ORAL ARGUMENT SCHEDULED FOR APRIL 15, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1101

STATE OF NEBRASKA, et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review

JOINT BRIEF OF PETITIONERS AND PETITIONER-INTERVENORS

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Filed in draft form: October 21, 2002.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rules 26.1 and 28(a)(1), Petitioners State of Nebraska, ex rel. Donald B. Stenberg, Attorney General of the State of Nebraska, and City of Alliance, Nebraska, and Petitioner-Intervenors, City of Oberlin, Desert Sands Mutual Domestic Water Consumers Association, Inc., Chesapeake Ranch Water Company, New Utsalady Water System, and Camano Water Systems Association, submit the following:

Parties and Amici:

Petitioners are the State of Nebraska, ex rel. Donald B. Stenberg, Attorney General of the State of Nebraska, and City of Alliance, Nebraska.

Respondent is the United States Environmental Protection Agency ("EPA").

Intervenors in support of Petitioners are the City of Oberlin, Desert Sands Mutual Domestic Water Consumers Association, Inc., Chesapeake Ranch Water Company, New Utsalady Water System, and Camano Water Systems Association.

Petitioner in support of Respondent is Natural Resources Defense Council.

Rulings Under Review:

Petitioners[1] challenge the EPA's final rule entitled "National Primary Drinking Water Regulations: Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring Final Rule" ("Arsenic Rule"). The rule was promulgated on January 22, 2001, and appears at 66 Fed. Reg. 6976-01.

Related Cases:

[1] Petitioners include the State of Nebraska, ex rel. Donald B. Stenberg, Attorney General of the State of Nebraska, and the City of Alliance, Nebraska. Petitioner Intervenors, are the City of Oberlin, Kansas, Desert Sands Mutual Domestic Water Consumers Association, Inc., of New Mexico, Chesapeake Ranch Water Company of Lusby, Maryland, New Utsalady Water System of Sanwood, Washington, and Camano Water Systems Association of Stanwood, Washington. (All of the above are hereinafter collectively referred to as "Petitioners.")

This case has not previously been before this Court or any other court. Although this case was previously consolidated with No. 01-1097 and consolidated cases (D.C. Cir. Mar. 1, 2001), those cases have since been voluntarily dismissed. (JA __) (Order No. 708044, October 17, 2002).

Natural Resources Defense Council v. Christine Todd Whitman, Administrator, United States Environmental Protection Agency, and United States Environmental Protection Agency, No. 01-1515 (D.C. Cir. Dec. 18, 2001) is no longer pending before this Court, but may not yet be final. This case was previously consolidated with No. 01-1097 (D.C. Cir. Mar. 1, 2001), but was dismissed and the consolidation vacated by this Court on July 10, 2002. Natural Resources Defense Council filed a petition for rehearing with this Court on August 26, 2002, which was denied. To Petitioners' knowledge, no Petition for Certiorari has been submitted to the U.S. Supreme Court as of this date, but time still remains for Natural Resources Defense Council to do so. With the exception of the City of Alliance, all parties to this brief are also intervenors in case No. 01-1515.

Corporate Disclosure Statement:

The Desert Sands Mutual Domestic Water Consumers Association, Inc., of New Mexico is a member-owned nonprofit quasi-governmental entity. The Chesapeake Ranch Water Company and the New Utsalady Water System are nonprofit, customer-owned corporations. The Camano Water Systems Association is a nonprofit incorporated association. None of these entities have parent companies, nor do any publicly held companies have ownership interest in them.

Respectfully submitted,

_____

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DATED this 21st day of October, 2002.

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to D.C. Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

APA	Administrative Procedures Act
EPA	Respondent United States Environmental Protection Agency
MCL	Maximum Contaminant Level
MCLG	Maximum Contaminant Level Goal
mg/l	micrograms per liter
NODA	Notice of Data Availability
PHSA	Public Health Service Act
ppb	parts per billion
RMCL	Recommended Maximum Contaminant Level
SDWA	Safe Drinking Water Act

