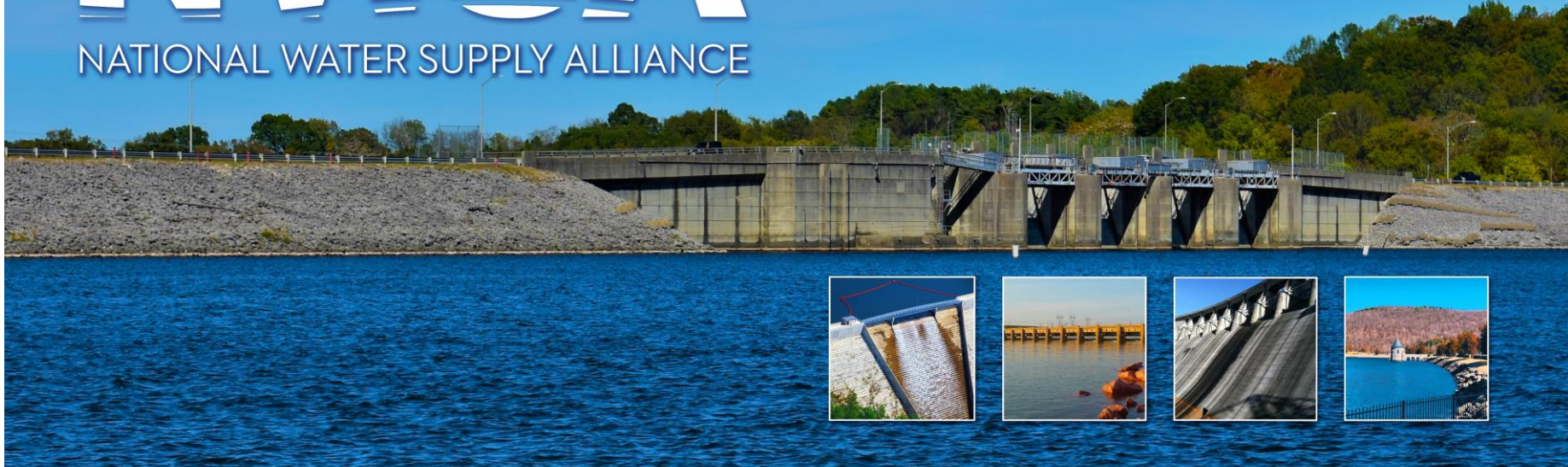


NWSA

NATIONAL WATER SUPPLY ALLIANCE



ADVANCING THE INTERESTS OF WATER SUPPLY PROVIDERS • NationalWaterSupply.org

Policy Committee Discussion

Annual Meeting

August 23, 2022 – Day 2

Overview

NWSA Strategic Plan – Define Key Issues

Purpose of Writing Down Policy Statements – Clear statements to support Congressional and USACE engagement

Member Survey – Top Responses (1) Return Flows and (2) Obtaining Corps Easements and Construction Approvals for Water Supply Projects

Based on DC Discussion – Natural Flows, Surplus Water, Other Non-Storage Water Supply Authorities



Advancing the interests of
water supply providers

Goals for Today's Discussion

1. Review and Finalize NWSA Policy Statements #1 and #2
2. Group Decision on Whether to Work on NWSA Policy Statements for Natural Flows / Surplus Water / Non-Storage Water Supply
3. Feedback on Other Focus Areas for Policy Committee

Review Draft Policy Statements

**Policy Statement #1 – Army Corps
Must Defer to State-Granted Water
Rights**

**Policy Statement #2 – Army Corps’
Primary Role in Water Supply is
Limited to Providing Storage Space
and Not Water Itself**



Natural Flows, Surplus Water, Non-Storage Water Supply

What key water supply issues are there beyond those related to storage?

Non-Storage Water Supply
Principles and Authorities



Advancing the interests of
water supply providers



Overview of Law re: Surplus Water



Advancing the interests of
water supply providers

Flood Control Act of 1944 – Section 6

Pub. L. No. 78-534 (33 U.S.C. § 708).

