

***Appeal No. 15-3751 (lead)***

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**In the  
United States Court of Appeals  
For the Sixth Circuit**

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**Murray Energy Corp. et al,  
*Appellants,*  
vs.  
United States Environmental Protection Agency et al,  
*Respondents.***

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On Petitions for Review of a Final Rule of the U.S. Environmental Protection  
Agency and the United States Army Corps of Engineers

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**Amicus Curiae Brief in Support of Petitioners**

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J. G. ANDRE MONETTE  
BEST BEST & KRIEGER LLP  
2000 Pennsylvania Avenue N.W.  
Suite 5300  
Washington, DC 20006  
Telephone: (202) 785-0600  
Facsimile: (202) 785-1234

*Attorneys for Amici Curiae*  
*ACWA*  
*NWRA*  
*Eastern Municipal Water District*  
*San Diego County Water Authority*  
*Santa Fe Irrigation District*  
*Helix Water District*  
*Santa Margarita Water District*

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## I. IDENTITY AND INTEREST OF AMICI CURIAE (FRAP 29(C)(4))<sup>1</sup>

Amici curiae are public water agencies and associations representing public water agencies that provide essential water supply, conveyance, conservation, treatment and storage functions across the United States. These critical operations could be hindered if the revised definition of the term “waters of the United States” (“WOTUS”) for the purposes of the Federal Water Pollution Control Act, the Clean Water Act, promulgated by the U.S. Environmental Protection Agency (“EPA”) and United States Army Corps of Engineers (“Corps”) (the “Final Rule”) becomes law.

### A. *Amici* Interests

Some or all of *Amici*’s public water agencies own and operate surface water impoundments, subsurface water distribution systems, pipelines, water treatment plants, reservoirs, and hundreds of miles of open canals and aqueducts. Contrary to the plain text and intent of the Clean Water Act<sup>2</sup>, the Final Rule will extend the

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<sup>1</sup> This *amicus* brief was not authored in whole or in part by a party’s counsel; a party or a party’s counsel did not contribute money that was intended to fund preparation and submission of the brief; and no person, other than the *Amici* and *Amici*’s counsel, contributed money that was intended to fund preparation and submission of the brief. Fed. R. App. Proc. 29(c)(5). The *Amici* are authorized to file this *Amicus* brief under Rule 29(b) of the Federal Rules of Appellate Procedure. *Amici* are not subsidiaries or affiliates of, and are not aligned through insurance, franchise agreement, or indemnity agreement with, any publicly owned corporation not named in the appeal. Fed. R. App. Proc. 26.1; 6 Cir. R. 26.1.

<sup>2</sup> The Federal Water Pollution Act Amendments, Code of Federal Regulations 40,

reach of the Clean Water Act to many of *Amici*'s facilities. In many cases, this extension creates recreation and aquatic life beneficial uses in these facilities and elevates such uses above the intended water supply purpose of the facilities. The Final Rule, thus, significantly affects *Amici* and *Amici*'s members' ability to provide safe and healthy water supplies.

*Amici* are filing this brief to bring to the Court's attention the far reaching, negative impacts that EPA's action will have on their ability to transport and store water. Limitations on these activities would have a direct impact on human life and wellbeing.

**B. Identity of *Amici Curiae***

The Association of California Water Agencies ("ACWA") is the largest statewide coalition of public water agencies in the nation, representing 440 public water agencies, which provide water supplies for urban and agricultural use. ACWA's member agencies range in size from small irrigation districts to the largest water wholesalers in the country, and its public members collectively are responsible for 90% of the water delivered to cities, farms, and businesses in California.

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Title 1, Sections 101 *et seq.* codified as 33 U.S.C. Sections 1251 *et seq.* ("Clean Water Act").



Eastern Municipal Water District (“EMWD”) is a water supply agency in southern California. EMWD encompasses 542-square miles and serves a population of 768,000 in arid western Riverside County, California. EMWD serves more than 140,000 potable water accounts, and 229,000 wastewater customer accounts. EMWD is one of 26 member agencies of the Metropolitan Water District of Southern California (MWD) and relies on imported water supplies from the San Francisco Bay-Delta Estuary and the Colorado River through the MWD and Northern California (Bay-Delta) for up to three quarters of its potable water supplies. The remaining potable water comes from wells located throughout its jurisdiction.

