The proposed rule does not meet the other tests for a ''significant regulatory action.'' With respect to the first test, the rule is not expected to have an annual effect on the economy of $100 million or more. The proposed rule would not cause any physical changes or changes to operations at any Corps reservoir. With respect to future actions that could be undertaken pursuant to the WSA, the proposed rule largely clarifies existing interpretations, definitions and policies, and would not modify the terms of existing storage agreements, although it would establish requirements for future agreements and require agreements for water supply users currently operating without a contract, if continuing uses are subsequently determined to fall within the authority of either Section 6 or the WSA. It would not change the Corps' current pricing policies for the inclusion of storage under the WSA, and would not impose additional costs on others or affect the payment of revenues to the Treasury for water supply storage under the WSA. The proposed rule is

[38] See Public Law 88–140, § 1–4, 77 Stat. 249 (Oct. 16, 1963) (codified at 43 U.S.C. 390c–390f), providing that when State or local interests have ''contributed to the Government, or . . . contracted to pay to the Government over a specified period of years, money equivalent to the cost of providing for them water storage space at Government-owned dams and reservoirs, constructed by the Corps of Engineers,'' those State or local interests may continue their use of such storage ''during the existence of the facility,'' subject to performance of contractual obligations, including annual operation and maintenance payments.

intended to clarify and adopt the Corps' customary practices with regard to storage accounting and accounting for return flows, and to make storage accounting methodologies more transparent, without disrupting current practice or creating new incentives or disincentives for utilizing Corps reservoirs for water supply. While the proposed rule would formally codify the Corps' practice of seeking comment from other agencies and the public on proposed reallocations of storage under the WSA, the proposed rule would not significantly change that existing practice, and would not impose additional requirements on any other entity. Rather, the rule is expected to improve clarity and coordination, providing unquantified benefits by reducing misunderstanding and litigation risk. In the case of Section 6 and WSA actions at projects that include federal hydropower, the Corps would coordinate in advance with the applicable federal PMA, and utilize in its determinations any information that the PMA provides regarding potential impacts to the federal hydropower purpose.

With respect to Section 6, the proposed rule would clarify and modify existing interpretations, definitions and policies applicable to future surplus water contracts, without affecting the terms of existing contracts. The proposed rule would establish a new methodology for determining a ''reasonable'' price for surplus water contracts, clarify the definitions of the terms ''surplus water'' and ''domestic and industrial uses,'' and simplify the processes for granting the approvals associated with surplus water determinations under Section 6. These provisions are expected to provide unquantified benefits by reducing misunderstanding and litigation risk, and also to increase the number of surplus water contracts that the Corps will enter into pursuant to Section 6, to accommodate some uses that have previously occurred without formal water supply agreements.

The proposed rule will bring the Corps' interpretation of a ''reasonable'' price into conformity with the provisions of WRRDA 2014 relating to charges for surplus water uses at the Missouri River mainstem reservoirs. In accordance with that Act, the proposed rule would acknowledge that the Corps will not charge for surplus water uses at its Missouri River mainstem reservoirs for a ten-year period ending June 10, 2024. For new Section 6 agreements at all other Corps reservoirs, and for any new Section 6 agreements at the Missouri River mainstem reservoirs after June 10, 2024, the Corps is proposing to determine the ''reasonable'' price of surplus water based upon the full, separable costs the Corps incurs in accommodating the surplus water request. The Corps does not expect it ordinarily will incur significant costs in making surplus water available, or that, to the extent such costs are incurred, they would be significant. The cost implications of these provisions fall far short of the Executive Orders' $100 million threshold, because the few surplus water contracts that do exist involve total costs in the thousands, not millions, of dollars; most current uses of surplus water are occurring only by virtue of an easement across Corps lands, without surplus water contracts and without charges for surplus water use; and most uses of surplus water under the proposed rule would involve little or no charge for the new surplus water contract that would be required. Transactional costs associated with the execution of new surplus water agreements, where presently only easements have been issued to facilitate surplus water withdrawals, are expected to be small, because the proposed rule would combine the surplus water contract approval with the easement approval process that already exists.

The Corps has only rarely entered into surplus water contracts pursuant to Section 6. As of July 2016, nine contracts relying on Section 6 were currently in effect, two of which involved no cost at all, and only one of which involves a total cost greater than $1039; the proposed rule would not affect the terms of any of these existing contracts. Apart from those few existing contracts, internal audits have identified approximately 1,600 real estate instruments that have been issued to grant access across Corps project lands for water intakes at Corps reservoirs: 400 easements at the 6 Missouri River mainstem reservoirs, and 1,200 real estate instruments at non-Missouri River projects.[39] Approximately 2,300 individual withdrawals are associated with these easements, for purposes variously described as municipal and industrial, domestic, irrigation, and unspecified. Specific details as to the purpose, amount, and authority for most of these withdrawals are not available. However, based on information provided by the Corps' District and Division offices, it is believed that the great majority of the 1,600 real estate instruments support relatively small-scale withdrawals, associated with State-administered water rights, for limited time periods, which have no known effect on project operations. Some of the uses associated with the 1,600 real estate instruments, including approximately 400 real estate easements for water withdrawal intakes at the Missouri River mainstem reservoirs, have previously been identified as potential candidates for Section 6 surplus water contracts, even though no contracts are presently associated with the withdrawals. Analysis of Missouri River withdrawals, and the limited information available with respect to non-contractual water supply withdrawals elsewhere, has not identified any inference with project operations from withdrawals associated with the 1,600 real estate easements. Thus, the Corps believes that under the proposed rule, which would clarify and refine the definitions of ''surplus water'' (generally, water that is not required to fulfill an authorized purpose of a project) and ''domestic and industrial uses'' (beneficial uses other than irrigation uses under 43 U.S.C. 390, *i.e.,* the federal Reclamation laws), most of the approximately 2,300 current withdrawals, associated with the approximately 1,600 real estate instruments, could be accommodated under the authority of Section 6.