Sec. 6. That the Secretary of War 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 War Department: 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.

- Very few contracts nationally
- 5-year contracts reserved by policy for short-term uses
- **May be an option for emergency M&I supplies (see WRDA 1974, P.L. 93-251)**
- Not ordinarily eligible for permanent rights under Pub. L 88-160
- Historically priced the same as storage (annual rental = annual P&I for storage). Water Supply Rule proposed limiting the charge to the government's direct marginal cost.

Does Sec. 6 authorize Corps to sell water?

- During floor debate on FCA 1944, Sen. White noted:

[T]his provision is something new in our legislation. I may be greatly in error, but I have not known of any previous legislation which authorized the Secretary of War or anyone else to sell stored waters. Am I correct that this is something new....

- But the legislation did not change
- Can still argue from first principles:
 - Secretary cannot sell what the Secretary does not own
 - Secretary has no claim to natural flows
 - Any claim would be limited to stored water
 - Floor debate supports limiting Sec. 6 to stored water

What is “surplus water”

Surplus to federal purposes

- *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 504 n.3 (1988) USAC’s current position is that “surplus water” is water that is “not needed to fulfill a project purpose in Army reservoirs.” This view is consistent with the language of the Act
- Similar to surplus power (1944 FCA § 5) or surplus property

Unappropriated / unclaimed: “Provided, That no contracts for such water shall adversely affect then-existing lawful uses of such water.” (FCA 1944 § 6)

Stored?