Helix Water District (“Helix”) is a potable and recycled water provider for a nearly 50 square mile service area in eastern San Diego County that includes the cities of La Mesa, Lemon Grove and El Cajon, the Spring Valley community and areas of Santee, Lakeside and unincorporated San Diego County. Helix’s history dates back to 1885 and the construction of one of the first flumes to transport water from the mountains east of San Diego to the City of La Mesa. Helix operates two major water supply storage reservoirs and is one of twenty-four member agencies of the San Diego County Water Authority, which also receives imported water supplies from the Colorado River and Northern California source water.

The National Water Resources Association (“NWRA”) is a non-profit, voluntary organization of state water associations, whose members include cities, towns, water conservation and conservancy districts, irrigation and reservoir companies, ditch companies, farmers, ranchers, and others with an interest in water issues in the western states. NWRA has member associations in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Texas, Utah, and Washington.

The San Diego County Water Authority (“SDCWA”) is an independent public agency that serves as San Diego County’s regional water wholesaler. SDCWA purchases, develops and imports water from various sources and provides the water to its 24 member agencies in San Diego County. SDCWA sustains a \$222 billion regional economy and the quality of life for 3.3 million residents through a multi-decade water supply diversification plan, major infrastructure investments, multiple surface storage reservoirs and pipelines totaling approximately 300 miles.

The Santa Fe Irrigation District (“SFID”) is a potable water and recycled water service provider located in San Diego County. SFID provides potable water service for residential, commercial, institutional and agricultural customers; and recycled water for irrigation within its service area. SFID has supplied local water to serve agricultural irrigation needs in its service area since the early 1900s. SFID

is one of twenty-four member agencies of the SDCWA. As a member of the SDCWA, SFID receives imported water supplies that include Colorado River and Northern California source water. In addition to imported water supplies, SFID has rights to local surface water which it transports and stores in reservoirs for subsequent treatment and potable use.

Santa Margarita Water District (“SMWD”) is a retail water supply agency in southern Orange County, California. SMWD is the second largest retail water agency in Orange County and serves more than 155,000 residents and businesses. SMWD is a member agency of the Municipal Water District of Orange County (“MWDOC”), and as a member agency receives imported water supplies that include Colorado River and Northern California source water. SMWD also has rights to local surface water and generates recycled water which it transports and stores in groundwater and surface reservoirs for subsequent treatment and potable use.

## **II. REGULATORY BACKGROUND**

The Clean Water Act establishes a national goal of eliminating the discharge of pollutants into “navigable waters.” 33 U.S.C. § 1251. The Act prohibits the discharge of any pollutant into “navigable waters” by any person, unless that person has a permit or other authorization pursuant to the Act. 33 U.S.C.

§§ 1311(a), 1342(a), 1344(a).<sup>3</sup> The Clean Water Act defines “navigable waters” as “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).

As EPA has noted in the Final Rule, most programs established by the Clean Water Act, including the Section 402 permit program and Section 404 permit program, rely on the definition of “waters of the United States” to determine the scope of the regulatory reach of the program. 80 Fed. Reg. 37,054 (June 29, 2015).

### III. ARGUMENT

The economic, agricultural, and human development that has occurred in the United States would not be possible without the ability to divert, transport, store, treat, and deliver water for human consumption and use. The Final Rule threatens the ability of water agencies to continue providing necessary water supplies, especially in the western United States. EPA and the Corps drafted the Final Rule intending to reach headwaters and wetlands that are geographically distant from what courts have defined as “navigable.” See *The Daniel Ball*, 77 U.S. 557, 563 (1871); see also *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406 (1940). In their zeal to protect these waters, the agencies define WOTUS, and in particular the terms “tributary” and “adjacent,” so broadly that they expand the

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<sup>3</sup> EPA and the Corps may issue permits allowing discharges in specific circumstances. 33 U.S.C. § 1342(a) (Section 402 permit for discharges of pollutants other than dredged or fill material) and § 1344(a) (Section 404 permit or dredge and fill permit).

reach of the Clean Water Act to capture a range of waters, including *Amici*'s facilities, contrary to the plain text and congressional intent of the Act.

*Amici* are concerned about this expansive definition of WOTUS and its potential application to the facilities they use and rely on to make water available to millions of people for a diverse range of uses.

**A. The Final Rule Classifies Man-Made Water Supply Infrastructure As WOTUS And Interferes With Potable Water Supply Systems**

Without question, some water supply facilities, such as those built on the main stem of the Columbia or Colorado Rivers, are WOTUS. However, *Amici* are concerned that the Final Rule's expanded definition will classify facilities, such as constructed water transportation networks, ground water recharge and in infiltration basins, and terminal reservoirs, as WOTUS. As a result, entities owning and operating these facilities will have to obtain time-consuming permits and satisfy the many regulatory requirements imposed by the Clean Water Act.