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Petitioners seek review of a final agency action by the EPA establishing a Maximum Contaminant Level ("MCLG") and Maximum Contaminant Level ("MCL") for arsenic under the Safe Drinking Water Act ("SDWA"). "National Primary Drinking Water Regulations: Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring Final Rule," 66 Fed. Reg. 6976-01 (January 22, 2000) (the "Arsenic Rule"). The promulgation of an MCLG and MCL is reviewable as a final agency action pursuant to section 1448 of the Safe Drinking Water Act, 42 U.S.C. § 300j-7 (2002), Addendum at A-1, which also provides that this Court has exclusive jurisdiction with respect to such review. Insofar as Petitioners seek review of the constitutionality of the Arsenic Rule, and not merely a substantive review of the underlying rulemaking, jurisdiction is also appropriate in this Court. *State of Nebraska v. United States*, 238 F.3d 946 (8th Cir. 2001), *cert. denied* 533 U.S. 929, 121 S. Ct. 2551. Petitioners have timely filed their petition for review in accordance with section 1448 of the SDWA. The EPA's action is also subject to review by this Court under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2002), and as provided by Rule 15 of the Federal Rules of Appellate procedure.

STATEMENT OF THE ISSUES

1. Whether the Safe Drinking Water Act, 42 U.S.C. § 300f et seq., Addendum at A-1, and the authority it provides to EPA to establish and enforce the Arsenic Rule, exceeds the authority granted to Congress under the Commerce Clause of the United States Constitution, art. I, § 8, c. 3, to the extent that they regulate health by requiring intrastate water systems to treat for noncontagious contaminants, exceed congress's commerce clause authority.

2. Whether the Safe Drinking Water Act, 42 U.S.C. § 300f et seq., and the authority it provides to EPA to establish and enforce the Arsenic Rule, violate the Tenth Amendment to the United States Constitution insofar as they mandate State action and intrude upon traditional state interests.

3. Whether EPA violated the Safe Drinking Water Act by requiring compliant water systems to make statements and provide warnings related to four contaminants, when the Act specifically limits EPA to three.

4. Whether EPA violated the Safe Drinking Water Act by requiring compliant water systems to make statements different from those identified by the Act, when the Act specifically limits EPA to certain types of statements identified in the Act.

5. Whether EPA violated Petitioners' First Amendment right not to speak by requiring even compliant water systems to make statements that are non-neutral, biased, inflammatory, and contrary to the beliefs held by the speakers.

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in the Addendum.

STATEMENT OF THE CASE

This case presents a challenge to the Arsenic Rule promulgated by EPA under the SDWA, 42 U.S.C. §§ 300f to 300j-26 (2000), and a challenge to the constitutionality of the SDWA and the Arsenic Rule insofar as they violate the Commerce Clause and the Tenth Amendment to the United States Constitution.

On January 22, 2001, EPA published the final regulation addressing arsenic, entitled "National Primary Drinking Water Regulations: Arsenic and Clarifications to Compliance and New

Source Contaminants Monitoring Final Rule," 66 Fed. Reg. 6976-01 (January 22, 2001), Joint Appendix (JA- __). The Arsenic Rule establishes enforceable standards for arsenic in public water supplies.

Petitioners, the State of Nebraska and City of Alliance, filed a Petition for Review on March 5, 2001, that was subsequently consolidated with *American Wood Preservers Institute v. Environmental Protection Agency*, No. 01-1097 (D.C. Cir. Mar. 1, 2001) and the various other cases consolidated with No. 01-1097. The Court granted leave to intervene in No. 01-1097 to Petitioner-Intervenors, the City of Oberlin, Desert Sands Mutual Domestic Water Consumers Association, Inc., Chesapeake Ranch Water Company, New Utsalady Water System, and Camano Water Systems Association, on February 1, 2001, and confirmed their right to participate as Petitioner-Intervenors in this Court's order dated September 23, 2002.

STATEMENT OF THE FACTS

I. Background

The SDWA "was enacted to ensure that public water supply systems meet minimum national standards for the protection of public health." *National Wildlife Federation v. U.S. E.P.A.*, 980 F.2d 765, 768 (D.C. Cir. 1992). The SDWA establishes the legal framework under which EPA promulgates standards for the regulation of drinking water contaminants that may have an adverse effect on health and which are known or anticipated to occur in public water systems. 42 U.S.C. § 300g-1(b)(1)(A). Such contaminants include both microbial pathogens that threaten public health through the spread of disease and illness (which are to be controlled by using approved treatment techniques) and chemical contaminants that may pose other health risks (which are to be controlled through enforceable standards that limit the concentrations of such contaminants in water supplies provided to the public).