For purposes of evaluating the economic effects of the proposed rule, the Corps assumes that an equivalent number of withdrawals could, in the future, be accommodated on an annual basis through surplus water contracts pursuant to Section 6. The proposed rule provides that surplus water contracts would be combined with the real estate instrument necessary to provide access for the withdrawals. Thus, the Corps estimates that under the proposed rule, it would enter into approximately 1,600 limited-term surplus water authorizations (combined contract and easement documents), renewable for as long as surplus water remains available. Without the proposed rule, the Corps would not enter into most or all of these contracts, because the authority for the withdrawals, and the Corps' policies for documenting and applying Section 6 to such withdrawals, would remain unclear. Under the proposed rule, the Corps would continue to issue and charge for real estate instruments in accordance with other applicable law and regulation, and would charge for the surplus water

[39] *See* CECW–P, Memorandum for Assistant Secretary of the Army (Civil Works), Subject: Audit of Water Withdrawals from the U.S. Army Corps of Engineers Reservoirs and Projects Nationwide 11–13 (Mar. 30, 2012) (on file); CECW–P, Memorandum for Assistant Secretary of the Army (Civil Works), Subject: Audit of Water Withdrawals from the Missouri River Mainstem Reservoirs, Encl. 1 at 3 (Feb. 3, 2012) (on file).

contracts based on the full, separable costs, if any, that the Government incurs in making surplus water available.

At the Corps' Missouri River projects, where 400 of the 1,600 current water intake easements are located, the Corps would not assess any charge for the surplus water use before June 2024, pursuant to WRRDA 2014. The proposed rule would no effect on the price of such surplus water contracts, and no effect on the amount that such users pay ($0), or the revenues accruing to the U.S. Treasury ($0).

At reservoir projects outside the Missouri River mainstem system—and at the Missouri River projects, after June 2024—the proposed rule would provide for charges for surplus water contracts based only on the full, separable costs incurred by the Government in making the surplus water available, which is expected to result in no more than minimal cost to the user for future surplus water contracts. Of the few surplus water contracts that currently exist outside the Missouri River basin, most (6 out of 7) involve a total cost to the user of about $1000 over a 5-year contract period. The costs for these contracts have included a $1000 administrative charge, plus additional costs based on estimated revenues or benefits foregone, or a share of OMRR&R expenses, ranging from $9 in one case (for a total contact cost of $1009 over 5 years) to $71,780 (for a total contract cost of $72,780 over 5 years). For the great majority of the estimated 1,600 current surplus water uses that are presently being made at no cost, there would be a minor cost difference under the proposed rule, unless the surplus water withdrawals involve a significant cost to the Government. Without the proposed rule, these withdrawals would be expected to continue without surplus water contracts, and therefore without cost to the user, and without revenues to the United States Treasury associated with the withdrawals. Under the proposed rule, the Corps could would enter into surplus water agreements in the future authorizing such uses, charging only the full, separable costs to the Government, which are expected to be small, or non-existent. Considering that the few surplus water contracts currently in effect charge approximately $1000 per contract, without identifying significant separable costs to the Government, and assuming that the full, separable costs of making surplus water available in most cases would be minimal, the cost difference under the proposed rule would amount to a reduction in cost to users of approximately $1000 per contract, and a reduction in revenues to the Treasury of approximately $1000 per contract. If the full, separable costs for new surplus water contracts averaged $1,000 per surplus water contract—similar to the price currently paid under existing surplus water contracts, and likely more than the cost that would be assessed under the proposed rule—the additional cost charged to users, and the additional revenue received by the U.S. Treasury, for 1,600 surplus water contracts would amount to a total of $1,600,000.

The cost implications of the proposed rule for determining ''reasonable'' prices under Section 6 would likely be even less than $1,600,000, because 400 of the 1,600 easements are associated with withdrawals from the Missouri River mainstem reservoirs, where all charges for surplus water uses are precluded by statute (WRRDA 2014) until 2024, with or without the proposed rule. Thus, for purposes of evaluating the economic impacts of the proposed rule, the Corps has assumed that there would be no charge for those 400 surplus water uses at the Missouri River projects.[40] Assuming that only 1,200 of 1,600 new surplus water contracts under the proposed rule would involve charges of up to $1000 per contract, the total cost to users of such contracts would be $1,200,000 (see Table 1 below). In any event, the annual effect on the economy from the proposed pricing policy under Section 6 would be far less than $100 million.