Once a water body is classified as WOTUS, a host of regulatory requirements apply to that water body. Under the Clean Water Act, EPA and the States must:

- Establish water quality standards for the water body that must, at a minimum, include water quality sufficient for aquatic life and body contact recreation
- Set effluent limits for discharges into covered water bodies

- Establish and implement Total Maximum Daily Loads for pollutants where waters are not meeting their designated water quality standards
- Issue permits for all point source discharges to the water body
- Identify non-point source discharges to the water body
- List all impaired WOTUS and develop a strategy for each segment that fails to meet water quality standards

*See, e.g.*, 33 U.S.C. §§ 1311, 1342, 1344.

If a water supply facility is considered a WOTUS, the facility owner and operator must obtain permits and comply with these requirements.

For water conveyance and infrastructure facilities, compliance with these requirements can significantly interfere with the normal operations and thus the water supply purpose of the facility. For example, under the Final Rule, a wastewater recycling structure constructed in close proximity to a surface stream may now be classified as a WOTUS.<sup>4</sup> The state in which the facility is located would need to establish water quality standards for the facility sufficient to protect aquatic life and body contact recreation.<sup>5</sup> The facility operator would be prohibited from discharging recycled water into its own facility or conducting maintenance such as dredging or vegetation removal without obtaining permits under the Clean

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<sup>4</sup> See note 5 below. While EPA included an exemption for certain groundwater infiltration basins, the basins must be constructed “in dry land” to qualify. Because many such facilities are located in close proximity to surface waters in locations that may qualify as WOTUS under the new rule, the exemption is of limited applicability.

<sup>5</sup> Most states have “default” water quality standards that apply to small water bodies not expressly listed in their state plans. As such, a water newly classified as jurisdictional would generally not require its own water quality standards.

Water Act; and said permits would prohibit any discharges that cause or contribute to an exceedance of water quality standards. 33 U.S.C. §§ 1342, 1311(m). Permit limitations on the discharge of chlorine, total dissolved solids, or nutrients (pollutants that are commonly present at low levels in recycled water) could altogether prevent the discharge of recycled water into the recycled water facility – entirely obfuscating its purpose.

EPA’s definition of WOTUS is flawed because it would apply the Clean Water Act to all kinds of man-made water supply facilities that in many cases have little to no surface connectivity to downstream waters and were never designed to support aquatic life or recreation. For that reason, EPA’s revised definition of WOTUS is fundamentally flawed and should be reversed.

#### **B. The Final Rule Threatens Multiple Types of Water Supply Facilities**

EPA has defined WOTUS broadly, to encompass all waters that are tributary or adjacent to: waters that are “susceptible to use in interstate or foreign commerce;” interstate waters; or the territorial seas. 80 Fed. Reg. 37,054, 37,104 (June 29, 2015).<sup>6</sup> As noted above, *Amici* are concerned that the rationale used to

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<sup>6</sup> EPA has interpreted the Clean Water Act to exclude certain man-made facilities from this broad definition, including some features “created in dry land.” 80 Fed. Reg. 37,054, 37,105 (June 29, 2015). EPA has not provided a regulatory definition of the term “dry land.” In the Final Rule’s preamble refers to “areas of the geographic landscape that are not water features such as streams, rivers, wetlands, lakes, ponds and the like.” 80 Fed. Reg. 37,054, 37,098 (June 29, 2015). EPA

include natural wetlands and other distant waters in the definition of WOTUS inadvertently captures *Amici's* facilities. Many of *Amici's* facilities would qualify as WOTUS under the Final Rule, an outcome that could severely limit their usefulness as water supply facilities and expose *Amici* to liability under the Clean Water Act.

