

Appeal No. 06-1068

In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

City of Portland, Oregon,
Petitioner,

-and-

City of New York, New York,
Intervenor,

v.

United States Environmental Protection Agency,
Respondent.

ON PETITION FOR REVIEW OF FINAL AGENCY ACTION BY
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BRIEF OF AMICUS CURIAE CITY OF WALLA WALLA, WASHINGTON

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

City of Portland Oregon,)	
)	Docket No. 06-1068
<i>Petitioner,</i>)	
v.)	CERTIFICATE AS TO PARTIES,
)	RULINGS, AND RELATED CASES
United States Environmental Protection)	
Agency,)	
)	
<i>Respondent.</i>)	
_____)	

Pursuant to D.C. Cir. R. 28(a), undersigned counsel for amicus curiae City of Walla Walla, hereby certifies:

A. Parties and Amici.

All parties, intervenors, and amici appearing in this court are listed in the Brief of Petitioner City of Portland, Oregon.

1. D.C. Cir. Rule 26.1 Certificate.

The City of Walla Walla is a governmental entity organized under Title 35A of the Revised Code of Washington, and the undersigned submits that the disclosure requirements of Circuit Rule 26.1 do not apply.

B. Rulings Under Review.

References to the rulings at issue appear in the Brief of Petitioner City of Portland, Oregon.

C. Related Cases.

Amicus is unaware of any related cases.

Timothy Donaldson
Attorney for Amicus Curiae, City of Walla Walla

Dated 12/19/2006

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** All applicable statutes, etc. are contained in the Brief of Petitioner City of Portland, Oregon.

3. Glossary

4. Identity & Interest of Amicus Curiae and Authority to File.

The City of Walla Walla is a non-chartered code city organized under Title 35A of the Revised Code of Washington with a population of approximately 30,000. The City of Walla Walla operates an unfiltered public water system. The cryptosporidium treatment requirement contained in the Long Term 2 Enhanced Surface Water Treatment Rule adopted by the Environmental Protection Agency in 71 Fed. Reg. 654-786 (1/5/2006) will significantly impact operation of the City of Walla Walla's public water system. The City of Walla Walla was granted leave to file an amicus curiae brief by order of this court filed on June 9, 2006.

A. Certificate re: Separate Brief

The undersigned counsel hereby certifies that the City of Walla Walla is a governmental entity, and it submits a separate amicus brief pursuant to the D.C. Cir. Rule 29(d) exception for governmental entities.

5. Argument.

A. Summary of Argument.

The Administrator of the Environmental Protection Agency (EPA) may require use of a treatment technique by administrative regulation only when "it is not economically or technologically feasible to ascertain the level" of a drinking water contaminant. 42 U.S.C. §300g-1(b)(7)(A). Ordinarily, the EPA is required to publish a maximum contaminant level goal (MCLG), 42 U.S.C. §300g-1(b)(1)(A), and to "specify a maximum contaminant level for such contaminant which is as close to the maximum contaminant level goal as is feasible." 42 U.S.C. §300g-1(b)(4)(B). When a maximum contaminant level (MCL) is specified, the EPA must list treatment techniques which are found to be feasible for meeting such maximum contaminant

level, however, the listed treatment techniques cannot be required. 42 U.S.C. §300g-1(b)(4)(E)(i). Amicus respectfully submits that the EPA abused its discretion by finding that it is not economically or technologically feasible to ascertain a contaminant level for cryptosporidium, and the EPA cannot require use of the treatment techniques for cryptosporidium inactivation specified in 40 C.F.R. §141.712(c).