A "public water system" is defined as a system that "has at least fifteen service connections or regularly serves at least twenty-five individuals." 42 U.S.C. 300f(4)(A). This is inclusive of:

> (i) any collection, treatment, storage, and distribution facilities under control of the operator of such system and used primarily in connection with such system, and (ii) any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system.

42 U.S.C. § 300f(4)(A). All public water systems that serve at least fifteen service connection used by year round residents of the area served by the system, or regularly serve at least twenty-five year-round residents, are "community water systems." 42 U.S.C. § 300f(15). All other public water systems are defined as "noncommunity water systems." 42 U.S.C. § 300f(16).

Chemical contaminants regulated under the SDWA are assigned a MCL, which is the enforceable standard representing the maximum level of that contaminant legally permitted to be delivered to any user of a public water system. 42 U.S.C. § 300f(3). A non-enforceable MCLG is also assigned for each contaminant, which identifies a level at which "no known or anticipated adverse effect on the health of persons occur and which allows an adequate margin of safety." 42 U.S.C. § 300g-1(b)(4)(A). EPA is required to promulgate a corresponding MCL that is as close as feasible to the MCLG, taking cost and technological feasibility into consideration. 42 U.S.C. § 300g-1(b)(4)(B)-(D).

In proposing a national primary drinking water regulation, the SDWA requires the Administrator to perform a thorough risk and cost analysis. 42 U.S.C. § 300g-1(c)(C). The SDWA also requires EPA to provide a public document containing:

> (i) each population addressed by any estimate of public health effects; (ii) the expected risk or central estimate of risk for the specific populations; (iii) each appropriate upper-bound or lower-bound estimate of risk; (iv) each uncertainty identified in the process of the assessment of public health effects and studies that would assist in resolving the uncertainty; and (v) peer-reviewed studies known to the Administrator that support, are directly relevant to, or fail to support any estimate of public health effects and the methodology used to reconcile inconsistencies in the scientific data.

42 U.S.C. § 300g-1(b)(3)(B). EPA must consult with the National Drinking Water Advisory Council and seek comment from the Science Advisory Board during this regulatory process. 42 U.S.C. §§ 300g-1(d-e).

II. The Localized Nature of Drinking Water

"Altogether, there are more than 180 thousand water systems in the United States serving over 250 million people." JA __ (US EPA. 1997g, Community Water System Survey, Volume I, January, 1997 ("CWSS")). The majority (95%) of PWSs are small systems that serve fewer than 10,000 people. 89 percent of PWSs serve 3,300 people or fewer; 77 percent serve fewer than 1,000 people; 67 percent serve fewer than 500 people; and 34 percent serve fewer than 100 people. JA __ (Proposed Arsenic in Drinking Water Rule RIA, 4-2).

Almost 80% of community water systems ("CWSs") use primarily ground water. JA __ (CWSS, p. 6, 8). Of the nation's approximately 73,400 water systems serving fewer than 10,000 persons, approximately 68,200 (or 93%) are ground water systems. JA __ (PCRS, P. 179 of 09.02.00).

The Arsenic Rule "will only impact a small percentage of public water systems, but as a policy matter, [EPA believes that it] will protect the consumers who drink the water from these systems because treatment must be installed to lower concentrations of arsenic." JA __ (Public Comment and Response Summary for the Arsenic in Drinking Water Regulation ("PCRS"), P. 2 of 12.00.00).

> EPA understands and appreciates the fact that the arsenic in drinking water rule will primarily (but not exclusively) affect **small drinking water utilities** (i.e., those serving fewer than 10,000 persons). This is due to the occurrence patterns of arsenic **(primarily in ground water**) and the fact that **many small systems tend to use ground water** as their drinking water source. EPA also recognizes that small systems typically have poorer economies of scale than do larger systems (i.e., large systems can spread costs of compliance over a larger customer base). EPA further understands that small municipalities with finite resources have many competing priorities for limited resources and that a relatively low new arsenic standard will force expenditures of funds (in many cases) for planning, building, operating, and maintaining treatment facilities to remove arsenic.

JA __ (emphasis added) (PCRS, P. 46 of Responses for Section 08); see also JA __ (PCRS, p. 2 of 14.02.00).