### **1. Aqueducts and Water Supply Canals**

The Final Rules regulates canals and aqueducts as WOTUS when they qualify as “tributaries.” 80 Fed. Reg. 37,054, 37,100 (June 29, 2015). Tributaries include “man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches.” *Ibid.* A water will qualify as a “tributary” (and therefore WOTUS) if it contributes flow, either directly or indirectly, to a water that is navigable in fact, *id.* at 37,104, or if it

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states that it will determine whether a water is WOTUS based on historical photos and other historical evidence that indicate whether the facility at issue was constructed in dry land. 80 Fed. Reg. 37,054, 37,098 (June 29, 2015). As a result, there is uncertainty about whether a facility constructed in a dry channel or natural low point would qualify as WOTUS. Many of *Amici's* water supply facilities were constructed in locations that could qualify as “dry land” under the Final Rule. But many, if not most, were constructed at natural low points, or in locations that historically received runoff. Water, among other things, flows downhill. From an engineering and design perspective, building water transport and storage facilities at natural low-points makes sense. As a result, the Final Rule’s exemptions are of limited benefit to *Amici* and other similarly situated water purveyors.



removes water from one part of the tributary network and moves it to another” *id.* at 37,100.<sup>7</sup>

The expansive definition of “tributary” provided in the rule means that almost any water transport network could be classified as WOTUS. Many states, particularly in the arid west, depend on aqueducts, irrigation canals and other conduits to provide water to a thirsty populace:

- The federal Central Valley Project (CVP) in California, the nation’s largest federal reclamation project, consists of dams, canals and other facilities that transfer water from the rivers of northern California to the central and southern parts of the State, in order to serve agricultural, municipal, industrial and other uses. *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 280-283 (1958); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728-736 (1950).
- California’s State Water Project (SWP), the analogue of the federal CVP, similarly transfers water from northern California rivers for agricultural, municipal and other uses in other parts of the State. *United States v. State Water Resources Control Board*, 182 Cal.App.3d 82, 98-100 (1986).
- The Newlands Reclamation Project in Nevada—the first federal reclamation project built pursuant to authority of the Reclamation Act of 1902—transfers water from the Truckee River for irrigation uses in the

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<sup>7</sup> EPA also noted that the Final Rule does not affect “the status of water transfers.” 80 Fed. Reg. 37,054, 37,055. Under the water transfers rule, water transfers are excluded from the Clean Water Act’s Section 402 permit requirement unless pollutants are added by the water transfer activity to the water being transferred. 40 C.F.R. § 122.3(i). “Water transfer” means an activity that conveys or connects WOTUS “without subjecting the transferred water to intervening industrial, municipal, or commercial use.” *Id.* However, if certain water supply facilities and infrastructure are considered WOTUS while others are not, transfers between such facilities may require costly and time-consuming Clean Water Act permits and compliance with numerous regulatory requirements.

project area located in central Nevada. *Nevada v. United States*, 463 U.S. 110, 115-116 (1983).

- The Central Arizona Project, which was built by the State of Arizona in order to provide Colorado River water for the benefit of the people of Arizona, transfers water from the Colorado River to the cities of Phoenix and Tucson, among others, to meet their domestic and other needs. *Maricopa-Stanfield Irrig. & Drainage Dist. v. United States*, 158 F.3d 428, 430-431 (9th Cir. 1998); *United States v. 0.59 Acres of Land*, 109 F.3d 1493, 1495 (9th Cir. 1997).
- The Colorado-Big Thompson Project, a federal reclamation project in Colorado, transfers water from the western slope of the Continental Divide through a tunnel to the eastern slope of the Rocky Mountains, in order to provide water supplies for people in Denver and other areas on the eastern slope. *City of Colorado Springs v. Climax Molybdenum Co.*, 587 F.3d 1071, 1074 (10th Cir. 2009).

These federal and state water projects have obtained their right to appropriate water pursuant to the water laws of the states where they are located. Regulating them as WOTUS will require the water flowing through the canals to attain applicable water quality standards. In order to attain those standards, water project operators may be required to curtail their operations.

Congress did not intend to classify water supply conduits such as canals and aqueducts as WOTUS. See 33 U.S.C. §1251(g); see also 118 Cong. Rec. 33699 (1972); 1972 Act Leg. Hist, v. 1, at 178. (Muskie statement) [describing the reach of the Clean Water Act in terms of channels of commerce].) These facilities were designed for one purpose: to convey water. They were not constructed for

recreation or aquatic life. It is wholly inappropriate for EPA to adopt a definition that regulates these facilities as WOTUS.