B. Contaminant Levels vs. Treatment Requirements.

The 1974 Safe Drinking Water Act (SDWA) required the EPA to establish national primary drinking water regulations with recommended maximum contaminant levels for drinking water. Pub. L. 93-523, Sec. 2, §1412(b)(1)(B)(2); 88 Stat. 1660, _____ (1974). The SDWA originally provided authority to adopt regulations “which specify a maximum contaminant level or require the use of treatment techniques for each contaminant for which a recommended maximum contaminant level is established or which is listed in a rule [because the contaminant level “cannot be accurately enough measured in drinking water to establish a recommended maximum contaminant level”]....” Pub. L. 93-523, Sec. 2, §1412(b)(3); 88 Stat. 1660, _____ (1974) (bracketed quotation taken from Pub. L. 93-523, Sec. 2, §1412(b)(1)(B)). Congress amended the EPA’s rule-making authority in 1986 by separating the regulatory pathways. The Safe Drinking Water Act Amendments of 1986 retained the EPA’s authority to specify maximum contaminant levels. Pub. L. 99-339, §101(b)(4); 100 Stat. 642, _____ (1986). However, the EPA may only list feasible alternatives to treat contaminants for which a maximum contaminant level is specified:

Each national primary drinking water regulation which establishes a maximum contaminant level shall list the technology, treatment techniques, and other means which the Administrator finds to be feasible for purposes of meeting such maximum

contaminant level, but a regulation under this paragraph shall not require that any specified technology, treatment technique, or other means be used for purposes of meeting such maximum contaminant level.

Pub. L. 99-339, §101(b)(6); 100 Stat. 642, _____ (1986) (codified as amended at 42 U.S.C. §300g-1(b)(4)(E)(i)). Particular treatment alternatives listed under this path cannot be required.

Treatment techniques may be required by regulation only when it is not feasible to ascertain a maximum contaminant level. The SDWA Amendments of 1986 created a new subsection which in part provides that:

The Administrator is authorized to promulgate a national primary drinking water regulation that requires the use of a treatment technique in lieu of establishing a maximum contaminant level, if the Administrator makes a finding that it is not economically or technologically feasible to ascertain the level of the contaminant. In such case, the Administrator shall identify those treatment techniques which, in the Administrator's judgment, would prevent known or anticipated adverse effects on the health of persons to the extent feasible....

Pub. L. 99-339, §101(b)(7)(A); 100 Stat. 642, _____ (1986) (codified at 42 U.S.C. §300g-1(b)(7)(A)). This is a separate rule-making pathway which may be used “in lieu of establishing a maximum contaminant level” only in limited circumstances.

In addition to creation of the dual regulatory pathways, the SDWA Amendments of 1986 specially mandated promulgation of rules regarding two statutorily identified treatment techniques. (1) The EPA was ordered to adopt “regulations specifying criteria under which filtration... is required as a treatment technique for public water systems supplied by surface water sources.” Pub. L. 99-339, §101(b)(7)(C)(i); 100 Stat. 642, _____ (1986) (codified at 42 U.S.C. §300g-1(b)(7)(C)(i)). (2) The EPA was also required to establish “regulations requiring disinfection as a treatment technique for all public water systems.” Pub. L. 99-339, §101(b)(8); 100 Stat. 642, _____ (1986) (codified as amended at 42 U.S.C. §300g-1(b)(8)). In response, the

EPA adopted the Surface Water Treatment Rule. 54 Fed. Reg. 27486 (6/29/1989). The Surface Water Treatment Rule principally established criteria for filtration avoidance, 54 Fed. Reg. 27527-27529 (codified at 40 C.F.R. §141.71), and disinfection, 54 Fed. Reg. 27529-27530 (codified at 40 C.F.R. §141.72). The rule requires public water systems to implement filtration if they use surface water sources and fail to meet either the criteria for filtration avoidance or the disinfection requirements. 40 C.F.R. §141.73.

Congress amended the SDWA again in 1996, in part, in response to cryptosporidium contamination in a Milwaukee, Wisconsin, filtration facility. *See*, H.R. REP. No. 104-632(I), 104th Congress, 2nd Session, at 10 (1996). The Safe Drinking Water Act Amendments of 1996 changed the manner in which contaminants are identified for listing and adopts a schedule for promulgation of certain surface water treatment and disinfectant/disinfectant-byproduct rules. Pub. L. 104-182, §102(a); 110 Stat. 1613, _____ (1996). They further require the EPA to use science in decision-making. Pub. L. 104-182, §103; 110 Stat. 1613, _____ (1996) (codified at 42 U.S.C. §300g-1(b)(3)(A)). However, it leaves the dual regulatory pathways in tact. *See*, Pub. L. 104-182, §104(a)(4); 110 Stat. 1613, _____ (1996) (re-numbering the feasible technology listing limitation with minor introductory amendment). Cryptosporidium control is expressly referenced by the SDWA Amendments of 1996, but neither rule-making pathway is preferred. Among the changes adopted in 1996, the EPA was authorized in some instances to engage in cost-benefit analysis to lower a maximum contaminant level requirement. Pub. L. 104-182, §104(a)(6); 110 Stat. 1613, _____ (1996). The SDWA Amendments of 1996 state that this paragraph in the statute may not be used in reference to cryptosporidium control requirements, and, in so doing, Congress indicates the ordinary dual rule-making structure applies. The