TABLE 1—EASEMENTS AND ESTIMATED CONTRACT COSTS WITH AND WITHOUT PROPOSED RULE

Easement location	Approximate number of easements	Approximate cost for surplus water (without proposed rule)	Estimated cost for surplus water (under proposed rule)	Total cost difference—with and without rule
Missouri River Mainstem System	400	$0	[41] $0	$0
Nationwide (Non-Missouri River)	1200	$0	≤ $1000	≤ $1,200,000

The provisions streamlining the processes for evaluating and granting the approvals associated with surplus water determinations are expected to reduce the administrative requirements associated with individual surplus water requests and eliminate former practices that have frustrated the finalization of contracts for uses of surplus water at Corps reservoirs. They will result in some unquantified cost savings to the Government and the party making the request for use of the surplus water; however, those savings (which are discussed in Part III.C. of the proposed rule) do not approach the monetary threshold specified in the Executive Orders.

As to the other matters to be considered under the first test for a ''significant regulatory action'' under

[40] In draft surplus water reports recently prepared for the six Missouri River mainstem reservoirs, prior to the enactment of WRRDA 2014, the Corps had estimated that the total annual cost of storage for all current and projected surplus water uses at those six reservoirs would be approximately $10,000,000, with an annual cost per acre-foot of surplus water of $53.77. See U.S. Army Corps of Engineers, Omaha District, Final Garrison Dam/Lake Sakakawea Project, North Dakota, Surplus Water Report Vol. 1 at 3–46 to 3–55 (March 2011) (finalized July 13, 2012); Final Fort Peck Dam/Fort Peck Lake Project, Montana, Surplus Water Report Vol. 1 at 3–29 to 3–35 (September 2014) (draft); Final Oahe Dam/Lake Oahe Project, South Dakota and North Dakota, Surplus Water Report Vol. 1 at 3–29 to 3–36 (September 2014) (draft); Final Big Bend Dam/Lake Sharpe Project, South Dakota, Surplus Water Report Vol. 1 at 3–27 to 3–34 (September 2014) (draft); Final Fort Randall Dam/Lake Francis Case Project, South Dakota, Surplus Water Report Vol. 1 at 3–27 to 3–34 (September 2014) (draft); Final Gavins Point Dam/Lewis and Clark Lake Project, Nebraska and South Dakota, Surplus Water Report Vol. 1 at 3–28 to 3–35 (September 2014) (draft), *available at http://www.nwo.usace.army.mil/Missions/CivilWorks/Planning/PlanningProjects.aspx.* The reports, which addressed potential surplus water uses during a 10-year period of analysis, originally calculated approximate prices for those uses according to the pricing methodology set forth in ER 1105–2–100. The reports did not specifically identify or discuss any full, separable costs to the Government associated with the projected surplus water withdrawals. As acknowledged in each of the surplus water reports, WRRDA 2014, § 1046(c) precludes any charges for surplus water contracts during the ten-year period contemplated in the reports, and thus it is not reasonably foreseeable that the pricing for storage as originally described in the draft reports would be implemented, with or without the proposed rule.

[41] Until June 2024, per WRRDA 2014 § 1046(c).

Executive Orders 12866 and 13563, the proposed rule would not adversely affect in a material way, the economy, productivity, competition, jobs, public health or safety, of state, local, or Tribal governments or communities. The proposed rule clarifies the Corps' interpretation of its authority under the WSA and Section 6. The proposed rule is intended to bring transparency and certainty to the Corps' contract practices under those authorities and to ensure those practices align with Congressional intent. Their goal is to enhance the Corps' ability to cooperate with State, Tribal, Federal, and local interests in facilitating water supply uses at Corps' reservoirs in a manner that is consistent with the authorized purposes of those reservoirs, and does not interfere with lawful uses of water. The proposed rule would apply prospectively and would not alter the terms of any existing water supply agreements. The proposed rule would not impose any unfunded mandates on others, or result in any on the ground changes in reservoir operations. Those changes are determined through separate administrative processes.

With respect to the second and third definitional tests for determining whether the proposal constitutes a ''significant regulatory action'', this proposal will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. Nor will it materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof. The proposed rule would apply only to reservoir projects operated by the Corps, not to projects operated by other federal or non-federal entities.

B. Unfunded Mandates Reform Act (Pub. L. 104–4, § 202)

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, requires Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under Section 202 of the UMRA, the agencies generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. The proposed rule would clarify the Corps' interpretation of its authority under Section 6 and the WSA and establish more consistent policies for the Corps' exercise of those authorities. The proposed rule does not require any non-federal entity to take any action under these authorities and does not impose any unfunded requirements for State, local, and Tribal governments, or for the private sector.

C. Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 et seq.

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, a small entity is defined as: (1) A small business based on Small Business Administration size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

With respect to future actions that could be undertaken pursuant to the WSA, the proposed rule largely clarifies existing interpretations, definitions and policies, and would not modify the terms of existing storage agreements with small entities or others. The proposed rule would not change the Corps' pricing policies for the inclusion of storage under the WSA, and would not impose additional costs on others or affect the payment of revenues to the Treasury for water supply storage under the WSA. It would clarify and adopt the Corps' customary practices with regard to storage accounting and accounting for return flows, and would make storage accounting methodologies more transparent, without disrupting current practice or creating new incentives or disincentives for utilizing Corps reservoirs for water supply. While the proposed rule would formally codify the Corps' practice of seeking comment from the public on proposed reallocations of storage under the WSA, the proposed rule would not significantly change that existing practice, and would not impose additional requirements on small entities, or any other entity. Thus, the proposed rule with respect to the WSA will not have a significant economic impact on a substantial number of small entities.