"Many of the systems that may be required to treat for arsenic are ground water systems, which may currently practice only disinfection and lack the necessary expertise to safely operate arsenic treatment facilities." JA __ (PCRS, P. 58 of Responses for Section 08). "Additionally, the preamble clearly indicates that a lower arsenic MCL will have a greater impact on ground water systems, especially with their multiple entry points that would require multiple treatment plants." JA __ (PCRS, P. 179 of 09.02.00).

III. The SDWA and Arsenic Rule Notice Requirements

The SDWA provides for the notification of each person served by a public water system when it fails to comply with applicable MCL or monitoring requirement. 42 U.S.C. § 300g-3(c). The SDWA further requires annual consumer confidence reporting. If a system has a detected a regulated contaminant, then it is required to notify its customers of the MCLG, the MCL, the level of such contaminant in the system, and for any regulated contaminant for which there has been a violation of the MCL during the year concerned, a "brief statement in plain language regarding the

health concerns that resulted in regulation of such contaminant," as provided by EPA. 42 U.S.C. § 300g-3(c)(4)(B). EPA may, but not for more than

> 3 regulated contaminants, . . . require a consumer confidence report . . . to include the brief statement in plain language regarding the health concerns that resulted in the regulation of the contaminant or contaminants concerned . . ."

42 U.S.C. § 300g-3(c)(4)(B).

The Arsenic Rule specifically requires "special arsenic-specific reporting requirements" for systems with arsenic levels below the MCL, including not only CCR health effects language which is identical to that required under the SDWA for systems in violation of the MCL, but also a "special informational statement" that is different from the health effects language required for an MCL violation. 66 Fed. Reg. at 6991. The standard CCR health effects language is:

> Some people who drink water containing arsenic in excess of the MCL over many years could experience skin damage or problems with their circulatory system and may have an increased risk of getting cancer.

40 C.F.R. § 141, Subpt. O, App. A. However, the "special informational statement" states:

> While your drinking water meets EPA's standard for arsenic, it does contain low levels of arsenic. EPA's standard balances the current understanding of arsenic's possible health effects against the costs of removing arsenic from drinking water. EPA continues to research the health effects of low level of arsenic, which is a mineral known to cause cancer in humans at high concentrations and is linked to other health effects such as skin damage and circulatory problems.

40 C.F.R. § 141.154(b)(1), Addendum at A-2 and A-3; 66 Fed. Reg. at 6991. EPA's rationale for requiring additional language is that "consumers should be aware of the uncertainties surrounding the risks presented even by very low levels of arsenic." 66 Fed. Reg. at 6991, JA ___.

SUMMARY OF THE ARGUMENT

EPA's arsenic standard for drinking water imposes stringent limits on a contaminant that is not contagious. The target of its regulation, drinking water, is produced by water systems predominantly serve community residents and local customers, and that ship across state lines only in the rarest of cases. The Safe Drinking Water Act, the statutory authority for EPA's regulation, was enacted with minimal regard for contagion and interstate commerce, factors which were the original focus of federal drinking water regulations. For these reasons, both the standard and the Act exceed Congress's regulatory power under the Interstate Commerce Clause.

This is clear from a series of recent Supreme Court decisions, which demonstrate that this federal power encompasses only those economic activities that significantly and directly affect interstate commerce. Under those decisions, the cumulative cost of a traditionally local issue, such as crime or health, does not by itself transform that issue into a proper target of federal regulation. Moreover, both the arsenic rule and the Act are contrary to the Tenth Amendment, inasmuch as they unjustifiably intrude on the protection of health, an area that has long been a state government function in the absence of such special factors as communicability.

Finally, because the standard imposes affirmative informational requirements upon state and local governments, it violates both the First Amendment and the Tenth Amendment, as demonstrated by judicial rulings regarding mandatory speech.

ARGUMENT

I.

THE ARSENIC RULE AND THE SDWA, TO THE EXTENT THAT THEY REGULATE HEALTH BY REQUIRING INTRASTATE WATER SYSTEMS TO TREAT FOR NONCONTAGIOUS CONTAMINANTS, EXCEED CONGRESS'S COMMERCE CLAUSE AUTHORITY.

A. The Supreme Court Has Made It Clear That There Are Limits To The Federal Government's Power To Regulate Under The Commerce Clause.

In Article I, section 8, the U.S. Constitution delegates to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Early Supreme Court cases noted that this power had its limits. It did not extend to that "which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Gibbons v. Ogden*, 9 Wheat. 1, 196 (1924).

> Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one . . . The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State.

Id. at 194-95.

In the 1930s and 1940s several Supreme Court decisions greatly expanded Congress's commerce clause power to encompass intrastate activities that were only indirectly related to interstate commerce. Nonetheless, beginning in 1996, a series of Supreme Court rulings has reaffirmed the constitutional limits of the federal commerce power. In *United States v. Lopez*, 514 U.S. 549 (1996), the Supreme Court struck down a federal ban on possessing firearms in school zones, holding that it was essentially a federal attempt to regulate local crimes that had no real

relationship to interstate commerce. In *United States v. Morrison*, 529 U.S. 598 (2000), the Court similarly invalidated the federal Violence Against Women Act. In *Jones v. United States*, 529 U.S. 848 (2000), the Court narrowly construed a federal arson statute as not extending to noncommercial dwellings, rejecting a broader interpretation that would have raised constitutional interstate commerce issues. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 521 U.S, 156 (2001), the Court overturned the Corps' broad interpretation of "navigable waters" under the Clean Water Act, ruling that this interpretation would similarly raise interstate commerce issues.

In *Lopez*, the Supreme Court reviewed in great detail the development of the law relating to Congress' Commerce Clause authority. 514 U.S. at 551-59. It noted that even in an era of expansive congressional power, there was still the need to maintain limits on the scope of commerce power in order to avoid "effects upon interstate commerce so indirect and remote that to embrace them in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Id*. at 554. The Court identified three broad categories of activity that Congress may regulate under its commerce power:

(1) "Congress may regulate the use of the channels of interstate commerce;"

(2) "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and,

(3) Congress may "regulate those activities having a substantial relation to interstate commerce."

Id. at 558-59. In order to fall within the federal commerce power, moreover, the activity had to be

economic in nature. As the Court stated in *Morrison*, "a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case." 529 U.S. at 610.

As is shown in section I(D) of this Argument, none of these criteria are satisfied by the target of the arsenic standard and its underlying statute.

B. Protecting The Health Of Its Citizens Is A Traditional State Function.

In *Lopez*, the Court noted the danger that broad interpretations of the Commerce Clause, based on attenuated connections between intrastate activities and interstate commerce, might allow limitless federal intrusions into "areas such as criminal law enforcement or education where States historically have been sovereign." 514 U.S. at 564. In *Morrison* the Court similarly expressed concern over federal involvement in "family law and other areas of traditional state regulation." 529 U.S. at 615.

A state's protection of the health of its citizens falls into this same category. In the words of the Supreme Court:

> Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are 'primarily, and historically, . . . matter[s] of local concern,' *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719, 105 S. Ct. 2371, 2378, 85 L. Ed.2d 714 (1985), the 'States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons,' *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756, 105 S. Ct. 2380, 2398, 85 L. Ed.2d 728 (1985) (internal quotation marks omitted).

Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996). *See also Gade v. National Solid Wastes Management Association*, 505 U.S. 88, 108 (1992) (noting the state's "power to protect the public health, safety, and other valid interests"); *Kesler v. Department of Public Safety, Financial*

Responsibility Division, State of Utah, 369 U.S. 153, 172 (1962) ("the 'police power' of a State, especially when exerted for the protection of life and limb, is as pervasive as any of the reserved powers of the States and should be respected unless there is a clear collision with a national law which has the right of way under the Supremacy Clause of Article VI"); *International Paper Co. v. Ouellette*, 479 U.S. 481, 502 (1987) ("traditional interest of the affected State, involving the health and safety of its citizens" (Brennan, J., dissenting on other grounds)); *Industrial Truck Assoc., Inc. v. Henry*, 909 F. Supp. 1368, 1373-74 (S.D. Cal. 1995) ("federal system places the authority for regulating health and safety in the hands of the states").

Contagious diseases are an exception to this, given their clear potential to spread across state lines. For this reason, contagious diseases have long been recognized as subject to federal regulation. "From as early as 1796, Congress has legislated directly in the area of contagious diseases." *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273, 290 (1987) (Rehnquist, C.J., dissenting on other grounds). Nonetheless, arsenic contamination in drinking water does not fall within this exception, since it is not linked to any communicable disorders.

