



RECOMMENDED ACTION MEMO

Agency: Department of Defense, Department of the Army, United States Army Corps of Engineers (“USACE”)
Topic: Trump Administration Rule Allowing Guns on USACE Land
Date: November 2020

Recommendation: Reverse a Trump administration rule that allows for the possession and use of firearms on project sites owned and run by the US Army Corps of Engineers.

I. Summary

Description of recommended executive action

For decades, the United States Army Corps of Engineers (“USACE”) embraced a commonsense approach limiting the possession of loaded firearms and ammunition on public lands it controls (e.g. water resource development projects). Namely, USACE allowed for possession of loaded firearms for law enforcement purposes, hunting, and recreational shooting, while requiring written permission from district commanders in all other circumstances (the “Traditional Rule”).¹

However, in late 2020, the Trump administration is expected to finalize a rule overturning this long-standing regulation in favor of a scheme that disposes of the written permission requirement and defaults to applicable state and local firearm regulations where the USACE property is located (“the Trump Rule”).² In effect, the Trump Rule will allow for both the open and concealed carry of firearms on public lands controlled by USACE—including military-style assault rifles—so long as potential possessors abide by the minimal standards set out by state and local law in many jurisdictions.

By allowing visitors to freely carry firearms in densely populated recreational areas and near critical infrastructure, the Trump Rule will pose significant risks to public safety, USACE park rangers, and national security. To protect the safety of Americans, the next administration should begin the rulemaking process to reinstate the Traditional Rule.

Overview of process and time to enactment

The Administrative Procedure Act (“APA”) requires that federal agencies issue rules through the notice and comment rulemaking (“NCRM”) process.³ To reinstate the Traditional Rule, USACE will be required to issue a notice of proposed rulemaking (“NPRM”), provide a period for receiving public comments, respond to significant received comments (by either modifying the proposed rule or addressing substantive comments directly), and publish the final rule in the

¹ 11 Fed. Reg. 9278, 9279 (August 24, 1946) (until recently, codified at 36 C.F.R. § 327.13).

² 85 Fed. Reg. 20460, “Rules and Regulations Governing Public Use of Water Resource Development Projects Administered by the Chief of Engineers,” Federal Register, April 13, 2020, <https://www.federalregister.gov/documents/2020/04/13/2020-07184/rules-and-regulations-governing-public-use-of-water-resource-development-projects-administered-by>.

³ 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.

Federal Register. A rule generally goes into effect thirty days after it is published.⁴ This multi-phase process generally extends for a year.

II. Current state

Longstanding USACE regulation

Since 1946, when USACE first designated lands for public recreational use, the agency has restricted the possession of firearms on public lands it controls.⁵ In the decades since—including during the Trump administration—the agency has consistently adopted additional rules⁶ and guidance⁷ codifying and implementing those initial protections. Under the Traditional Rule and the guidance implementing the Rule:

- USACE regulations allowed for possession of loaded firearms for law enforcement purposes, hunting, and recreational shooting, in accordance with applicable local, state, and federal law.⁸
- For all other purposes, USACE regulations required individuals to obtain written permission from district commanders in order to possess a loaded firearm.⁹

To obtain written permission from a district commander, USACE implementing guidance required an individual to (1) have a state-issued weapons permit and (2) only carry the firearm in a concealed manner.¹⁰ Even if these requirements were met, permission was granted at the discretion of each district commander, who was also required to consider whether the possession would “interfere, impede, or disrupt the use of a project or otherwise impair safety.”¹¹

The Traditional Rule and the guidance implementing the Rule are part of a longstanding government practice of regulating or prohibiting the possession of firearms in public spaces, including areas of recreation, and near potential targets of terrorism.

Trump administration action

On April 13, 2020, the Department of the Army, through USACE, issued a proposed rule to eliminate these important protections and make it easier for individuals to carry loaded firearms on the 12 million acres of public land it controls.¹² In response to the proposed rule, the agency received over 8,380 comments.¹³

⁴ Congressional Research Service, “An Overview of Federal Regulations and the Rulemaking Process,” January 7, 2019, <https://crsreports.congress.gov/product/pdf/IF/IF10003>.