The proposed rule for implementing Section 6 also will not have a significant impact on a substantial number of small entities; while surplus water users making withdrawals without a contract would need to obtain one in order to continue those withdrawals, the cost of the contract is anticipated to be minimal. Under the proposed rule, the Corps would no longer charge surplus water users, including small entities, for the cost of reservoir storage under Section 6. Should a potential user, including a small entity, elect to enter into a surplus water contract with the Corps, the price charged under that contract would be based only upon the full, separable costs that the Government may incur in making surplus water available. The Corps does not expect that it ordinarily will incur any direct significant costs in making surplus water available, or that such costs would be substantial, given the proposed definition of ''surplus water'' as water that is not required during a specified time period to accomplish any authorized purpose of the project. The proposed rule would also implement recently enacted law by providing, in accordance with WRRDA 2014, § 1046(c), that no charge will be assessed for surplus water uses at the Corps' Missouri River mainstem reservoirs for ten years after June 10, 2014.

The new pricing policy under the proposed rule would result in an increased number of contracts for surplus water, since some existing surplus water uses are not currently under contract, but this is not expected to have a significant economic impact on a substantial number of small entities. Issues surrounding the Corps' existing pricing policies and implementation practices under Section 6 have frustrated the finalization of contractual understandings regarding current and prospective water withdrawals. As a result, most surplus water withdrawals are occurring without contracts and without payment to the United States Treasury. The Corps has identified nine current contracts that identify Section 6 as a source of authority, of which seven provide for some payment to the United States Treasury in connection with the surplus water withdrawals. Only one of these agreements involves a total payment greater than $1,000, and annual payments of any amount. Six of these agreements are for a total amount of approximately $1,000, with no annual charges, and two of the agreements are at no cost, because they are for surplus

water at Lake Sakakawea, a Missouri River mainstem reservoir subject to the no-charge provision of WRRDA 2014. Taking this experience into account, the new pricing policy for surplus water is not expected to have a significant economic effect on a substantial number of small entities. Of the nine current users with surplus water contracts, two (at Missouri River projects) would pay nothing, and the remaining seven would pay approximately the same, or less, under the proposed rule. For those users currently making withdrawals, assuming the withdrawals continue with new surplus water contracts, the cost under the proposed rule would not be substantial. Surplus water users at the Missouri River mainstem reservoirs would not be charged for surplus water contracts until at least 2024, and charges after that date under the proposed rule would likely not be substantial under the proposed rule.

The proposed rule would streamline administrative processes and reduce transactional costs associated with surplus water contracts under current policy and practice. Instead of setting forth the understandings surrounding surplus water withdrawals in two documents (a real estate easement and a surplus water agreement), the Corps is proposing in this rule to combine the approvals that would be required to provide access to, and the authorization for the withdrawals, in one document. Virtually all entities withdrawing water from Corps reservoirs hold separate grants of real estate instruments (typically easements) allowing access across federal project lands. Clarifying the definition of ''surplus water,'' and simplifying and streamlining the administrative processes associated with authorizing surplus water withdrawals, should promote the finalization of contracts for surplus water and facilitate a small entity's access to that water. It also should result in some cost savings to small entities, because the administrative costs associated with one document (a contract and easement) can be expected to be less than the administrative costs associated with two documents (an easement and a separate contract). These cost savings, while beneficial to small entities, are not expected to be significant, given the relatively small costs involved.

In general, the Corps' practices for recovering the costs associated with such agreements are guided by the principle that the services the Corps provides should be self-sustaining. However, for several reasons, it is not possible to arrive at a firm figure for the savings a small entity can expect to reap from the administrative simplification proposed in this rule. First, the Corps has entered into a very small number of Section 6 agreements, and it does not have reliable information on the costs that could be associated with such agreements, although those costs are expected to be low. As noted above, of the 9 contracts relying on Section 6 in effect as of August 2016, 2 involve no cost at all, and 6 involve a total cost of approximately $1000, based on estimated administrative costs, and revenues and benefits foregone. The Corps lacks cost information for other withdrawals, believed to be utilizing surplus water, that are occurring in connection with approximately 1,600 easements, without contracts. Second, the charges that the Corps imposes for providing the easements traversing Federal lands are governed by separate laws and policies unrelated to surplus water, and they vary according to the complexity of the transaction and the amount of information gathering required, as well as the value of the real estate interest being conveyed.

In general, the fees for real estate easements vary from approximately $300 to $1,000 depending on the complexity of the transaction involved. Extrapolating from these real estate related costs and assuming they bear some similarity to the administrative costs a user may be charged for the expense to the Government of preparing and administering a separate surplus water contract, it is reasonable to conclude that small entities may expect to save similar, or slightly smaller amounts, per each transaction, because the Government would be authorizing the surplus water withdrawals through a single real estate easement, rather than two separate documents and transactions. The Corps estimates that a total of approximately 1,600 uses of surplus water, pursuant to easements but without contracts, are occurring at Corps reservoirs and could potentially be authorized under Section 6. As shown on Table 1, above, the total cost charged to all users for surplus water uses, if 1,600 new contracts were executed pursuant to the proposed rule, is expected to be equal to or less than $1,200,000. The impact on small entities associated with the savings in administrative costs under the proposed rule would not be significant, even if one assumes the Corps grants approvals to such entities for 1,600 surplus water withdrawals each year, through a combined easement and authorization document, rather than through separate documents.

D. Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

This proposed rule does not impose any new information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* As before, parties seeking to make use of Corps reservoirs for water supply must submit a request to the Corps, and provide information regarding the amount of withdrawals requested. However, the Corps has not previously analyzed the information collection burden associated with water supply requests from Corps reservoirs, or solicited public comments or secured OMB approval for information collection requests specific to the Corps' water supply program. Accordingly, the Corps is separately developing a new form that could be used by applicants seeking to make use of Corps reservoirs for water supply. This new, proposed form, and the Corps' evaluation of the information burden associated with it, will be submitted to OMB for review and made available for public comment. This proposed rule governing the use of Corps reservoirs for water supply may be finalized prior to final approval of the associated information collection request, but no party will be required to complete the form or submit information related to a water supply request until an information collection request has been approved, and an OMB control number has been assigned.

Because this action is still under development, the Corps has not evaluated the information collection burden associated with the proposal, but the Corps does not expect that the burden would be significant. Preliminarily, based on other survey forms that the Corps has used with OMB approval, the Corps expects that the burden would involve approximately 1 hour per user to complete the form. The Corps expects to enter into as many as 1600 contracts initially, to reflect ongoing surplus water uses that are not presently under contract; but over time, the Corps expects that water supply requests would be received at the present rate. Between 1986 and 2014, the Corps entered into an average of 5 water supply agreements per year.

Additionally, the Corps recognizes that water supply requests typically require separate approvals from the Corps, under its regulatory (*e.g.,* Clean Water Act or Rivers and Harbors Act) or real estate authorities. The proposed water supply information collection request would reference, but would not duplicate or add to, the information collection requests associated with these separate activities. Parties seeking to

make use of Corps reservoirs would, as before the proposed rule, be required to submit the information necessary to process those applications.

E. Executive Order 13132, ''Federalism''

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires the Corps to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications.'' The phrase ''policies that have Federalism implications'' is defined in the Executive Order to include regulations 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.''

We do not believe that the proposed rule has Federalism implications. The Corps operates its water resource development projects in accordance with federal legislation that Congress has enacted. In accordance with this Congressional intent, the Corps endeavors to operate its projects for their authorized purposes in a manner that does not interfere with the States' abilities to allocate consumptive water rights, or with lawful uses pursuant to State authorities. The Corps develops water control plans and manuals through a public process, affording all interested parties the opportunity to present information regarding uses that may be affected by Corps operations, and the Corps takes that information into account in determining operations for authorized purposes of its projects. The proposed rule acknowledges, but would not change, these authorities, operations pursuant to these authorities, or the processes for updating operating manuals.

Section 6 and the WSA authorize the Corps to make its reservoirs available for water supply use by others, even where water supply is not otherwise a specifically authorized purpose of those projects. Congress did not intend for the Corps to interfere with State allocations of water when exercising its discretion under Section 6 or the WSA. The proposed rule recognizes this and would not interfere with State prerogatives. The proposed rule would apply only to Corps reservoirs, not to reservoir operated by non-federal entities, and it would not establish or determine any consumptive water rights. Nor would the proposed rule itself result in any physical changes or changes to operations at Corps reservoirs. The proposed rule does include provisions intended to improve coordination with States, when the Corps takes action pursuant to Section 6 or the WSA, but it would not change the relationship between the federal government and the States.

Rather, the rule would reinforce the Corps' current practice of recognizing the interests and rights of States in the development of waters, as provided in existing law. The proposed rule would provide that, when the Corps does proposed to take action pursuant to its authority under Section 6 or the WSA, such action shall not adversely affect any then-existing, State-recognized water right. The proposed rule would improve the ability of the Corps to exercise its authority under Section 6 and the WSA to facilitate the exercise of water rights held by others. The proposed rule would also improve the ability of the Corps to accommodate the efforts of States and local interests to develop their own water supplies through nonfederal conveyance systems, in connection with the operation of Corps reservoir projects. The proposed rule would not apply to uses of water or storage that may be authorized by other federal laws or implementing regulations. It would not establish or determine any consumptive water rights.

Finalization of the proposed rule would not impose any substantive obligations on State or local governments. We do not believe that clarifying and improving the Corps' ability to exercise its statutory authorities under Section 6 and the WSA will have substantial direct effects on the States, the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, we do not believe that Executive Order 13132 applies to this proposed rule.

F. Executive Order 13175, ''Consultation and Coordination With Indian Tribal Governments''

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 6, 2000), requires the agencies to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' The phrase ''policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

We do not believe that the proposed rule has tribal implications. The Corps operates its water resource development projects in accordance with federal legislation that Congress has enacted. In accordance with this Congressional intent, the Corps endeavors to operate its projects for their authorized purposes in a manner that does not interfere with lawful uses pursuant to Tribal authorities. The Corps develops water control plans and manuals through a public process, affording all interested parties the opportunity to present information regarding uses that may be affected by Corps operations, and the Corps takes that information into account in determining operations for authorized purposes of its projects. The proposed rule acknowledges, but would not change, these authorities, operations pursuant to these authorities, or the processes for updating operating manuals. The proposed rule would not itself result in any physical changes or changes to operations at Corps reservoirs.