C. <u>In Enacting The Safe Drinking Water Act, Congress Illegally Abandoned The Commerce Clause Limits That It Had Previously Observed In Regulating Drinking Water.</u>

The earliest federal regulations regarding drinking water were expressly limited to interstate travel and communicable diseases. Federal involvement with such standards began with the Interstate Quarantine Act of 1983, which authorized the Secretary of the Treasury to issue regulations

> to prevent the introduction of contagious or infectious diseases into the United States from foreign countries, and into one State or Territory or the District of Columbia from another State or Territory or the District of Columbia . . . .

Act of Feb. 15, 1893, ch. 114, § 3, 52d Cong., Sess. II, at 450. This led, in 1912, to "the first water-related regulation: the use of the common drinking cup on interstate carriers was prohibited." C.D. Larson, *Historical Development of the National Primary Drinking Water Regulations*, in Safe Drinking Water Act ch. 2 at p.5 (E.J. Calabrese et al. ed., 1989).

This approach was continued in the 1944 Public Health Service Act, which authorized the Surgeon General to "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable disease into the States or possessions, or from one State or possession into any other State or possession." Act of July 1, 1944, ch. 373, § 361(a), 58 Stat. 682, 703.

Like their predecessors, the regulations issued under this provision applied only to interstate conveyances: "Only potable water shall be provided for drinking and culinary purposes by any operator of a conveyance engaged in interstate traffic ." 21 Fed. Reg. 9881, ---- (1965), codified at 42 C.F.R. § 72.101 (1974).

This interstate traffic limitation ended, however, in 1974 with the enactment of the SDWA, P.L 93-523. The Act's purpose was not the regulation of interstate commerce, but the protection of public health irrespective of state borders or the risk of contagion. The Act was titled "An Act to Amend the Public Health Service to Assure That the Public Is Provided With Safe Drinking Water, and for Other Purposes". As its legislative history makes clear, Congress expressly rejected its previous focus on interstate commerce limitations. The accompanying House Report stated:

> The purpose of the legislation is to assure that water supply systems serving the public meet minimum national standards for protection of public health. *At present, the Environmental Protection Agency is authorized to prescribe Federal drinking water standards only for water supplies used by interstate carriers. Furthermore, these standards may only be*

> *enforced with respect to contaminants capable of causing communicable disease. In contrast,* this bill would . . . authorize the Environmental Protection Agency to establish Federal standards for protection from *all* harmful contaminants, which standards would be applicable to *all* public water systems . . . .

H. Rep. No. 93-1185 (1974), 1974 USCCAN 6454 (emphasis added), Addendum at A-4. While noting that "the problem of unsafe drinking water . . . is and should be primarily the concern of State and local governments," 1974 USCCAN at 6461, the report went on to set out a series of reasons for why this supposedly was a national issue: the effect of other federal laws on waste disposal; the impact of unsafe drinking water on the national economy and federal health costs; its effect on interstate tourism and travel by workers; and the interstate nature of the hydrologic cycle. 1974 USCCAN at 6461.

Despite these claims, the 1974 SDWA was essentially an across-the-board public health measure. This became even clearer as the Act was amended over time. In enacting the SDWA Amendments of 1996, P.L. 104-182, Congress did not even bother with attempts at interstate commerce justifications; its essential finding was that "safe drinking water is essential to the protection of public health". *Id*. at § 3(1), 42 USCA § 300f note. As is shown below, the resulting regulatory scheme and the arsenic standard in particular are constitutionally infirm for precisely this reason.

D. Congress's Interstate Commerce Rationalizations For The SDWA Fail To Meet The Criteria Set Forth In *Lopez* and *Morrison* For Valid Federal Regulation.

The congressional reports on the SDWA alluded to the impact of unsafe drinking water on the national economy, its effects on interstate tourism and travel by workers, and the impact on federal health costs. 1974 USCCAN at 6461. However, "simply because Congress may conclude

that a particular activity substantially affects interstate commerce does not necessarily make it so." *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc*., 452 U.S. 264. 311 (1981) (Rehnquist, J., concurring). Instead, courts must themselves decide whether a rational basis exists for concluding that a regulated activity sufficiently affects interstate commerce. *Lopez*, 514 U.S. at 557 (*citing Hodel*, 452 U.S. at 276-80).

In *Lopez*, the Supreme Court identified three broad categories of activities that Congress may regulate under its commerce power: (1) "the use of the channels of interstate commerce;" (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities," and (3) "those activities having a substantial relation to interstate commerce." *Lopez*, 514 U.S. at 558-59 (citations omitted). The regulation of arsenic, or any other contaminant that does not cause contagious disease, in local drinking water fails to fall within any of these categories.

