



DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 207

Reservoirs at Headwaters of the Mississippi River; Use and Administration

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: The U.S. Army Corps of Engineers is proposing to amend the rules regarding use and administration of the reservoirs at the headwaters of the Mississippi River by deleting from the Code of Federal Regulations all references to minimum discharges and to operating limits for the reservoirs. Following extensive public input and environmental review, the St. Paul District of the Corps of Engineers recently adopted an updated operating plan for the Mississippi River Headwaters reservoirs containing minimum flow values that differ from those currently codified in the Code of Federal Regulations. Deleting all references to minimum flows in the regulations will eliminate the current discrepancy between the regulations and the approved operating plan for the reservoirs. The operating limits are also contained in the operating plan for the reservoirs, and eliminating both the minimum flow values and the operating limits from the rule will make it unnecessary to amend the regulations each time the values are modified in the operating plan in the future.

DATES: Submit comments on or before [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by docket number COE-2013-0008, by any of the following methods:

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

E-mail: Jerry.W.Webb@usace.army.mil and Chandra.S.Pathak@usace.army.mil.

Include the docket number, COE-2013-0008 in the subject line of the message.

Mail: U.S. Army Corps of Engineers, Attn: CECW-CE (Chandra S. Pathak), 441 G Street NW, Washington, DC 20314-1000.

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

Instructions: Direct your comments to docket number COE-2013-0008. 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 e-mail. 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 e-mail directly to the Corps without going through regulations.gov, your e-mail 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 form.

FOR FURTHER INFORMATION CONTACT: Mr. Jerry W. Webb, Headquarters, U.S. Army Corps of Engineers, Engineering and Construction Community of Practice, Washington, D.C. at 202-761-0673; Mr. Chandra S. Pathak, Headquarters, U.S. Army Corps of Engineers, Engineering and Construction Community of Practice, Washington, D.C. at 202-761-4668; or Mr. Kenton Spading, U.S. Army Corps of Engineers, St. Paul District, at 651-290-5623.

SUPPLEMENTARY INFORMATION:

Executive Summary

The purpose of this action is to amend the current rule regarding minimum discharges and minimum operating limits of the reservoirs at the headwaters of the Mississippi River to ensure that the regulations do not conflict with the current operating plan for those reservoirs.

The Corps' authority to amend the minimum flow values and minimum operating limits for the reservoirs of the headwaters of the Mississippi River is Section 7 of the Rivers and Harbors Act of 1917 (40 Stat. 266; 33 U.S.C. 1) and Section 216 of the Flood Control Act of 1970 (84 Stat. 1830; 33 U.S.C. 549a).

Background

The Rivers and Harbors Acts of June 14, 1880, and August 2, 1882, authorized the construction of dams at each of the six Mississippi River Headwaters lakes for the purpose of augmenting Mississippi River flow for navigation. The lakes affected by these acts are Winnibigoshish, Leech, Pokegama, Sandy, Cross (Pine River), and Gull. Following authorization of the reservoirs, the Secretary of War prescribed regulations governing operation of the reservoirs on February 11, 1931, which were codified at 33 C.F.R. § 207.340. The current regulations list minimum discharges for each reservoir at 33 C.F.R. § 207.340(d)(2). The current regulations also list minimum operating limits, or the lowest level at which the Corps may operate each reservoir, at 33 C.F.R. § 207.340(d)(7).

The Corps' procedure adopting and publishing regulations related to reservoirs has changed since the aforementioned regulations were originally codified in 1931. The present-day practice is to include minimum flow values, operating limits and other related information in Water Control Manuals that are adopted following an extensive public and environmental review process, as outlined in Engineer Regulation (ER) 1110-2-240. Moreover, the operating limits in the Water Control Manuals prescribe not only the minimum level at which a reservoir may operate but also the absolute upper limit on

reservoir operations, effectively providing a band within which the Corps may operate a reservoir.

As a precursor to updating the Water Control Manuals for the Mississippi River Headwaters reservoirs in 2009, we completed a study known as the Mississippi River Headwaters Reservoir Operating Plan Evaluation (ROPE). The primary purpose of the ROPE was to evaluate alternative operating plans for the Headwaters reservoirs in an attempt to improve the operation of the system while balancing tribal trust obligations, flood risk reduction, environmental concerns, water quality, water supply, recreation, navigation, hydropower, and other public interests.