In proposing this rule, we recognize that Tribal reserved water rights enjoy a unique status under federal law, and that the exercise of such rights is not dependent upon the Corps' discretionary actions pursuant to Section 6 or the WSA. The proposed rule would not apply to uses of water or storage that may be authorized by other federal laws or implementing regulations, or to the exercise of Tribal reserved water rights. It would not establish, define, or quantify any Tribal water rights. The proposed rule would clarify that the Corps' exercise of its authority under Section 6 or the WSA shall not adversely affect any Tribal or other federal reserved water right, including reserved water rights that have not yet been quantified. It contains provisions that are intended to ensure proper coordination before decisions are made, to foster more effective communication with Tribes, and to ensure that reserved water rights of Tribes are protected.

The proposed rule does not impose new substantive requirements on Indian tribal governments. We do not believe that clarifying and improving the Corps' ability to exercise its statutory authorities under Section 6 and the WSA will have substantial direct effects on tribal governments, the relationship between the Federal government and the Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Therefore, we do not believe that

Executive Order 13175 applies to this proposed rule.

G. Congressional Review Act, 5 U.S.C. 801 et seq.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. We will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This proposed rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

H. Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use''

This proposed rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use'' (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This proposed rule relates to the use of Corps reservoirs for water supply under Section 6 or the WSA. The proposed rule does not by itself affect operations at any Corps reservoir. Moreover, subsequent actions that the Corps may take to accommodate water supply uses at a Corps reservoir project would have to be consistent with the authorized purposes of that reservoir project. The proposed rule is consistent with current agency practice, does not impose new substantive requirements, and therefore will not have a significant adverse effect on the supply, distribution, or use of energy.

I. Plain Language

In compliance with the principles in the President's Memorandum of June 1, 1998 (63 FR 31855), regarding plain language, this preamble is written using plain language. The use of ''we'' in this notice refers to the Corps. We have also used the active voice, short sentences, and common everyday terms except for necessary technical terms.

J. Environmental Documentation

The Corps has prepared a draft Environmental Assessment (EA) in accordance with the National Environmental Policy Act (NEPA). The proposed rule is procedural in nature, in that it proposes to establish an accepted legal interpretation of the authority conferred under Section 6 and the WSA, and to set forth the processes that will be followed when taking action under these authorities. The clarifications of policies governing the Corps' implementation of Section 6 and the WSA would not, in and of themselves, significantly affect the quality of the human environment. Only subsequent, specific actions that the Corps might consider taking at particular Corps reservoir projects, consistent with the principles set forth in the proposed rule, may affect the environment. The environmental effects of any such subsequent actions, such as a decision to enter into an agreement with a nonfederal entity for surplus water uses of water at a particular Corps reservoir pursuant to Section 6, or to include storage in a particular reservoir project for water supply pursuant to the WSA, will be separately evaluated in accordance with NEPA before any final decisions are rendered. Any such environmental effects would be dependent on the circumstances of the particular reservoir project, and of the particular action that may be proposed. Thus, the Corps has made a preliminary determination that preparation of an Environmental Impact Statement (EIS) will not be required for publication of this proposed rule. A copy of the draft EA is available at *http://www.regulations.gov* in docket number COE–2016–0016.

List of Subjects in 33 CFR Part 209

Electric power, Mississippi River, Navigation (water), Sunshine Act, Surplus water, Water supply storage, Waterways.

Dated: December 8, 2016.

Jo-Ellen Darcy,

Assistant Secretary of the Army (Civil Works), Department of the Army.

33 CFR PART 209 [AMENDED]

■ 1. The authority citation for part 209 is revised to read as follows:

Authority: 5 U.S.C. 301; 33 U.S.C. 1; 10 U.S.C. 3012; 33 U.S.C. 708; 43 U.S.C. 390b

■ 2. Add § 209.231 to read as follows:

§ 209.231 Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, municipal, and industrial water supply.

(a) *Definitions.* For purposes of the Water Supply Act, 43 U.S.C. 390b, when applied to a U.S. Army Corps of Engineers reservoir project:

(1) The terms ''reservoir project'' and ''project'' mean any facility surveyed, planned, or constructed, or to be planned, surveyed, or constructed, and under the operational control of the U.S. Army Corps of Engineers, to impound water for multiple purposes and objectives. The terms ''reservoir project'' and ''project'' may comprise a single dam-and-reservoir facility or a system of improvements, depending on how the facility or system is authorized and funded by Congress.

(2) The terms ''water supply,'' ''municipal or industrial water'' and ''municipal and industrial water supply'' mean water that is or may be put to any beneficial use under an applicable water rights allocation system, other than irrigation uses as provided under 43 U.S.C. 390.

(3) The term ''storage may be included'' means making storage available for water supply by modifying the plans for an as-yet unconstructed reservoir project; by changing the physical structure of an existing reservoir project; or by changing the operations of an existing reservoir project.