paragraph states without choosing or endorsing a particular option, that “[t]he Administrator may not use the authority of this paragraph ... to establish a maximum contaminant level or treatment technique requirement for the control of cryptosporidium.” Pub. L. 104-182, §104(a)(6); 110 Stat. 1613, _____ (1996) (codified at 42 U.S.C. §300g-1(b)(6)(C). Unlike the SDWA Amendments of 1986 which especially authorized and demanded promulgation of rules for statutorily identified treatment techniques, the SDWA Amendments of 1996 contain no similar direction authorizing deviation from the regular requirements pertaining to the treatment technique rule-making pathway.

The Long Term 2 Enhanced Surface Water Treatment Rule attempts to require unfiltered public water systems to employ particular treatment techniques. It states that “[u]nfiltered systems must use chlorine dioxide, ozone, or UV [ultraviolet light] ... to meet Cryptosporidium inactivation requirements.” 40 C.F.R. §141.712(c); *see*, 71 Fed. Reg. 776 (1/5/2006). The EPA does so by trying to fit its regulation within the subsection 7(A) pathway:

The Act ... requires each [National Public Drinking Water Regulation] for which a [maximum contaminant level goal] is established to specify a maximum contaminant level ... that is as close to the [maximum contaminant level goal] as is feasible.... The Agency is authorized to promulgate a [National Public Drinking Water Regulation] that requires use of a treatment technique in lieu of establishing [a maximum contaminant level] if the Agency finds that it is not economically or technologically feasible to ascertain the level of the contaminant....

The Agency has concluded that it is not currently economically or technologically feasible for [public water systems] to determine the level of Cryptosporidium in finished drinking water for the purpose of compliance with a finished water standard.

71 Fed. Reg. 658; *see also*, 68 Fed. Reg. 47460, 47645 (8/11/2003). . The EPA’s finding that it is not feasible to ascertain Cryptosporidium levels is contradicted by the regulatory history and the monitoring requirements of the rule itself.

C. Review Standard

Amicus acknowledges that the EPA's construction of the SDWA is entitled to deference. *See, Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). It submits, however, that the EPA's predicate finding for resort to 42 U.S.C. §300g-1(b)(7)(A) rule-making authority is not simply a question of construction. The finding at issue here involves the EPA's authority to act, and as Judge Wright wrote for this court in *Office of Communication of United Church of Christ v. F.C.C.*, 707 F.2d 1413, 1424 (D.C. Cir., 1983):

In sum, when the Commission interprets the Act so as to find sufficient legal authority to act, we may give due consideration to the Commission's interpretation, but we cannot relinquish our duty to conduct an independent analysis. We will therefore scrutinize these orders closely to assure ourselves that the Commission has acted within its authority under the Act. It is beyond cavil that, notwithstanding the acknowledged breadth of the Commission's powers to codify by regulation its view of the public interest, courts remain "the final authorities on issues of statutory construction * * * and are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."

The sufficiency of the finding is at issue. Congress requires something more than a discretionary administrative choice through 42 U.S.C. §300g-1(b)(7)(A).