Thoughts

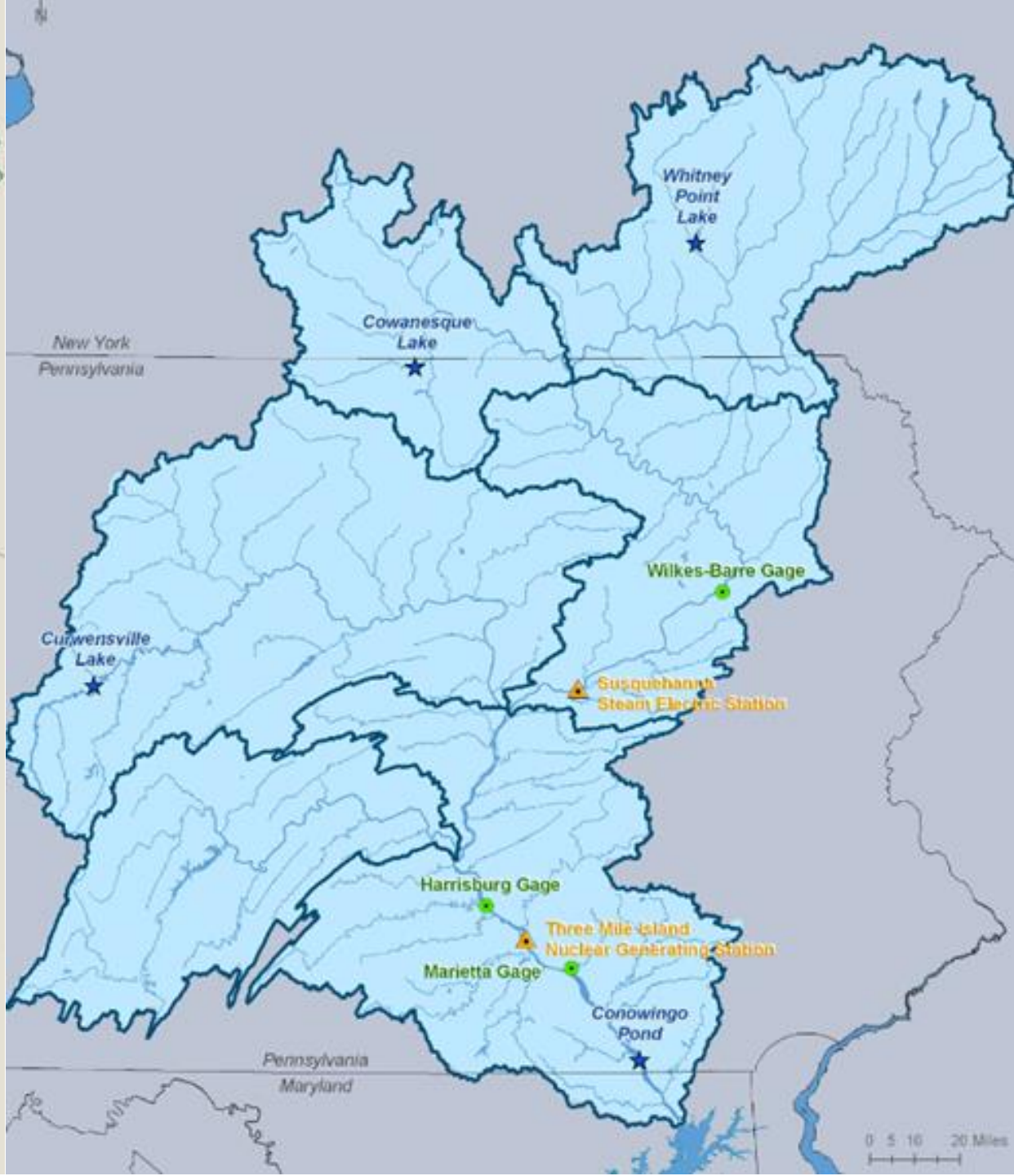
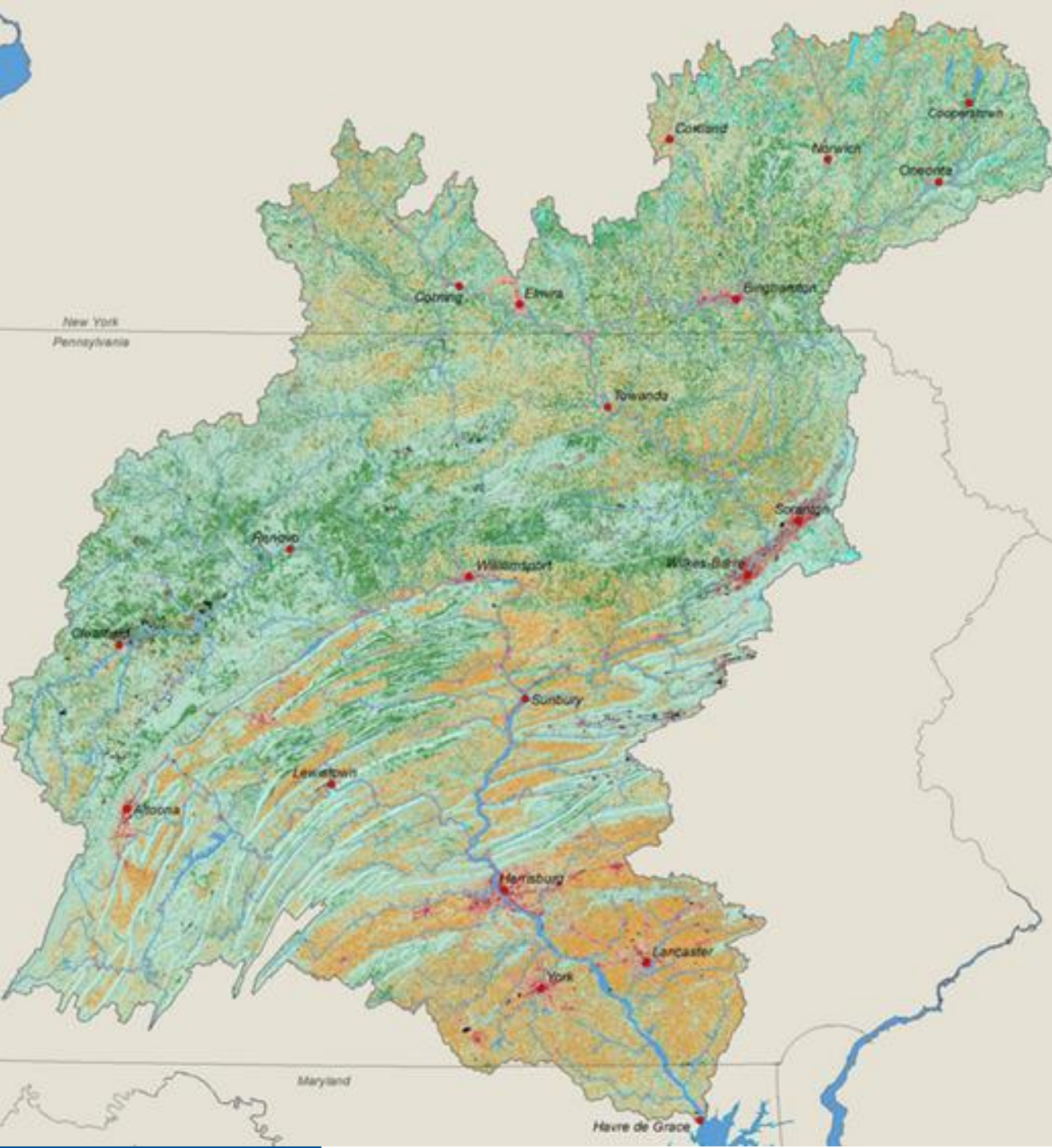
- Controversy is not about the Corps' willingness to grant contracts; it is about the Corps' authority to control usage and charge \$
- Until 2020, USACE real estate policy prohibited granting an easement to access water without a contract (surplus or storage). This changed (at least on paper!) in 2020 as a compromise to proposed Cramer-Merkley Amendment
- Surplus water contracts might have a role in providing emergency drought relief and/or interim supplies pending reallocation