⁵ 11 Fed. Reg. 9278, 9279 (August 24, 1946) (initially codified at 36 C.F.R. § 301.8).

⁶ See e.g., 36 C.F.R. § 313.12 (1966) (codifying the 1946 regulations); 36 C.F.R. § 327.13 (1976) (codifying the 1946 regulations); 36 C.F.R. § 327.15 (1986) (extending the restrictions to shooting ranges).

⁷ USACE, “Command Guidance in Considering Firearm Possession Requests Under 36 C.F.R § 327.13(a), Explosives, Firearms, other Weapons and Fireworks,” Department of the Army, May 14, 2018, <https://corpslakes.ercd.dren.mil/employees/cecwon/pdfs/18May14-FirearmsPossessionGuidance.pdf>.

⁸ Supra note 1.

⁹ *Id.*

¹⁰ Supra note 7.

¹¹ *Id.*

¹² Supra note 2.

¹³ *Id.*

We expect that the Trump Rule will be finalized before January 20, 2021. We also expect that the Trump administration will simultaneously revoke the guidance implementing 36 C.F.R. § 327.13(a)(4), the written permission requirement.

Together, the Trump Rule and revocation of the Traditional Rule's implementing guidance will:

- Remove the written permission requirement, allowing individuals to carry firearms on federal public lands so long as they comply with state and local law, including unqualified people with a dangerous history in states with weak carrying laws
- Remove the requirement that firearms only be carried in a concealed manner, thus allowing individuals to openly carry loaded firearms, including high-powered assault rifles, on federal public lands

In its notice of proposed rulemaking (NPRM), the agency explained the Trump Rule would benefit the public by eliminating the "burdensome" requirements that had governed possession of weapons on USACE land for decades.¹⁴

Dangers inherent in the Trump Rule

Public safety and national security are threatened by the Trump Rule.

- By removing the written permission requirement (a form of permitting), the Trump Rule will allow dangerous individuals, including those who have not passed a background check, to carry loaded weapons on public lands. Permitting systems ensure important public safety standards are preserved when people carry handguns in public places, and most states require safety training and a background check in order to receive a concealed carry permit.¹⁵ However, not all states have such permitting systems in place; there are currently 15 states that allow concealed firearms to be carried without a background check or firearms training.¹⁶ In these states, the Trump Rule will make such "permitless carry" regimes the rule for USACE public lands, thus allowing dangerous individuals to carry loaded weapons near critical infrastructure and high-density recreation areas.

Multiple studies show that restrictions on carrying concealed weapons like those in place under the Traditional Rule can increase public safety. For example, recent analyses have shown that states with weak standards for concealed carry have higher rates of

¹⁴ *Id.*

¹⁵ According to an analysis by Everytown: 39 states and D.C. require firearm training in order to get a concealed carry permit; 34 states and D.C. require applicants to pass a background check; 30 states and D.C. disqualify people convicted of (a) misdemeanor "crimes of violence," as classified by the state, or (b) certain serious violent misdemeanors such as assault and battery, threatening, or crimes committed with a weapon, available at: <https://beta.regulations.gov/document/COE-2018-0008-8354>.

¹⁶ Giffords Law Center, "Concealed Carry," accessed October 1, 2020, <https://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/concealed-carry/>.

violent crime¹⁷ and gun homicides¹⁸ than would be expected if the states had stricter standards for public carry.

- By removing the ban on open carry, the Trump Rule will authorize this dangerous practice on USACE public lands in nearly all states. Because open carry is legal in nearly all states, the Trump Rule will authorize this dangerous practice on nearly all federal public lands controlled by USACE.¹⁹ By promoting gun carrying in public places, often with few restrictions, open carry can increase the likelihood of conflict, severely endangering public safety. Researchers have suggested that the presence of visible firearms may alter behavior and increase aggressive and violent behaviors.²⁰
- USACE property is made up of highly dense recreational areas. USACE property receives 370 million visits per year, making it the most visited of any single federal agency's sites.²¹ USACE property is particularly vulnerable to shootings purely on account of the increased number of interactions between civilians. *United States v. Lauchli* demonstrates the risks inherent in loaded firearm possession on USACE property and the vital need to place restrictions on such possession.²² In *Lauchli*, the defendant was fishing with his wife while on the Kaskaskia River in Clinton County, Illinois when his fishing line got tangled with lines of several people fishing from the shore. An argument ensued and the defendant, in anger, pulled a revolver and threatened to injure the other fishermen. The defendant was charged and convicted of possessing a loaded firearm on USACE property, in violation of the Traditional Rule.²³