(4) The term ''seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed'' means to adversely affect the Congressionally-authorized purposes of a project or reservoir project in a manner that would fundamentally depart from Congressional intent, as expressed through the relevant authorizing legislation. Evaluation of effects on authorized purposes requires both technical and legal analysis of the proposed action, in light of that Congressional intent.

(5) The term ''major structural or operational change'' means a change, to the physical structure or operations of a project or reservoir project, that would fundamentally depart from Congressional intent, as expressed through the relevant authorizing legislation. Evaluation of structural and operational changes requires both technical and legal analysis of the proposed changes, in light of that Congressional intent.

(b) *For purposes of section 6 of the Flood Control Act of 1944, 33 U.S.C. 708:*

(1) The term ''reservoir,'' as used in this section, means any facility, under the operational control of the U.S. Army Corps of Engineers, that impounds water and is capable of being operated for multiple purposes and objectives. The term ''reservoir'' may comprise a single dam-and-reservoir facility or a system of improvements, depending on the Congressional intent for the project,

as expressed through the authorizing legislation relevant to that reservoir project or system of projects.

(2) The term ''surplus water'' means water, available at any reservoir defined in paragraph (b)(1) of this section, that the Assistant Secretary of the Army (Civil Works) determines is not required during a specified time period to accomplish an authorized federal purpose or purposes of that reservoir, for any of the following reasons—

(i) Because the authorized purpose or purposes for which such water was originally intended have not fully developed; or

(ii) Because the need for water to accomplish such authorized purpose or purposes has lessened; or

(iii) Because the amount of water to be withdrawn, in combination with any other such withdrawals during the specified time period, would have virtually no effect on operations for authorized purposes.

(3) The term ''domestic and industrial uses'' means any beneficial use under an applicable water rights allocation system, other than irrigation uses as provided under 43 U.S.C. 390.

(4) The term ''then existing lawful uses'' means uses authorized under a State water rights allocation system, or Tribal or other uses pursuant to federal law, that are occurring at the time of the surplus water determination, or that are reasonably expected to occur during the period for which surplus water has been determined to be available.

Policies.

(c) *Determinations; Approval Authority.* (1) *Public participation; coordination with federal agencies, States and Tribes:* Prior to making a final determination that storage may be included in a Corps reservoir pursuant to 43 U.S.C. 390b, or that surplus water within the meaning of 33 U.S.C. 708 is available at a Corps reservoir, a written report shall be prepared explaining and documenting the basis for such determination. That report shall include an evaluation of any operational changes and impacts to authorized project purposes, and shall be coordinated with interested Federal, State, and Tribal water resource agencies. Public notice and opportunity for comment on the report shall be provided.

(2) The inclusion of storage at any Corps reservoir for municipal and industrial water supply pursuant to 43 U.S.C. 390b shall require the approval of the Assistant Secretary of the Army (Civil Works).

(3) Determinations of the availability of surplus water pursuant to 33 U.S.C. 708 shall require the approval of the Assistant Secretary of the Army (Civil Works), and shall specify the time period in which surplus water is determined to be available.

(4) *Federal hydropower projects:* At any Corps reservoir that has federal hydropower as an authorized purpose, where the Corps is considering a proposal to include storage for water supply, or to enter into contracts for surplus water, the Corps will coordinate that proposal in advance with the federal Power Marketing Administration that is responsible for marketing that federal power. The Corps will utilize in its determinations any information provided by the Power Marketing Administration, including its evaluation of hydropower impacts and cost information regarding revenues foregone and replacement power costs, in determining the impacts of the proposed action (including whether the proposed action would ''seriously affect'' the hydropower purpose or involve a ''major structural or operational change'' under 43 U.S.C. 390b, or the determination of whether ''surplus water'' is available under 33 U.S.C. 708), and the cost of storage, if applicable, to be charged to the prospective water supply user.

(d) *Storage agreements pursuant to the Water Supply Act, 43 U.S.C. 390b.* (1) *General:* Agreements for the inclusion of storage for water supply in a Corps reservoir (water supply storage agreements) pursuant to 43 U.S.C. 390b shall be executed by the Assistant Secretary of the Army (Civil Works) or that official's designee, and shall identify an amount of storage estimated to reliably provide a gross amount of water supply withdrawals or releases, and the costs allocated to that water supply storage. Agreements that would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve major structural or operational changes, shall not be executed without Congressional approval.

(2) *Water supply storage accounting:* Before including storage for water supply, the Corps shall include in the report prescribed under paragraph (c)(1) of this section reasonable projections of withdrawals, return flows, and any other flows directly attributable to the proposed water supply storage use. Water supply storage agreements shall include, or incorporate by reference, appropriate mechanisms for accounting for actual storage usage and available water supply storage on a continuing basis, and withdrawals pursuant to those agreements shall be limited to the actual yield of the reallocated storage, as measured by that storage accounting. Such storage accounting mechanisms shall be based on the principle that all inflows to and losses from the Corps reservoir are credited or charged proportionally to each water supply storage account, except that direct water supply withdrawals from the reservoir shall be charged to the storage account of the entity making the withdrawal.