On January 19, 2010, after thoroughly assessing potential environmental impacts and involving the public in the process, the District Engineer for the St. Paul District signed a Record of Decision approving the ROPE's recommended operating plan for the Headwaters reservoirs. The ROPE's recommended plan adopts minimum discharges that were scientifically developed using a habitat in-stream flow analysis (Tenant 1976), as described in the ROPE. The minimum discharges in the ROPE's recommended plan differ from the minimum discharges listed in 33 C.F.R. § 207.340 as it is currently written. We are in the process of updating the Water Control Manuals for the Headwaters reservoirs to implement the recommendations from the 2009 ROPE. Once the Water Control Manuals are revised, the minimum discharge values in the revised Water Control Manuals will also be in conflict with 33 C.F.R. § 207.340 if the regulation is not amended.

Table No. 1 illustrates the differences between the current regulations and the 2009 ROPE study minimum flows.

Table 1 Mississippi River Headwater Reservoir System Operating Limits and CFR versus ROPE minimum discharges						
	Winni- bigoshish	Leech	Pokegama	Sandy	Cross L. Pine R.	Gull
Total Operating Limit	1294.94- 1303.14	1292.70- 1297.94	1270.42- 1278.42	1214.31- 1221.31	1225.32- 1235.30	1192.75- 1194.75
Minimum Flow: 33 C.F.R. § 207.340	150 cfs	70 cfs	200 cfs	80 cfs	90 cfs	30 cfs
Minimum Flow: 2009 ROPE	≥ 1294.94 100 cfs < 1294.94 50 cfs	≥ 1292.70 120 cfs < 1292.70 60 cfs	≥ 1273.17 200 cfs < 1273.17 Sum of Flow From Winni- bigoshish plus Leech	≥ 1214.31 20 cfs < 1214.31 10 cfs	≥ 1225.32 30 cfs < 1225.32 15 cfs	≥ 1192.75 20 cfs < 1192.75 10 cfs

We are proposing to amend the regulations to delete all references to minimum flows to eliminate any conflict between the regulations and the Water Control Manuals that guide operations at the Mississippi River Headwaters reservoirs. We further propose to remove the minimum operating limits from the regulations. Any future changes to the minimum flows or the operating limits of the Headwaters reservoirs will be handled through revisions to the Water Control Manuals, which will be accomplished in accordance with the guidance provided in ER 1110-2-240 after public input and any necessary environmental reviews. The proposed change to the rule will eliminate the necessity of amending the Code of Federal Regulations each time a Water Control Manual is updated.

Administrative Requirements

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.

Paperwork Reduction Act

This proposed action will not impose any new information collection burden under the provisions of the Paperwork Production Act (44 U.S.C. 3501 et seq.). The proposed modification would eliminate minimum flow values and operating limits from the rule. Since the proposed rule does not involve any additional collection of information from the public, this action is not subject to the Paperwork Reduction Act.

Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Corps must determine whether the regulatory action is “significant” and therefore subject to review by OMB and the requirements of the Executive Order. The Executive Order defines “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, a sector of 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.

Pursuant to the terms of Executive Order 12866, we have determined that the proposed rule is not a "significant regulatory action" because it does not meet any of these four criteria. The proposed rule modifies the regulations to be consistent with an approved, updated operating plan for the Mississippi River Headwaters reservoirs.

Executive Order 13132

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."

The proposed rule does not have Federalism implications. We do not believe that amending the regulation to eliminate references to minimum flow values and operating limits for the Mississippi River Headwaters reservoirs will have substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. The proposed rule does not impose new substantive requirements. In addition, the

proposed changes will not impose any additional substantive obligations on State or local governments. Therefore, Executive Order 13132 does not apply to this proposed rule.

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 requirements 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 proposed 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.

After considering the economic impacts of the proposed rule on small entities, we believe that this action will not have a significant economic impact on a substantial number of small entities. The proposed rule is consistent with current agency practice, does not impose new substantive requirements, and therefore would not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for 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. Before promulgating a rule for which a written statement is needed, Section 205 of the UMRA generally requires the agencies to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows an agency to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation why that alternative was not adopted. Before an agency establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed, under Section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that the proposed rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. The proposed rule is consistent with current agency practice, does not impose new substantive requirements and therefore does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. Therefore, the proposed rule is not subject to the requirements of Sections 202 and 205 of the UMRA. For the same reasons, we have determined that the proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments. Therefore, the proposed rule is not subject to the requirements of Section 203 of UMRA.

Executive Order 13045

Executive Order 13045, “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be “economically significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the proposed rule on children, and explain why the regulation is preferable to other potentially effective and reasonably feasible alternatives.

The proposed rule is not subject to this Executive Order because it is not economically significant as defined in Executive Order 12866. In addition, it does not

concern an environmental or safety risk that we have reason to believe may have a disproportionate effect on children.

Executive Order 13175

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 6, 2000), requires 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.”