The Trump Rule will open the floodgates to millions of visitors carrying firearms in areas where disputes can quickly escalate over minor issues. Should disputes arise over fishing, musical tastes, or invasion of personal space (especially in the midst of a global pandemic), firearms can lead to explosive encounters and threaten public safety, especially when alcohol is brought into the mix.

- USACE park rangers are mainly responsible for visitor assistance and issuing minor park-related citations; they do not carry weapons and cannot enforce state or other

¹⁷ John J. Donohue, Abhay Aneja, and Kyle D. Weber, "Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis," *Journal of Empirical Legal Studies* 16, no. 2 (2019): 198–247.

¹⁸ Michael Siegel, et al., "Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States," *American Journal of Public Health* 107, no. 12 (2017): 1923–1929.

¹⁹ Giffords Law Center, "Open Carry," accessed September 1, 2020, <https://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/open-carry/>.

²⁰ Arlin J. Benjamin Jr., Sven Kepes, and Brad J. Bushman, "Effects of Weapons on Aggressive Thoughts, Angry Feelings, Hostile Appraisals, and Aggressive Behavior: A Meta-analytic Review of the Weapons Effect Literature," *Personality and Social Psychology Review* (2017); Arlin James Benjamin Jr. and Brad J. Bushman, "The Weapons Priming Effect," *Current Opinion in Psychology* 12 (2016): 45-48; David Hemenway, Mary Vrinotis, and Matthew Miller, "Is an Armed Society a Polite Society? Guns and Road Rage," *Accident Analysis & Prevention* 38, no. 4 (2006): 687-695.

²¹ Decl. of Stephen B. Austin in Supp. of Def's Opp'n to Pls' Mot. for Prelim. Inj. ¶ 3, *GeorgiaCarry.org, Inc. v. U.S. Army Corps of Eng'rs*, No. 4: 14-CV -00139-HLM (N.D. Ga. 2014), ECF 11-1 (filed July 14, 2014).

²² *United States v. Lauchli*, 724 F.2d 1279, 1281 (7th Cir. 1984).

²³ *Id.*

federal laws.²⁴ Without means for keeping order, USACE park rangers cannot protect civilians should a violent shooting erupt.

- The Trump Rule will expose the U.S. to terrorist and military threats. The USACE manages critical water infrastructure projects that provide energy and supply “water to thousands of cities, towns, and industries from the 9.5 million acre-feet of water stored in its 116 lakes and reservoirs throughout the country, including service to approximately 1 million residents of the District of Columbia and portions of northern Virginia.”²⁵ If even one dam were destroyed, the consequences would be devastating. This tie-in to critical infrastructure and the nation’s water supply differentiates the USACE from the National Park Service and other federal agencies. The risk of catastrophic damage from armed terrorists make gun regulation necessary.

III. Proposed action

The next administration should issue a new rule (“New Rule”) to reinstate the Traditional Rule.

A. Substance of the New Rule

The New Rule should reinstate the Traditional Rule and its implementing guidance. This would reverse the dangerous changes made during the Trump administration and once again:

- Allow for possession of firearms on USACE land for law enforcement purposes, hunting, and recreational shooting, in accordance with applicable local, state, and federal law (this change should be made via rulemaking and mirror the Traditional Rule.)
- Require that, for all other purposes, individuals receive written permission from a district commander to possess a firearm on USACE land (this change should be made via rulemaking and mirror the Traditional Rule.)

To obtain written permission from a district commander, an individual would be required to: (1) have a state-issued weapons permit, (2) only carry the firearm in a concealed manner, and (3) comply with other reasonable conditions imposed by the district commander, keeping in line with the discretion provided to district commanders under the Traditional Rule and the guidance implementing the Rule. These changes could be made via rulemaking or, as with the Traditional Rule, be implemented via guidance.