## 2. Groundwater Recharge Basins

EPA has defined WOTUS to include “adjacent waters.” 80 Fed. Reg. 37,054, 37,105 (June 29, 2015). An adjacent water is any water that is “bordering, contiguous, or neighboring” another water that itself is either “susceptible to use in interstate or foreign commerce;” an interstate water; a territorial sea; or is an impoundment of or tributary to one of those waters. 80 Fed. Reg. 37,054, 37,104-05 (June 29, 2015). Any water located within 100 feet of the ordinary high water mark of the above listed waters or a tributary thereto is considered “neighboring” and is a WOTUS. 80 Fed. Reg. 37,054, 37,105 (June 29, 2015). All waters located within the 100-year floodplain of such waters, but not more than 1,500 feet from the ordinary high water mark are also considered “neighboring” and a WOTUS. *Ibid.* These broad definitions will capture infiltration basins and similar facilities, despite the Final Rule’s exemption for certain man-made facilities created in dry land.<sup>8</sup>

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<sup>8</sup> See note 5 *supra*. While EPA did include an exemption for certain groundwater infiltration basins, they must have been constructed “in dry land” to qualify. Because many such facilities are located in close proximity to surface waters in locations that may qualify as WOTUS under the new rule, the exemption is of limited applicability.

Throughout the United States, water providers are facing drought, and the need to develop new water supplies. Agencies can no longer rely on a constantly available supply of surface water. To diversify and expand their portfolios, many agencies are using subsurface aquifers to store water. Groundwater storage allows water supply agencies to reduce losses from evaporation, and avoid the costs and environmental impacts associated with construction of new surface water reservoirs.

EPA fully recognizes the benefits of groundwater storage, stating in the preamble to the Final Rule:

Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water, which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water.

80 Fed. Reg. 37,054, 37,100 (June 29, 2015).

Certain *Amici* are actively engaged in projects that rely on groundwater infiltration and storage. EMWD sells nearly 40,000 acre feet of recycled water annually. EMWD is in the process of constructing infiltration basins to dramatically increase the recycled water it can store for future use. Similarly, SMWD is developing a project to capture and infiltrate stormwater for use in the

potable supply system. These projects are the future of water supply development for these agencies.

Many groundwater infiltration facilities are constructed in close proximity to surface streams. Locating the facilities in this manner facilitates the transport of water to areas where it can be most efficiently infiltrated into groundwater basins. Proximity to natural streams puts infiltration basins squarely within the definition of “adjacent” waters as defined in the Final Rule.

As with canals and aqueducts, classification of groundwater infiltration basins as WOTUS will require the facilities to attain designated water quality standards, and will require facility operators to obtain NPDES permits to discharge recycled water into their own facilities. Agencies will be reluctant to invest in infrastructure that would be subject to these burdensome requirements. Thus, a WOTUS designation would significantly hinder, if not prevent, these projects.

### **3. Terminal Reservoirs**

Certain *Amici* own and operate surface water reservoirs and other impoundments. *Amici* are concerned that “terminal reservoirs” will be classified as WOTUS under the Final Rule. Terminal reservoirs are man-made surface water impoundments that do not discharge stored water downstream. Most terminal reservoirs are constructed in what could be considered “dry land,” but many were constructed on a canyon or valley with a pre-existing stream. Water in terminal

reservoirs is almost entirely imported. The native stream often contributes little to no volume to the impoundment, and no water is discharged below the dam creating the reservoir. The terminal reservoirs were constructed for their water supply benefit.

Terminal reservoirs used for storing imported water have different water quality protection needs than reservoirs constructed on stream systems. Water quality conditions in terminal reservoirs may be more readily controlled by water agency management actions than within reservoirs that are significantly influenced by local runoff. More importantly, they do not regularly discharge to downstream waters and therefore have little to no connectivity to what has been defined as traditional navigable waters.

The Final Rule's definition of WOTUS makes no distinction between reservoirs that are comprised of native stream flows; and terminal reservoirs that are overwhelmingly comprised of imported water and no longer contribute flow to downstream waters.

*Amici* do not believe Congress intended to regulate terminal reservoirs as WOTUS under any rationale. See 118 Cong. Rec. 33699 (1972); 1972 Act Leg. Hist, v. 1, at 178. (Muskie statement) [describing the reach of the Clean Water Act in terms of channels of commerce]. Nevertheless, EPA and some states have classified many terminal reservoirs as WOTUS. The Final Rule appears to ratify

that action. Regulating terminal reservoirs in this manner could substantially interfere with operation of *Amici*'s facilities and violate a core principle of the Clean Water Act: regulation of water supply is reserved to the states.

### **C. EPA's Revised Definition Violates the Clean Water Act**

Under the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), an agency's interpretation of a statute that it is responsible for administering is entitled to deference under a two-part test: (1) if the statute is "silent or ambiguous" and (2) the agency's interpretation is "permissible." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, *supra*, at 842-844; see also *Mayo Foundation v. United States*, 562 U.S. 44, 52 (2011); *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 703 (1995).