Just as in *Lopez*, the first two of the three categories may be quickly disposed of: the SDWA and the Arsenic Rule do not regulate the use of channels of interstate commerce, nor do they attempt to prohibit the interstate transportation of a commodity through such channels, nor do they seek to protect an instrumentality of interstate commerce or a thing in interstate commerce. *See Lopez*, 514 U.S. at 559. Instead, they seek to protect the citizens of each state from a commodity received or consumed solely through intrastate activities. Thus, for the SDWA and the Arsenic Rule to be sustained, "it must be under the third category as a regulation of an activity that substantially affects interstate commerce." *Id*.

"Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez*, 514 U.S. at 560. However, the regulation at issue does not

regulate an economic activity any more than did the statute in *Lopez*. Instead it regulates the use of a commodity (whether it be a glass of drinking water or a gun), that could pose a threat to the health and safety of those coming into contact with it (whether by drinking it, being bathed with it, or being shot at). The harm to be prevented is that of the health and safety of a citizen, and while that harm may have economic repercussions, that alone does not qualify it as an "economic activity."

The Court in *Lopez* was faced with the allegation that gun control was necessary because firearm possession in school zones may lead to violent crime, may reduce the willingness of individuals to travel to areas within the country that are perceived to be unsafe, and may handicap the educational system resulting in a less productive citizenry. *Lopez*, 514 U.S. at 564. However, the Court noted that under such reasoning, the federal government could regulate all activities that might lead to violent crime, any activity related to the economic productivity of individual citizens (including family law issues traditionally reserved to the states), and the educational process itself. *Lopez*, 514 U.S. at 564. Despite the fact that the case involved "commercial" activity – the delivery of a gun for a fee – the Court found that this category of regulated conduct, "possession of a firearm in a local school zone", was outside the commerce power. *Lopez*, 514 U.S. at 561, 563. The same is true with respect to Congress' ability to regulate drinking water for the safety and welfare of individual citizens. While a PWS may arguably be involved in an activity that has a minor "commercial" aspect -- the delivery of water for a fee -- the arsenic standard goes directly to promoting the public health; it does not regulate the economic aspect of a PWS's activities.

Morrison re-emphasized that legislative findings are not determinative of whether an activity affects interstate commerce; "simply because congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Morrison*, 529 U.S. at

614-15. In particular, congressional findings are weakened when they rely on the "but-for causal chain" that the activity regulated, while not necessarily economic in nature, has attenuated economic affects on interstate commerce. *Id*

The SDWA's definition of public water system is not tailored to ensure that it only regulates activities with a substantial relation to interstate commerce. There is no requirement that water from the system be sold as a commercial or consumer good, or that it be sold interstate. The SDWA does not differentiate between activities that are non-commercial and commercial in nature, nor does it contain any jurisdictional requirement that a system be related to interstate commerce to be regulated. The SDWA is simply not aimed at regulating economic activity; it is solely concerned with public health.

The SDWA and the Arsenic Rule, to the extent that they regulate public health and safety by requiring intrastate water systems to treat for contaminants that do not cause communicable diseases, fail to meet any of the three prongs of *Lopez* to qualify as a valid exercise of Congress' Commerce power. They are public health mandates whose effects on interstate commerce are attenuated at best. Thus, they exceed Congress' Commerce Clause authority.

II.

IN ADDITION TO THE LIMITS OF THE COMMERCE CLAUSE, THE TENTH AMENDMENT SERVES AS YET ANOTHER BASIS FOR INVALIDATING THE ARSENIC STANDARD AND THE SDWA.

Closely related to the issue of limits on the federal power over interstate commerce is the Tenth Amendment. As the Supreme Court has noted, there is a clear connection between the Article I's enumeration of federal powers and the Tenth Amendment's reservation of unenumerated powers:

> Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'

Printz v. United States, 521 U.S. 898, 919 (1997) (invalidating provisions of the federal Brady Handgun Violence Prevention Act that imposed enforcement obligations on state officials).

As the Supreme Court has noted,

> the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power.