B. Process

Although the next administration will rely on the Traditional Rule to inform development of the New Rule, the administration must go through the NCRM process under the APA.²⁶

First, an agency must provide notice that it intends to promulgate a rule by publishing an NPRM in the *Federal Register*. The notice must provide the time, place, and nature of the rulemaking;

²⁴ Supra note 20.

²⁵ Claudia Copeland, “Terrorism and Security Issues Facing the Water Infrastructure Sector,” Congressional Research Service, December 15, 2010, <https://fas.org/sgp/crs/terror/RL32189.pdf>.

²⁶ 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.

the legal authority under which the rule is proposed; and either the terms or subject of the proposed rule.²⁷

Then the agency must accept public comments on the proposed rule for a period of at least thirty days.²⁸ Received comments must be reviewed, and the USACE must respond to significant comments, either by explaining why it is not adopting proposals or by modifying the proposed rule to reflect the input.

Once this process is complete, the final rule can be published in the *Federal Register* along with a concise explanation of the rule's basis and purpose.²⁹ Generally, the final rule may not go into effect until at least thirty days after it is published.

If the next administration chooses to issue updated guidance to implement any of the policy changes discussed above, the requirements will be less demanding. This type of guidance may appropriately be considered an interpretive rule because it is "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."³⁰ The APA's NCRM requirement "does not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," unless another statute provides otherwise.³¹ As the Supreme Court observed in *Perez*, issuing interpretive rules is "comparatively easier" than issuing legislative rules.³² However, "that convenience comes at a price: Interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'"³³

Unlike notice and comment rulemaking under the APA, there is no uniform process that an agency must follow to issue guidance. Each agency publishes guidance in accordance with internal procedures for the draft, approval, and release of interpretive rules and policy statements. However, agencies are still expected to comply with some general guidelines.

Executive Order 13891, issued by the Trump administration in October 2019, requires agencies to provide increased transparency for their guidance documents by creating "a single, searchable, indexed database that contains or links to all guidance documents in effect from such agency or component."³⁴ Executive Order 13891 also requires each guidance document issued by an agency to specify that the guidance is not legally binding, as well as the process by which the public may petition the agency to modify or remove the guidance.

²⁷ 5 U.S.C. § 553(b).

²⁸ 5 U.S.C. § 553(d).

²⁹ 5 U.S.C. § 553(b).

³⁰ *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87,99 (1995)).

³¹ 5 U.S.C. § 553(b)(A). Note that while the APA contains the phrase "interpretative rule," the phrase "interpretive rule" is more commonly used, including by the Supreme Court. See Administrative Conference of the United States, "Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules," June 13, 2019, at footnote 1, <https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules>.

³² *Perez*, 575 U.S. at 97.

³³ *Id.* (citing *Guernsey*, 514 U.S. at 99).

³⁴ Executive Office of the President, "Promoting the Rule of Law Through Improved Agency Guidance Documents," Executive Order 13891, October 15, 2019, <https://www.federalregister.gov/documents/2019/10/15/2019-22623/promoting-the-rule-of-law-through-improved-agency-guidance-documents>.

Agencies should also consider the recommendations of the Administrative Conference, most recently updated on June 13, 2019.³⁵ The most relevant recommendations concern transparency and public participation. These include: (1) providing “members of the public a fair opportunity to argue for modification, rescission, or waiver of an interpretive rule”; (2) stating on the guidance document that the public is entitled to that opportunity, and providing detailed information about how and where an individual can submit their complaint;³⁶ and (3) avoiding the use of mandatory language (such as “shall” or “must”) to accurately reflect the non-legislative nature of the guidance.³⁷

C. Legal justification

The USACE is authorized to issue regulations under 16 U.S.C. § 460, which states “[t]he water areas of all . . . [water resources development] projects shall be open to public use . . . and ready access to and exit from such areas along the shores of such projects shall be maintained for general public use . . . under such rules and regulations as the Secretary of the Army may deem necessary.” This authority extends to “the waters of such projects” and “any land federally owned and administered by the Chief of Engineers” at the projects.³⁸

IV. Risk analysis:

After an administrative regulation is finalized, it can be judicially challenged for being beyond the agency’s statutory authority, violating a constitutional right, not following rulemaking procedures, or arbitrary or capricious agency action.³⁹ Regulating USACE’s land is clearly within USACE’s statutory authority and is unlikely to be challenged on such grounds.⁴⁰ If the New Rule is judicially challenged, it will likely be challenged for improperly following procedural rulemaking, arbitrary and capricious agency action, or violating the Second Amendment.