At its inception, the SDWA contained language authorizing the EPA to require the use of a treatment technique when either a maximum contaminant level was established or a contaminant could not be accurately measured enough to establish such a level. Pub. L. 93-523, Sec. 2, §1412(b)(3); 88 Stat. 1660, _____ (1974). Congressional intent was clarified by the SDWA Amendments of 1986. The SDWA was amended to unambiguously provide that the EPA cannot require use of particular technologies or treatment techniques when a maximum contaminant level is established. Pub. L. 99-339, §101(b)(6); 100 Stat. 642, _____ (1986)

(codified as amended at 42 U.S.C. §300g-1(b)(4)(E)(i)). Treatment techniques may be required only if the EPA makes the necessary finding that measurement is not feasible. Pub. L. 99-339, §101(b)(7)(A); 100 Stat. 642, _____ (1986) (codified at 42 U.S.C. §300g-1(b)(7)(A)). Deference to an agency does not overcome “the clear meaning of a statute, as revealed by its language, purpose, and history.” *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979). The EPA’s treatment technique rule-making authority is dependent upon the validity of the subsection 7(A) finding, and the first function of a reviewing court is to decide whether or not the EPA may proceed down the 42 U.S.C. §300g-1(b)(7)(A) pathway. *See, Office of Communication of United Church of Christ v. F.C.C.*, 707 F.2d 1413, 1422 (D.C. Cir., 1983).

The EPA’s 42 U.S.C. §300g-1(b)(7)(A) finding is reviewable under 5 U.S.C. §706(2)(A) which provides that the court “hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” This court explained in *New Mexico Environmental Improvement Division v. Thomas*, 789 F.2d 825, 830 (D.C. Cir., 1986):

In applying the arbitrary and capricious test to the EPA's actions we will not substitute our judgment for that of the agency; instead, we will judge the agency's actions in light of the evidence before it and determine whether the agency's reasoning has been sufficiently adduced.

The agency is entitled to deference, but its reasoning must be supported by the evidence. Even if this court determines that the availability of the 42 U.S.C. §300g-1(b)(4) and 42 U.S.C. §300g-1(b)(7)(A) options are left to the EPA’s discretion, the agency must still cogently explain why it has exercised its discretion in a given manner. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48-49 (1983). The agency’s general obligation to

cogently explain its reasoning is augmented in the context of promulgation of national drinking water regulations by the 42 U.S.C. §300g-1(b)(3)(A) requirement that the EPA do so through use of science.

D. 42 U.S.C. §300g-1(b)(7)(A) requirement re: inability to ascertain levels

Subsection 7(A) of 42 U.S.C. §300g-1(b) authorizes promulgation of regulations requiring the use of treatment techniques to prevent adverse effects of a contaminant only if it is “not economically or technologically feasible to ascertain the level of the contaminant.” This court examined the contours of this requirement in *American Water Works Ass’n (AWWA) v. EPA*, 40 F.3d 1266 (1994). Petitioner in that case argued that the SDWA required the EPA to set a tap point maximum content level for lead in drinking water. The EPA argued, and this court agreed, that this was not “feasible,” because leaching from customers’ plumbing would render the results of such testing valueless for purposes of measuring and improving the overall water quality in public water systems. *AWWA*, 40 F.3d at 1270-1271. This court explained that “[t]he Congress clearly contemplated that [a maximum contaminant level] would be a standard by which both the quality of the drinking water and the public water system’s efforts to reduce the contaminant could be measured.” *AWWA*, 40 F.3d at 1271.

The EPA has itself enunciated the factors to be considered in determining whether or not it is economically or technologically feasible to ascertain the level of a contaminant. In its notice of proposed rule-making regarding drinking water arsenic levels, the EPA explained:

In deciding whether an analytical method is economically and technologically feasible to determine the level of a contaminant in drinking water, the Agency considers the following factors:

- Is the method sensitive enough to address the level of concern (i.e., the MCL)?
- Does the method give reliable analytical results at the MCL? What is the precision (or

reproducibility) and the bias (accuracy or recovery)?

- Is the method specific? Does the method identify the contaminant of concern in the presence of potential interferences?
- Is the availability of certified laboratories, equipment and trained personnel sufficient to conduct compliance monitoring?
- Is the method rapid enough to permit routine use in compliance monitoring?
- What is the cost of the analysis to water supply systems?

65 Fed. Reg. 38888, 38912 (6/22/2000). The Long Term 2 Enhanced Surface Water Treatment Rule contains no cogent explanation regarding application of these factors. *See*, 71 Fed. Reg. 654-786 (1/5/2006). Amicus additionally submits that the EPA's imposition of cryptosporidium monitoring requirements over the years and reliance upon data thereby generated demonstrates that an analytical method is now economically and technologically feasible to determine the level of cryptosporidium in drinking water.