An agency, however, gets no deference if its rule, regulation or policy violates the plain language of the statute it is implementing. *Public Employees Ret. Sys. v. Betts*, 492 U.S. 158, 171 (1989) superseded by statute on other grounds ["no deference is due to agency interpretations at odds with the plain language of the statute itself"]. Where Congress makes a clear statement of its intent to preserve state's primary responsibility over the development and use of land and water resources, an agency's interpretation cannot contradict that unambiguous intent and any such contradiction fails the first part of the *Chevron* test. See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013); *Solid Waste Agency of N. Cook*

*County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001) (*SWANCC*); *Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016).

Here, there is no statutory ambiguity. The Clean Water Act precludes regulation of the above described water supply facilities as WOTUS because doing so would substantially interfere with the facilities' water supply function. The Clean Water Act specifically reserves to the states the right to regulate water supplies. The Final Rule violates the Clean Water Act's plain language and intent and is entitled to no deference.

**1. EPA's Revised Definition of WOTUS Unlawfully Infringes on States' Authority Over Water Supply**

State authority over water supply is unambiguously spelled out in the Clean Water Act's declaration of goals and policy. 33 U.S.C. § 1251(b). Section 101 of the Clean Water Act expressly recognizes and preserves the states' primary responsibilities and rights to prevent, reduce, and eliminate pollution, and "to plan the development and use . . . of land and water resources." *Id.* Congress included this limitation in the Clean Water Act in recognition of the states' constitutional authority over waters within their jurisdiction under the Equal Footing Doctrine. *Ibid.*; U.S. Const. art. IV, § 3, cl. 1; see also *Coyle v. Smith*, 221 U.S. 559 (1911).

Pursuant to the Equal Footing Doctrine, each state upon its admission to statehood acquired sovereign rights and interests in the navigable waters and underlying lands within its borders. *PPL Montana, LCC v. Montana*, 565 U.S.



576, 588-591 (2012); *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-374 (1977); *Shively v. Bowlby*, 152 U.S. 1, 49-50 (1894); *Pollard's Lessee v. Hagan*, 44 U.S. 212, 224-229 (1845); *Martin v. Lessee of Waddell*, 41 U.S. 367, 410 (1842). “[E]xcept where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters.” *California v. United States*, 438 U.S. 645, 662 (1978), citing *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 709 (1899).

Under the Equal Footing Doctrine, states’ authority over water supply and quality is subject only to the federal government’s power to regulate commerce. *Appalachian Elec. Power Co.*, *supra*, 311 U.S. at 406 (1940) (describing federal power to regulate navigable waters); *The Daniel Ball*, 77 U.S. 557, 563 (1870) (same); *California v. United States*, 438 U.S. 645, 662 (1978) (describing states’ traditional authority to regulate water); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158, 163-164 (1935) (same).

While Congress’ authority over commerce is broad, see *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000), the Clean Water Act includes express limitations to avoid conflict with the Equal Footing Doctrine. Clean Water Act Sections 101(g), 33 U.S.C. Section 1251(g), provides that “the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired,” and that

“nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State.” 33 U.S.C. § 1251(g). Likewise, Clean Water Act Section 510 states that the Clean Water Act “shall [not] be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States.” 33 U.S.C. § 1370.

Both the Constitution and the Clean Water Act therefore make clear that the states have primary authority to regulate water supply. This basic principle informs the meaning of Sections 101(g) and 510 of the Clean Water Act, and indicates that the Act cannot be construed to limit or hinder water rights and the movement of water for purposes of supply within the states.

The United States Supreme Court has repeatedly recognized that state authority over water supply should not be compromised.<sup>9</sup> Courts are required to view federal efforts to expand regulation into areas of traditional state authority with a skeptical eye:

Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This

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<sup>9</sup> *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 108 (2004) [“the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by the Act”] (internal citations omitted); *Rapanos v. United States*, 547 U.S. 715, 756 (2006); *SWANCC, supra*, 531 U.S. at 172.

requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. Thus, “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”

*SWANCC*, *supra*, 531 U.S. at 172-173; see also *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); *Machinists v. Street*, 367 U.S. 740, 749-750 (1961); *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

The Final Rule presents a federal effort to expand regulation into areas of traditional state authority. EPA and the Corps have drafted the Final Rule so broadly that many water supply conduits are susceptible to being classified as WOTUS. Application of the Final Rule to these structures will infringe on the states’ ability to manage water supplies within their jurisdictions.