Procedural challenges

By following the NCRM process outlined above, the next administration can ensure compliance with the APA’s procedural requirements. At first glance, these requirements appear simple, but court opinions about agency action make clear that these requirements are in fact relatively demanding, and require meaningful engagement with each phase of the process.⁴¹

³⁵ Administrative Conference of the United States, “Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules,” June 13, 2019,

<https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules>.

³⁶ *Id.* at 7.

³⁷ *Id.*

³⁸ 16 U.S.C. § 460(d); see also 36 CFR 327.0 & 327.1(c).

³⁹ 5 U.S.C. § 706.

⁴⁰ See 16 U.S.C. § 460(d) (“The water areas of all such projects shall be open to public use . . . all under such rules and regulations as the Secretary of the Army may deem necessary . . .”).

⁴¹ See Louis J. Virelli III., “Deconstructing Arbitrary and Capricious Review,” 92 N.C.L. Rev. 721, 737-38 (2014) (describing “first” and “second” order inquiries into an agency’s decision making). See also *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (requiring the agency to create an administrative record so the court could review what was before the agency at the time of the decision); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (finding an agency rule to be arbitrary because it failed to consider the benefits of an alternative airbag mechanism); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 512-13 (2009), vacated, 567 U.S. 239 (2012) (affirming the agency’s change in policy because it provided rational reasons for the change).

In particular, the USACE should take care to review all comments submitted during the public comment period. Courts have adopted a strong reading of the requirement that the agency “consider...the relevant matter presented” in the comments.⁴² The agency must address the concerns raised in all non-frivolous and significant comments.⁴³ The final rule must be the “logical outgrowth” of the proposed rule and the feedback it elicited.⁴⁴ By reviewing the comments submitted to the Trump Rule, the next administration can produce a New Rule that anticipates the types of comments a new NPRM may receive.

Arbitrary-and-capricious challenge under the APA

If there is a judicial challenge brought regarding the New Rule being arbitrary or capricious, a court will invalidate the regulation if the agency action or conclusion is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁴⁵ The arbitrary-and-capricious test is used by courts to review the factual basis for agency rulemaking. When analyzing whether a rule passes the test, a court will look to whether the agency examined the relevant data and offered a satisfactory explanation for its action establishing a nexus between the facts and the agency’s choice.⁴⁶ Where an agency fails to consider important facts or where its explanation is either unsupported or contradicted by the facts, it is grounds for the court to find the rule “arbitrary or capricious.”⁴⁷

Further, when a challenged rule reverses or rescinds an existing rule, an agency must provide a “reasoned analysis” in which it acknowledges a change in policy and provides a “good reason” for the proposed change.⁴⁸ However, the additional “reasoned analysis” requirement does not automatically subject rule reversals to a higher level of scrutiny.⁴⁹ There are some circumstances in which a justification must be more detailed for policy changes than for initial policies, such as when the new policy relies on factual findings contradicted by those underlying the existing policy.⁵⁰ The “reasoned analysis” does not require agencies to persuade the court that a new policy is superior to the one being reversed, but merely requires an agency to “display awareness that it is changing position” and demonstrate that “there are good reasons for it.”⁵¹

⁴² 5 U.S.C. § 553(c).

⁴³ *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977) (finding the agency’s “statement of general purpose” inadequate because it did not provide the scientific evidence on which it was based, and the agency’s consideration of relevant information inadequate because it did not respond to each comment specifically).

⁴⁴ *Chesapeake Climate Action Network v. EPA*, No. 15-1015, 2020 WL 1222690 at *20 (D.C. Cir. Mar. 13, 2020) (noting that a final rule is the “logical outgrowth” of a proposed rule if “interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice and comment period.” A final rule “fails the logical outgrowth test” if “interested parties would have had to divine the agency’s unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.”) (internal quotation marks and citations omitted).

⁴⁵ 5 U.S.C. § 706(2)(A).