The EPA proposed an enhancement to the Surface Water Treatment Rule in 1994 to provide additional protection against certain disease causing organisms, including cryptosporidium. In its proposal the EPA stated that it intended to pursue a treatment technique requirement in lieu of establishing a maximum contaminant level for the following reasons:

EPA is proposing a treatment technique rather than an MCL for Cryptosporidium, because EPA believes that it is not currently economically or technologically feasible for a system to monitor for this organism in the finished water to determine whether it meets an acceptable risk level. The Agency bases its belief on three factors: (1) The variability of Cryptosporidium spatially and temporally may be considerable, and consequently systems would have to collect frequent samples and inordinately large sample volumes to properly characterize the density of this organism, (2) current methods for Cryptosporidium analysis are difficult and expensive, (3) it is not yet possible to predict the risk resulting from a specific level of exposure to Cryptosporidium, and (4) even if Cryptosporidium could be detected at the lowest concentrations of concern in the finished water, the exposure and associated risk would have already occurred, thereby reducing the significance of monitoring non-compliance.

59 Fed. Reg. 38832 (7/29/1994). The EPA proceeded with consideration of the proposed rule,

and decided in 1996 to initiate a process for developing additional data for future regulatory decisions. *See generally, U.S. v. Massachusetts Water Resources Authority*, 97 F.Supp.2d 155, 162-167 (2000) (outlining the legislative and regulatory history re: cryptosporidium control), *aff'd*, 256 F.3d 36 (2001). Subsequent agency action has eliminated each of the agency's stated concerns from consideration.

On May 14, 1996, the EPA promulgated an information collection rule (ICR), which required public water systems to monitor for cryptosporidium and other contaminants. 61 Fed. Reg. 24354 (5/14/1996). The EPA noted that the adequacy of the analytical method to generate meaningful cryptosporidium data was an issue, but that the EPA had worked to improve testing methods and now had confidence in the ability to monitor by sampling. 61 Fed. Reg. at 24356. Having determined that testing methods were sufficiently reliable, the EPA required public water systems to conduct both source water and finished water monitoring. 61 Fed. Reg. at 24384-24386 (40 C.F.R. §141.143). In the course of justifying the adoption of its information collection rule, the EPA discounted its two of its earlier stated concerns regarding ability to sample and testing costs. *See*, 61 Fed. Reg. at 24362-24363. At the time the EPA adopted the Interim Enhanced Surface Water Treatment Rule in 1998, it commented that the agency was supporting and participating in the development of improved analytical methods, and the research looked promising. *See*, 63 Fed. Reg. 69478, 69493 (12/16/1998). The EPA thereafter refined testing methods even further and used the improved analysis for preparation of a Information Collection Rule Supplemental Survey (ICRSS) which was deemed sufficiently reliable by the EPA to use in considering the rule presently under review. 68 Fed. Reg. 47640, 47652-47659 (8/11/2003). At the time of adoption of the ICR, the EPA controverted concerns

over testing reliability by asserting that the data would be adequate for conducting national regulatory impact analysis. 61 Fed. Reg. at 24363. With the subsequently adopted refinements, the EPA has asserted the testing is reliable to determine cryptosporidium concentrations at individual water treatment plants: “The ICRSS used a newer method with better quality control that yields significantly higher recovery, and this suggests that these data are more reliable for estimating concentrations at individual plants.” 68 Fed. Reg. at 47658-47659. The EPA can no longer claim (1) that monitoring procedures do not properly characterize cryptosporidium density, because the EPA is relying upon the sampling data; or (2) that cryptosporidium monitoring is too expensive, because the EPA has required public water systems to monitor.