The proposed rule does not have tribal implications. It will not have substantial direct effects on tribal governments, 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. It is generally consistent with current agency practice and does not impose new substantive requirements. Therefore, Executive Order 13175 does not apply to this proposed rule.

Environmental Documentation

The purpose of this proposed rulemaking is to make the Code of Federal Regulations consistent with the current operating plan for the Mississippi River Headwaters Reservoirs. This action is solely administrative in nature. There is no intended change in the use or operation of the reservoirs as a result of this action. The substantive change in reservoir operations has already occurred as a consequence of the

adoption of an updated operating plan, as approved in the Record of Decision for Mississippi River Headwaters Reservoir Operating Plan Evaluation dated January 19, 2010. The potential environmental impacts of the updated operating plan were thoroughly assessed in the Final Integrated Reservoir Operating Plan Evaluation and Environmental Impact Statement dated September 2009. Because the present action is merely administrative and an environmental analysis was completed at the time the substantive changes to the operating plan were adopted, no additional environmental documentation will be required at this time.

Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added 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. The proposed rule is not a “major rule” as defined by 5 U.S.C. 804(2).

Executive Order 12898

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each Federal agency must make achieving environmental justice part of its mission. Executive Order 12898 provides that each Federal agency conduct its programs, policies, and activities that substantially affect human health or the

environment in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

The proposed rule is not expected to negatively impact any community, and therefore is not expected to cause any disproportionately high and adverse impacts to minority or low-income communities.

Executive Order 13211

The 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. 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.

List of Subjects in 33 CFR Part 207

Navigation (water), Penalties, Reporting and recordkeeping requirements,
Waterways.

Date: July 3, 2013.

Approved By: _____

James R. Hannon

Chief of Operations

For the reasons stated in the preamble, the Corps proposes to amend 33 CFR part 207 as follows:

PART 207 - - NAVIGATION REGULATIONS

1. The authority citation for part 207 continues to read as follows:

Authority: 40 Stat. 266 (33 U.S.C. 1).

2. Revise § 207.340 to read as follows:

§ 207.340 Reservoirs at headwaters of the Mississippi River; use and administration.

(a) Description. These reservoirs include Winnibigoshish, Leech Lake, Pokegama, Sandy Lake, Pine River and Gull Lake.

(b) Penalties. The River and Harbor Act approved August 11, 1888 (25 Stat. 419, 33 U.S.C. 601) includes the following provisions as to the administration of the headwater reservoirs:

And it shall be the duty of the Secretary of War to prescribe such rules and regulations in respect to the use and administration of said reservoirs as, in his judgment, the public interest and necessity may require; which rules and regulations shall be posted in some conspicuous place or places for the information of the public. And any person knowingly and willfully violating such rules and regulations shall be liable to a fine not exceeding five hundred dollars, or imprisonment not exceeding six months, the same to be enforced by prosecution in any district court of the United States within whose territorial jurisdiction such offense may have been committed.

(c) Previous regulations now revoked. In accordance with the above act, the Secretary of War prescribed regulations for the use and administration of the reservoirs at the headwaters of the Mississippi River under date of February 11, 1931, which together with all subsequent amendments are hereby revoked and the following substituted therefor.

(d) Authority of officer in charge of the reservoirs. The accumulation of water in, and discharge of water from the reservoirs, including that from one reservoir to another, shall be under the direction of the U.S. District Engineer, St. Paul, Minnesota, and of his authorized agents subject to the following restrictions and considerations:

(1) Notwithstanding any other provision of this section, the discharge from any reservoir may be varied at any time as required to permit inspection of, or repairs to, the dams, dikes or their appurtenances, or to prevent damage to lands or structures above or below the dams.

(2) During the season of navigation on the upper Mississippi River, the volume of water discharged from the reservoirs shall be so regulated by the officer in charge as to maintain as nearly as practicable, until navigation closes, a sufficient stage of water in the navigable reaches of the upper Mississippi and in those of any tributary thereto that may be navigated and on which a reservoir is located.

(e) Passage of logs and other floating bodies. Logs and other floating bodies may be sluiced or locked through the dams, but prior authority for the sluicing of logs must be

obtained from the District Engineer when this operation necessitates a material change in discharge.

(f) Obstructions to flow of water. No person shall place floating bodies in a stream or pond above or below a reservoir dam when, in the opinion of the officer in charge, such act would prevent the necessary flow of water to or from such dam, or in any way injure the dam and its appurtenances, its dikes and embankments; and should floating bodies lying above or below a dam constitute at any time an obstruction or menace as beforesaid, the owners of said floating bodies will be required to remove them immediately.

(g) Trespass. No one shall trespass on any reservoir dam, dike, embankment or upon any property pertaining thereto.

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