⁴⁶ See *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁴⁷ *Id.* at 43.

⁴⁸ See *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

⁴⁹ *Id.* at 515.

⁵⁰ *Id.* at 515-516.

⁵¹ *Id.* at 515.

Therefore, to withstand a potential judicial challenge that the New Rule is an arbitrary and capricious action by USACE, the agency must be able to demonstrate that it considered all factors pertinent to the issue in its decision-making and provide a sufficient justification for its final decision. In order to clear these hurdles, the administrative record created during the rulemaking process should reflect two high-level items. First, it should contain a justification for the policy based on sound evidence, empirical or otherwise. Second, it should contain an acknowledgement of the Trump Rule and address why the policy reasons cited in support of the Trump Rule (mainly the “compliance burden”) are outweighed by public safety factors outlined above.

A. Facts and Data Rationale

The first component of the framework, which is applicable to all rulemaking, is the requirement to consider all relevant factors and data, and to articulate a satisfactory explanation that gives “a rational connection” between the findings and the decision.⁵² There are three primary factors implicated in the policy at issue: public health and safety, administrative burden, and regulatory consistency.

i. Public health and safety

The USACE is concerned with the health and safety of the public visiting property under its control and the USACE park rangers who patrol the land. Being able to effectively and efficiently police who is in possession of a firearm on USACE property is an important consideration in protecting the health and safety of public visitors and USACE park rangers. Numerous recent studies have shown statistically significant links between permissive gun possession laws and increased violent crime, firearm homicides, and unintentional injury.⁵³ The Traditional Rule allowed USACE park rangers to ensure that dangerous individuals, including those who would fail a background check, do not possess a firearm on USACE property. The Trump Rule takes away this important protection.

USACE park rangers cannot carry firearms, and are therefore ill-equipped to handle situations where visitors become violent.⁵⁴ Furthermore, USACE property includes various dams and important water sources that supply necessary water and energy to local towns.⁵⁵ USACE property is thus susceptible to potential attacks. With more unregulated firearms on the property, USACE would be unable to adequately protect such important resources without state and local law enforcement. Again, since the USACE park rangers are not armed, the rangers

⁵² *State Farm*, 463 U.S. at 43.

⁵³ See, e.g., John D. Donohue, et al., “Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Controls Analysis,” *NAT’L BUREAU OF ECON. RESEARCH*, Working Paper No. 23510 (2018), <https://www.nber.org/papers/w23510.pdf> (linking permissive right-to-carry laws with statistically significant increases in violent crime and homicide); Michael Siegel et al., “Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States,” *AM. J. PUB. HEALTH* 107 (2017), 1923, 1923 - 1929 (finding right-to-carry and “may-issue” laws are associated with increased rate of gun homicides; J. DeSimone, S. Markowitz, and J. Xu, “Child Access Prevention Laws and Nonfatal Gun Injuries,” *Southern Economic Journal* 80, no. 1 (2013) (finding statistically significant difference in accidental injury rate among adults in states with concealed carry laws).

⁵⁴ “Firearms at Army Corps Water Resource Projects: Proposed Legislation and Issues in the 113th Congress,” Congressional Research Service, March 16, 2015, <https://crsreports.congress.gov/product/pdf/R/R42602/18>.

⁵⁵ *Id.*

would have a difficult time seizing a weapon from an uncooperative visitor. The New Rule would help USACE ensure the health and safety of visitors and allow USACE park rangers to more effectively manage the use of firearms on USACE property.

ii. Administrative burden

The Trump Rule argued that a change in policy was necessary to ease the administrative burden created by the Traditional Rule and create regulatory consistency across federal departments. Although the New Rule would require additional paperwork, which is estimated to take 300 hours per year to review, it is not an administrative burden that outweighs the health and safety considerations outlined above. The Trump Rule noted that changing the USACE policy would have an estimated cost savings of \$2,340, which is the estimated cost of reviewing 300 applications in a year.⁵⁶ The estimated cost savings do not take into account the cost of implementation of the Trump Rule, including the additional law enforcement needed for protection and the injuries that would result from an increased presence of firearms on federal lands. Even assuming the estimate was accurate, such nominal savings surely ignore the actual costs of the change in policy and should not overshadow the health and safety considerations.

iii. Regulatory consistency

The Trump Rule's rationale for regulatory consistency similarly lacked a genuine justification for a policy change. The Trump Rule asserted that removing the written permission requirement would reduce confusion by bringing USACE property into alignment with other federal lands. That assertion ignores the real differences between USACE property and other federal lands.