(3) *Pricing:* Water supply storage agreements pursuant to 43 U.S.C. 390b shall include provisions for repayment by the water supply user of all project costs allocated to water supply, as provided in paragraphs (d)(3)(i) through (d)(3)(iii) of this section, including an annual charge for an appropriate share of the joint-use operation, maintenance, repair, rehabilitation, and replacement (OMRR&R) costs, as follows:

(i) In the case of projects where water supply storage is to be included through new construction, project costs allocated to water supply shall include all direct costs directly attributable to water supply; a share of the remaining first cost (construction cost) of the project, to be allocated based on the water supply share of the estimated benefits to be realized from the project; and an appropriate share of annual OMRR&R costs of the project.

(ii) Where water supply storage is added to an existing project through structural modifications, project costs allocated to water supply shall include the direct costs of those modifications; an amount equal to fifty percent of the savings compared to the cost of the most likely alternative that could service the water supply need, in lieu of the proposed modification to the Corps reservoir; and an appropriate share of annual OMRR&R costs of the project.

(iii) In the case of projects where no new construction costs are incurred in including storage for water supply, the project costs allocated to water supply shall be determined based upon the higher of quantified benefits foregone, revenues foregone, or the updated cost of storage allocated to water supply. The amount of storage allocated to water supply shall reflect an amount of storage estimated to reliably provide an individual user's requested, gross water supply withdrawals (dependable yield). The water supply user shall be responsible for an appropriate share of annual OMRR&R costs of the project.

(iv) *Other charges:* Any charges for water supply storage agreements under paragraph (d)(3) of this section are in addition to any costs associated with any real property transactions or regulatory permits as may be necessary to facilitate the withdrawals.

(e) *Surplus water agreements pursuant to Section 6, 33 U.S.C. 708.* (1) *General:* Contracts for the use of surplus water pursuant to 33 U.S.C. 708 may be executed by the Assistant Secretary of the Army (Civil Works) or that official's designee, shall identify the amount of surplus water to be withdrawn, and shall be for a term not to exceed the duration of the applicable surplus water determination, as provided in paragraph (c)(3) of this section. The terms of such contracts and of any necessary easements may be incorporated into a single instrument, as provided in paragraph (g) of this section.

(2) *Pricing:* Except as provided in paragraph (e)(2)(i) of this section, or by applicable federal law, surplus water agreements pursuant to 33 U.S.C. 708 shall include an annual charge to reflect only the full, separable costs, if any, to the Government associated with the surplus water withdrawals.

(i) *Upper Missouri River Mainstem Reservoirs:* For the period ending ten years after June 10, 2014, no fee will be charged for surplus water agreements pursuant to 33 U.S.C. 708 for surplus water withdrawn from the Upper Missouri River Mainstem Reservoirs.

(ii) *Other charges:* Any charges for surplus water uses of reservoirs under paragraph (e)(2) of this section are in addition to any costs associated with any real property transactions or regulatory permits as may be necessary to facilitate the withdrawals.

(f) *Exercise of Discretion and Choice of Authority; Transition Period.* (1) The authorities of the Secretary of the Army as set forth in 33 U.S.C. 708 and 43 U.S.C. 390b are discretionary. The authority conferred under 33 U.S.C. 708 should be used, at the Secretary's discretion, to accommodate water supply needs provisionally, for limited time periods, so long as surplus water remains available, and provided that contracts for surplus water do not adversely affect then existing lawful uses of such water. The authority provided in 43 U.S.C. 390b should be used, at the Secretary's discretion, to accommodate long-term and permanent water supply needs that require the dependability afforded by storage in a Corps reservoir.

(2) *Transition period.* All new agreements entered into pursuant to 33 U.S.C. 708 and 43 U.S.C. 390b after the effective date of the final rule, including new agreements for users with expiring agreements, shall comply with the policies set forth in this section. Current water supply withdrawals that are occurring pursuant to easements only, without water supply agreements, will be reassessed when the easements expire, or within five years of the effective date of the final rule, whichever is earlier. If those withdrawals are found to require a Section 6 surplus water contract or a WSA storage agreement, the appropriate agreement shall be required in order for the withdrawals to continue.

(g) *Real Estate Instruments.* The Corps will issue any easements necessary to allow the withdrawal of water under either 33 U.S.C. 708 or 43 U.S.C. 390b in accordance with the provisions of 10 U.S.C. 2668. Such easements shall be conditioned on the grantee's continued compliance with the terms and conditions of authorizations for withdrawal pursuant to either 33 U.S.C. 708 or 43 U.S.C. 390b. The pricing policies set forth in paragraphs (d)(3) and (e)(2) of this section shall not alter or substitute for any charge assessed for the granting of an easement pursuant to 10 U.S.C. 2668 and applicable regulations. Easements issued in connection with surplus water agreements under 33 U.S.C. 708 may incorporate all necessary terms in a single instrument.

(h) *Relation to State, Tribal, or other federal reserved water rights:* The exercise by the Corps of authority under 33 U.S.C. 708 or 43 U.S.C. 390b shall not adversely affect any then-existing State water right, or Tribal or other federal reserved water right. It shall be the responsibility of private water supply users to secure and defend any state water rights necessary to use water withdrawn from a Corps reservoir. The Corps shall not obtain water rights on behalf of water supply users, nor shall it become, by virtue of any agreement executed pursuant to 33 U.S.C. 708 or 43 U.S.C. 390b, a party to any water rights dispute.

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