The EPA similarly cannot rely upon its third stated belief in 59 Fed. Reg. 38832 that it was not yet possible to predict the risk resulting from a specific level of exposure to cryptosporidium. The EPA adopted an Interim Enhanced Surface Water Treatment Rule in 1998 which established a maximum contaminant content level goal of zero for cryptosporidium. 63 Fed. Reg. 69478, 69515 (12/16/1998) (40 C.F.R. §141.52). The EPA therein relies upon studies and new information developed after 1994 to establish the goal of zero, and claims that it provides an adequate margin of safety. 63 Fed. Reg. 69484-69486. The EPA dispensed with concerns raised at that time regarding uncertainty related to the analytical method used to predict health risks by stating that they “may relate to the issue of whether EPA establishes an MCL versus treatment technique requirements for Cryptosporidium. However, they are not compelling with regard to the public health goal that should be set for this contaminant.” 63 Fed. Reg. at 69485 (12/16/1998). The Long Term 2 Enhanced Surface Water Treatment Rule contains no further explanation to indicate that this remains a concern. *See*, 71 Fed. Reg. 654-

786 (1/5/2006). To the contrary, the proposal for the present rule asserts that the EPA is now able to assess the risk associated with cryptosporidium in drinking water and to classify such risks by bin thresholds concentrations. 68 Fed. Reg. 47460, 47669-47678 (8/11/2003); *see also*, 68 Fed. Reg. 47650-47652 (analyzing new data developed after 1998) and 67 Fed. Reg. 1812, 1824-1826 (1/14/2002) (quantifying health benefits attributable to reduced cryptosporidium exposure). The EPA can no longer claim that it is not possible to predict the risk resulting from a specific level of exposure to cryptosporidium, because the EPA found the health risk associated with cryptosporidium sufficiently predictable to establish an MCLG in 1998 and to classify such risks by concentration levels in 2003.

The EPA's last belief stated in 59 Fed. Reg. 38832 in support of establishing a treatment technique in lieu of an MCL is that monitoring cryptosporidium levels in finished drinking water would be ineffective because exposure and risk would have already occurred. Amicus respectfully submits that such reasoning is nonsensical, because the same rationale would apply to every contaminant for which the EPA requires MCL monitoring. For example, the EPA established an MCL for arsenic in 66 Fed. Reg. 6976, 7061 (1/22/2001) (40 C.F.R. §141.11(b)). MCL compliance is monitored by periodic sampling at entry points into the distribution system. 40 C.F.R. §141.23. Any time a public water system monitors for arsenic, or the other inorganic contaminants for which an MCL has been established by 40 C.F.R. §141.11 or 40 C.F.R. §141.62, the contaminant has entered the drinking water system and the exposure and risk have already occurred. Another even more closely analogous example is fecal coliforms. Like cryptosporidium, coliforms are a microbiological contaminant. *See*, 40 C.F.R. §141.52. The EPA established an MCL for coliforms in 1989. 54 Fed. Reg. 27544, 27566 (6/29/1989) (40

C.F.R. §141.63). The agency has listed recommended, but not required, treatment techniques for coliforms in 40 C.F.R. §141.63(d). The EPA monitors MCL compliance through periodic distribution system sampling. 40 C.F.R. §141.21. As with other contaminants for which MCL's are set and monitored, coliform exposure and risk has already occurred at the time sampling takes place, but the EPA nonetheless regulates the contaminant through the MCL process.

The structure of the rule at issue in the present case belies the notion that cryptosporidium levels cannot be ascertained. The Long Term 2 Enhanced Surface Water Treatment Rule requires unfiltered systems to monitor source waters unless they meet criteria for monitoring avoidance. 40 C.F.R. §701(a)(2) (71 Fed. Reg. at 770). The rule prescribes the analysis methods and laboratories which must be used. 40 C.F.R. §§704 & 705 (71 Fed. Reg. at 772). These methods will yield a sample volume together with the number of cryptosporidium oocysts which are counted, and such data must be reported together with additional information. 40 C.F.R. §706(e)(1) (71 Fed. Reg. at 772-773). On the basis of his monitoring, unfiltered systems are divided into two categories. Those with a mean cryptosporidium level of 0.01 oocysts/L or less must provide 2-log inactivation, and those with a greater level must provide at least 3-log inactivation. 40 C.F.R. 712(b) (71 Fed. Reg. at 770). The system must then use certain treatment techniques to achieve log credits against its inactivation requirements. 40 C.F.R. 715(a)(2) (71 Fed. Reg. at 770); and 40 C.F.R. 720 (71 Fed. Reg. at 782-784). Three treatment techniques are specified: (1) chlorine dioxide application, 40 C.F.R. 720(b)(1) (71 Fed. Reg. at 782-783); (2) ozone treatment, 40 C.F.R. 720(b)(2) (71 Fed. Reg. at 783); and (3) exposure to ultraviolet light, 40 C.F.R. 712(d) (71 Fed. Reg. at 783-784). Although the log credit tables in the rule indicate that a 3-log credit is attainable through any one of the methods,