USACE property receives more visitors per year than any other single federal agency's sites.⁵⁷ Along with being one of the most visited federal agency's sites, USACE property includes water infrastructure projects that provide critical energy and water supply to local residences. USACE property is busier and more susceptible to attack than other federal lands. At the same time, USACE park rangers are unable to carry firearms themselves and must rely on local law enforcement from various state and local governments for protection. Changing the Traditional Rule for regulatory consistency ignores the inconsistency between how federal lands are actually run on a day-to-day basis, and the New Rule would allow USACE to better manage its land.

B. Reasoned Analysis

The second component of this framework is the "reasoned analysis" requirement. The New Rule is a change in policy direction from the Trump Rule. Therefore, the New Rule must address the various reasons USACE wants to revert back to the old policy and why the Trump Rule is the wrong policy for the agency.

The health and safety, administrative burden, and regulatory consistency reasons discussed above each acknowledge that the Trump Rule should be repealed because it does not adequately address issues created by removing the written permission requirement. The Trump Rule failed to sufficiently point to a rational policy justification for the change. The neglect of such an important factor in the rulemaking process is further evidence the existing policy was ill-advised and the New Rule's change in direction is justified.

⁵⁶ COE-2018-0008 (posted April 13, 2020).

⁵⁷ Supra note 20.

If the New Rule adheres to the guidance offered in this section, it should be able to withstand the judicial review process. The New Rule considers all relevant factors to USACE in managing its property, and offers rational explanations connecting the finding to the agency action. Further, the policy change meets the reasoned analysis requirement by addressing the lack of rationale behind the Trump Rule's change in policy and why the New Rule's policy is critical for safely managing USACE property. Thus, it is unlikely a court will find the USACE acted arbitrarily and capriciously in issuing the New Rule.

Constitutional challenge

The New Rule would be identical to the Traditional Rule, which has already survived Second Amendment scrutiny and been declared constitutional by numerous federal courts.⁵⁸ Thus, there is no reason to suggest the New Rule will be struck down as unconstitutional.

Most circuits have adopted a two-step approach to evaluating Second Amendment challenges, in which they ask: "(1) Is the restricted activity protected by the Second Amendment in the first place? [and] (2) If so, does it pass muster under the appropriate level of scrutiny?"⁵⁹ The scrutiny applied "will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right."⁶⁰

A. Activity Protected by the Second Amendment

First and foremost, the Second Amendment does not create an unqualified right to possess and use a loaded firearm in public places.⁶¹ The New Rule is constitutional and one of the permissible restrictions on firearm possession contemplated by the Supreme Court in *Heller*.

Indeed, USACE policy since at least 1946 has recognized that limitations to bringing guns on USACE property is appropriate.⁶² Here, the New Rule is less strict than its 1946 counterpart; an individual may possess firearms following written permission from a district commander, at authorized shooting ranges, or for lawful hunting or fishing if the firearms are being transported lawfully over USACE property. Over time, USACE policy was changed to allow the possession of firearms in each of these circumstances.⁶³

Some firearm regulations do not implicate core Second Amendment protections at all; the Second Amendment allows gun restrictions in "sensitive places."⁶⁴ While Second Amendment jurisprudence recognizes a right to self-defense, the narrowly tailored New Rule does not

⁵⁸ See, e.g., *GeorgiaCarry.org, Inc. v. U.S. Army Corps of Eng'rs*, 212 F. Supp. 3d 1348, 1366 (N.D. Ga. 2016); see generally *Lauchli*, 724 F.2d at 1281 (enforcing penalties for violation of Traditional Rule).

⁵⁹ *GeorgiaCarry.org*, 212 F. Supp. 3d at 1359; accord *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *Ezell v. City of Chi.*, 651 F.3d 684, 701–04 (7th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010); *Heller v. D.C. (Heller II)*, 670 F.3d 1244, 1252 (D.C. Cir. 2011).