Surplus Water-Like Provision for the Susquehanna River Basin 2007 WRDA – Section 5019

(d) WATER SUPPLY AND CONSERVATION STORAGE, SUSQUEHANNA RIVER BASIN.—

(1) IN GENERAL.—The Secretary shall enter into an agreement with the Susquehanna River Basin Commission to provide temporary water supply and conservation storage at Federal facilities operated by the Corps of Engineers in the Susquehanna River basin for any period for which the Commission has determined that a drought warning or drought emergency exists.

(2) LIMITATION.—The agreement shall provide that the cost for water supply and conservation storage under paragraph (1) shall not exceed the incremental operating costs associated with providing the storage.





Recap and Summary of North Dakota's Position – Natural Flows



Advancing the interests of
water supply providers



Possible Next Steps for Committee

– Work on Policy Statements for:

Articulate what NWSA Wants re:

- Natural Flows
- Surplus Water
- Non-storage water rights

Possible Next Steps for Committee

– Work on Policy Statements for:

- Establish a standard procedure for determining benefits foregone for hydropower
- Develop new procedures for establishing the cost of storage
- Establish procedures for OMRRR billing and for developing more useful 5-year OMRRR expense forecasts
- Streamline 404 permitting of state and local reservoirs
- Establish standards and procedures for coordinating reallocation studies with dam safety repairs (permanent or interim repairs)
- FIRO (write-in)
- Establish USACE policy on sediment management

Other Issues on Committee's Radar

Watching for Corps' Report to Congress on whether Water Supply should be a primary mission of the Corps

Following rulemaking re: Corps' Agency-Specific Procedures for the Principles, Requirements, and Guidelines

ASACW Memo directing USACE "to provide a comprehensive brief to my office [by September 12, 2022] on the ongoing, planned, and additional potential CW actions that can further drought resilience at local and regional scales."



Advancing the interests of
water supply providers