71 Fed. Reg. at 782-783, the rule requires use of a combination of two methods to achieve the necessary log credits. 40 C.F.R. 712(d) (71 Fed. Reg. at 786). In other words, treatment technique requirements are primarily dependent upon ascertainment of cryptosporidium levels.

The EPA has previously recognized the feasibility of finished water monitoring to ascertain cryptosporidium levels by actually requiring such monitoring. 40 C.F.R. §141.143(a)(2)(ii) & (iii) (61 Fed. Reg. at 24384-24385). Unlike the situation in *AWAA* where this court accepted the agency's explanation that the results of finished water testing would be ineffective to measure overall water quality due to the possible presence of lead in customer pipes which could interfere with efforts to determine lead levels in the public water delivery system, *AWWA*, 40 F.3d at 1270-1271, there is nothing in the published agency record to indicate that cryptosporidium contamination leaches from customer pipes. Cryptosporidium contamination occurs in the same manner as coliform contamination. The presence of coliforms in drinking water suggests strong evidence of fecal contamination. *See*, 52 Fed. Reg. 42224, 42234 (11/3/1987). Cryptosporidium similarly finds its way into a water supply principally through fecal contamination. 68 Fed. Reg. 47640, 47647 (8/11/2003). As is the case with coliform monitoring, *see*, 54 Fed. Reg. 27544, 27549-27555 (6/29/1989), post treatment sampling of a cryptosporidium MCL would yield "a standard by which both the quality of the drinking water and the public water system's efforts to reduce the contaminant could be measured." *AWWA*, 40 F.3d at 1271.

E. Conclusion.

Amicus submits that the EPA cannot cogently pursue contradictory positions upon the feasibility of ascertaining cryptosporidium levels in drinking water. The agency can't on the one

hand require finished water monitoring for cryptosporidium, 61 Fed. Reg. at 24384-24386 (40 C.F.R. §141.143), and on the other hand claim that finished water monitoring is not feasible. It can't on the one hand claim that the monitoring analyses are scientifically accurate enough to establish the occurrence data upon which agency assumptions and treatment requirements are based, and on the other hand assert that such analyses are inadequate to measure levels. It can't assert that it is too expensive to ascertain cryptosporidium levels while, at the same time, it forces public water systems to test and bases treatment requirements upon the levels ascertained through such testing. Amicus respectfully submits that the EPA abused its discretion by finding that it is not economically or technologically feasible to ascertain a contaminant level for cryptosporidium, and the EPA cannot require use of the treatment techniques for cryptosporidium inactivation specified in 40 C.F.R. §141.712(c).

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6. Certificate of Type-Volume, Typeface & Type Style Compliance.

I, Timothy Donaldson, hereby certify that this brief complies with the type volume limitation of FRAP 32(a)(7)(B), because this brief contains _____ words (no more than 7,000), excluding parts of the brief exempted by FRAP 32(a)(7)(B)(iii) and D.C. Cir. Rule 32(a)(2); and

I certify that this brief complies with the typeface requirements of FRAP 32(a)(5) & D.C. Cir. Rule 32(a)(1) and the type style requirements of FRAP 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using WordPerfect X3 in plain, roman style, 12 point font.

TIM DONALDSON
Attorney for the City of Walla Walla

Dated 12/19/2006

7. Certificate of Service.

I, Timothy Donaldson, hereby certify that on December 19, 2006, I served two copies of the foregoing Amicus Brief of the City of Walla Walla, Washington, by first class mail, postage prepaid upon the below stated parties at their stated addresses.

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8. Appendix.