## **2. *Amici’s* Water Supply Facilities Lack a Significant Nexus to Downstream WOTUS**

Terminal reservoirs, groundwater infiltration basins, and the canals that deliver water to them should not be classified as WOTUS because they do not discharge downstream and therefore lack a “significant nexus” to downstream navigable waters. *Rapanos*, *supra*, 547 U.S. at 715; *SWANCC*, *supra*, 531 U.S. at 172. Under the Supreme Court’s decisions in *SWANCC* and *Rapanos*, a water

body or wetland will be considered WOTUS if it has a “significant nexus” to downstream navigable waters. *Rapanos, supra*, 547 U.S. at 715; *SWANCC, supra*, 531 U.S. at 172.

In *SWANCC*, the Supreme Court first devised the “significant nexus” standard, holding that an isolated wetland will only qualify as WOTUS if it “either alone or in combination with similarly situated [wet]lands in the region, significantly affects the chemical, physical, and biological integrity of other covered waters more readily understood as navigable.” *SWANCC, supra*, 531 U.S. at 172.<sup>10</sup> If there is no downstream connection, or the waters’ effects on water quality are “speculative or insubstantial,” they fall outside the zone fairly encompassed by the statutory term “navigable waters.” *Ibid.*

At issue in *SWANCC* was whether a hydrologically isolated wetland could be considered WOTUS because it provided habitat for migratory birds. The Court held that a biological connection to other traditional navigable waters on its own was insufficient for the water at issue to qualify as WOTUS. *Id.* at 171-73.

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<sup>10</sup> Notably, the Final Rule expands the Significant Nexus standard beyond what the Supreme Court has allowed by classifying waters as WOTUS if they have a chemical, physical or biological connection to downstream navigable waters. 80 Fed. Reg. 37,054, 37,061 (June 29, 2015). This change allows EPA to assert jurisdiction if any of the three factors are present instead of when all three are present.

EPA relies heavily on the significant nexus standard to support its Final Rule, but expands the reach of the Clean Water Act beyond waters with a significant nexus under *SWANCC*. See e.g. 80 Fed. Reg. 37,054, 30,057-58 (June 29, 2015). It is EPA's effort to reach headwaters and wetlands that are geographically distant from traditional navigable waters that poses the biggest threat to *Amici's* facilities.

*Amici's* facilities form a network of water supply canals, storage basins and reservoirs. The canals transport water from major rivers and streams to storage reservoirs where the water is treated for potable use. The canals include a collection of open, dirt lined channels, concrete lined aqueducts and fully enclosed pipes. In some cases, water is drawn directly from the canals into treatment plants. In others, it is stored in a reservoir that sends water back and forth to the plant, or it is sent to an infiltration basin for storage in an underlying aquifer.

In most circumstances, the terminal reservoir or infiltration basin is the end point for the water the water is sent to potable treatment. In simple terms, these facilities do not discharge water downstream. They have little to no connection to downstream WOTUS. The canals that deliver water to these facilities likewise have no connection to downstream WOTUS. Their connection stops at the terminal facility, and as a result, neither the terminal facilities nor the canals that

deliver water to them “significantly affect the chemical, physical, and biological integrity” of waters readily understood as navigable.

As in *SWANCC*, these facilities are hydrologically isolated from downstream traditional navigable waters. Nonetheless, the Final Rule’s expansive definitions of “tributary” and “adjacent” mean that terminal reservoirs, infiltration basins, and canals could be considered WOTUS, without any consideration of the absence of a significant nexus to downstream waters. For that reason, *Amici* request that the Court of Appeals reverse and remand the Final Rule to EPA.

### **3. Congress Did Not Intend to Regulate Water Supply Infrastructure as WOTUS**

When adopting the Clean Water Act, Congress was clear that it intended to reach more than waters capable of being used for traditional navigation. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985). However, Congress also relied heavily on court interpretations of congressional authority extending jurisdiction to non-navigable waters that, with moderate improvement, could be utilized as channels of commerce. See *Daniel Ball*, *supra*, 77 U.S. at 563; see also *Appalachian Elec. Power Co.*, *supra*, 311 U.S. at 406.<sup>11</sup>

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<sup>11</sup> In *Ex Parte Boyer*, 109 U.S. 629, 632 (1884) (emphasis added), the first case in which the Supreme Court extended federal jurisdiction to man-made waters, the Court did so on the grounds that the canal at issue was designed as a channel of commerce:

Navigable water situated as this canal is, used for the purposes

Senators Muskie and Dingell described the Clean Water Act's intent to reach waters that "in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on," 118 Cong. Rec. 33699 (1972); 1972 Act Leg. Hist, v. 1, at 178 (Muskie statement), and "serve as a link in the chain of commerce among the States as it flows in the various channels of transportation." 118 Cong. Rec. 33756-57 (1972); 1972 Act Leg. Hist., v. 1, at 250 (Dingell statement).