⁶⁰ *GeorgiaCarry.org*, 212 F. Supp. 3d at 1359 (quoting *Ezell*, 651 F.3d at 701).

⁶¹ *D.C. v. Heller*, 554 U.S. 570, n.2 (2008) ("[T]he Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.")

⁶² See, e.g., 11 Fed. Reg. 9278, 9279 § 301.8 (August 24, 1946) ("Loaded rifles, loaded pistols, and explosives are prohibited in the reservoir area.").

⁶³ 36 C.F.R. § 327.13.

⁶⁴ *Heller*, 554 U.S. 570 (2008).

diminish that right because it applies to property that is on or near sensitive military installations and it allows for the possession of weapons after receiving written permission from USACE. *GeorgiaCarry.org, Inc. v. U.S. Army Corps of Eng'rs*, 38 F. Supp. 3d 1365, 1376 (N.D. Ga. 2014), *aff'd*, 788 F.3d 1318 (11th Cir. 2015).

In *GeorgiaCarry.org*, Plaintiff commenced an action after he was denied written permission to carry his firearm on USACE property in Georgia by a district commander, pursuant to the Traditional Rule.⁶⁵ Plaintiff claimed that the regulation requiring written permission was unconstitutional under the Second Amendment because it infringed on his right to self-defense. The District Court disagreed, holding that the only right to self-defense recognized was within the home, not on USACE property; therefore, the New Rule, like the Traditional Rule, would not infringe on that right.⁶⁶

B. Applicable Level of Scrutiny

Even if the Proposed Rule was within the scope of the Second Amendment, intermediate scrutiny would apply, and the regulation would still be found constitutional as a matter of law.

Intermediate scrutiny applies to regulations that implicate Second Amendment protected activity. Because the *Heller* Court largely avoided defining the contours of non-strict scrutiny for the Second Amendment, decisions by Circuit Courts provide the most guidance on this question. For example, the Second Circuit holds that a regulation passes intermediate scrutiny if “it is substantially related to the achievement of an important governmental interest.”⁶⁷ Multiple Circuit Courts have applied this formulation of intermediate scrutiny analysis, including the Fourth Circuit when it upheld a regulation that restricted possession of loaded firearms in motor vehicles on National Park Service land.⁶⁸

Here, the New Rule, too, would withstand intermediate scrutiny. The USACE has a substantial interest in public safety and national security on USACE property, and the regulation is substantially related to that interest.⁶⁹ Plainly, strict scrutiny does not apply to the New Rule because it does not infringe upon the core protection of self-defense in the home.

Throughout its many years in force, only one federal court questioned the constitutionality of the Traditional Rule.⁷⁰ In *Morris*, the Court improperly interpreted *Heller's* exception for sensitive places when it defined the Traditional Rule as a “ban imposed by the Corps [that] applies to outdoor parks.”⁷¹ Simply dismissing USACE property as outdoor parks because they include recreational areas does not make the place less sensitive under *Heller*. The national security concerns for USACE regulations that impact “700 dams – holding back more than 100 trillion gallons of water” are certainly different than those implicated by the average campground.⁷²

⁶⁵ *GeorgiaCarry.org*, 212 F. Supp. 3d at 1366.

⁶⁶ *Id.*

⁶⁷ *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012).

⁶⁸ *U.S. v. Masciandaro*, 638 F.3d 458, 460 (4th Cir. 2011) (“[T]he government has amply shown that the regulation reasonably served its substantial interest in public safety in the national park area.”).

⁶⁹ *GeorgiaCarry.org, Inc.*, 38 F. Supp. 3d at 1378.

⁷⁰ *Morris v. U.S. Army Corps of Eng'rs*, 60 F. Supp. 3d 1120, 1122 (D. Idaho 2014).

⁷¹ *Id.* at 1124.

⁷² *Id.* at 1121.

Moreover, *Morris* should not and has not been countenanced by any other court because it was based, in large part, on a Ninth Circuit decision that was later overruled.⁷³ There exists no case law actually calling into doubt the Traditional Rule's—and, thus, the New Rule's—constitutionality under the Second Amendment.

⁷³ *Id.* (relying on *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1148 (9th Cir. 2014 (*Peruta I*)).