Senator Muskie described the reach of the term WOTUS in terms of the waters' use as a highway of commerce, as described in *The Daniel Ball*, *supra*, 77 U.S. at 563-65; and *Appalachian Elec. Power Co*, *supra*, 311 U.S. at 407, 118 Cong. Rec. 33699 (1972); 1972 Act Leg. Hist, v. 1, at 178. (Muskie statement); and both Senators clarified that any water serving as a channel of interstate commerce or susceptible to such use would be classified as WOTUS under the Act.

Their testimony is critical for two reasons: first, because the Supreme Court relied on Senator Dingell's testimony in particular to determine that adjacent

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for which it is used, a highway for commerce between ports and places in different States, carried on by vessels such as those in question here, is public water of the United States, and within the legitimate scope of the admiralty jurisdiction conferred by the Constitution and statutes of the United States.

wetlands could be WOTUS in *Riverside Bayview Homes*; and second because it confirms that the intended scope of the Act is limited traditional navigable waters, and as interpreted by the Supreme Court, non-navigable waters with a significant nexus to downstream navigable waters.<sup>12</sup>

As evidenced by the express reservations in the Act, Congress intended to draw a line between water supply infrastructure and waters that act as channels of commerce. In their efforts to protect distant headwaters and wetlands, the EPA and the Corps have gone too far, and drafted an overbroad rule that exceeds the Agencies' authority under the Clean Water Act.

#### IV. CONCLUSION

As water supply agencies, many of *Amici*'s members are responsible for ensuring a safe, healthful water supply for public consumption and use. *Amici* are also charged with ensuring that the water quality in their facilities is high quality

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<sup>12</sup> See *Sackett v. EPA*, 566 U.S. 120 (2012) [Alito Concurring] "When Congress passed the Clean Water Act in 1972, it provided that the Act covers 'the waters of the United States.' But Congress did not define what it meant by 'the waters of the United States'; the phrase was not a term of art with a known meaning; and the words themselves are hopelessly indeterminate. Unsurprisingly, the EPA and the Army Corps of Engineers interpreted the phrase as an essentially limitless grant of authority. We rejected that boundless view, but the precise reach of the Act remains unclear." See also *United States Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1817 (2016) ["The Act, especially without the JD procedure were the Government permitted to foreclose it, continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation"].



and remains that way. *Amici*, above all other state and federal agencies, are best suited to perform these tasks. The possible extension of the Clean Water Act's permitting requirements to *Amici*'s infrastructure would substantially interfere with *Amici*'s ability to operate.

*Amici* strongly believe that the Final Rule is an administrative overreach that violates both the plain text and the intent of the Clean Water Act. The long-term implications of the EPA's action could substantially interfere with *Amici*'s operations, and – due to the additional time and cost associated with obtaining Clean Water Act permits – delay or prevent important water conservation and supply projects that *Amici* and their member agencies are pursuing. In turn, EPA's decision could significantly reduce the availability and raise the cost of water throughout the country.

*Amici* therefore urge the Court of Appeals to remand the Final Rule to the EPA because the overbroad definition EPA has adopted violates the Clean Water Act.

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Respectfully submitted,

By: /s/ J.G. Andre Monette

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J. G. ANDRE MONETTE  
BEST BEST & KRIEGER LLP  
2000 Pennsylvania Avenue, NW, Suite 5300  
Washington, D.C. 20006

*Attorneys for Appellant*  
*ACWA*  
*NWRA*  
*Eastern Municipal Water District*  
*San Diego County Water Authority*  
*Santa Fe Irrigation District*  
*Helix Water District*  
*Santa Margarita Water District*

## CERTIFICATE OF COMPLIANCE WITH RULE 28.1(E) OR 32(A)

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\_\_\_\_\_  
/s/ J.G. Andre Monette  
Counsel for Amici

### **CERTIFICATE OF SERVICE**

I, J.G. Andre Monette, hereby certify that on November 4, 2016, I electronically filed the foregoing AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Date: November 4, 2016

/s/ J.G. Andre Monette

J.G. Andre Monette

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