New York v. United States, 505 U.S. 144, 156-57 (1992) (invalidating certain provisions of the federal Low-Level Radioactive Waste Policy Act). In some cases, the amendment may actually serve as an additional limitation, beyond what is implicitly imposed by Article I's enumerated powers:

> The Tenth Amendment . . . incorporates extra-textual limitations upon Congress' exercise of its Article I powers. Thus, when an Act of Congress is challenged under the Tenth Amendment, we must be concerned not only with whether Congress has the power under Article I to regulate the activity in question, but also with whether the method by which Congress has chosen to regulate the activity pursuant to that power invades that province of state sovereignty protected by the Tenth Amendment.

Acorn v. Edwards, 81 F.3d 1387, 1392-93 (5th Cir. 1996) (*citing New York*, 505 U.S. at 158-61) (holding unconstitutional a provision of the Lead Contamination Control Act that required states to establish remedial action programs).

EPA's arsenic standard, as well as the underlying SDWA, not only exceed the federal regulatory power under the Commerce Clause; they also impermissibly intrude on a traditional state function and impose affirmative obligations on state officials. As addressed in section I(B) of this

Argument, the states' protection of the health of their citizens is a traditionally protected police power of the states. For these reasons, they the SDWA and the Arsenic Rule violate the Tenth Amendment.

Petitioners assertions in this regard are summed up by Randall Lutter in *Sovereignty, Federalism, and the Identification of Local Environmental Problems*, 2 Chi. J. Int'l L. 447, 450-51 (Fall 2001):

> Contaminants in drinking water, unlike pollutants in the air or in lakes and streams, *do not cross state boundaries*. Arsenic in drinking water differs from other forms of pollution because no profit motive pushes entrepreneurs to peddle contaminated water. Utilities controlled by local governments supply the vast majority of US tap water. At the low levels found naturally in groundwater in the United States, arsenic poses risks only to people exposed for many years. These people are residents of *local communities* who have concerns about both health and pocketbooks that presumably matter to the *local governments* in control of tap water treatment and distribution systems.
>
> Local governments' decisions about tap water purity are likely to be sensible because tap water consumers are adequately informed about possible health risks. They already receive federally mandated reports about contaminants found in drinking water and the associated risks to health. Americans already trust local governments with many important decisions affecting *health and safety*. Local governments provide police protection, fight fires, and regulate ambulance services. Deciding how pure to make tap water *is not qualitatively different from these risk management decisions.*

> The federal government has the scientific expertise to assess risks better than local governments. Using this expertise, it should establish recommended drinking water standards. But federal mandates that local governments act and pay the bill are simply paternalistic.

Lutter, 2 Chi. J. Int'l L. at 450-51 (citing EPA, Public Drinking Water Systems: Facts and Figures, available online at < http://www.epa.gov/safewater/pws/factoids.html> (Sept 30, 2001); US Environmental Protection Agency, National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring; Final Rule, 66 Fed Reg 6976, 7003-07 (2001); US Environmental Protection Agency, Final Consumer Confidence Report Rule Requires Annual Water Quality Reports, available online at <http://www.epa.gov/safewater/ccr/ccrfact.html> (Sept 30, 2001)).

Petitioner, the State of Nebraska, particularly objects to Congress' usurpation of its traditional police power to protect the health of its citizens. It disagrees with EPA's rationale in enacting the Arsenic Rule, and believes that Congress and the Courts have given EPA undue deference in enacting broad regulations based on questionable science and faulty cost-benefit analyses. While the State appreciates that the federal government may have immense resources to fund scientific research, it believes that it has failed to utilize those resources effectively, but instead has chosen to fund studies or "review" panels to support its predetermined standards (a process which is not subject to judicial review and the results of which EPA can utilize to substantiate questionable regulations with entitlement to extraordinary deference in the statutory review process).

Furthermore, due to the increasing number of regulatory burdens imposed by federal environmental and health regulations, the State spends a significant amount of its time and resources merely meeting the reporting requirements imposed therefrom. What few resources remain, are

grossly insufficient to then fund the regulatory burdens imposed. Effectively responding to the flood of regulatory activities has become virtually impossible for local and state governments. Thus, instead of managing their resources to maximize the health and safety of their citizens, State's are forced to dedicate their resources to implement and enforce unfunded federal mandates.

The SDWA and the Arsenic Rule unlawfully invade Petitioner's Tenth Amendment rights, and it is time that the general police power over the health and welfare of their citizens be returned to the individual states as our forefathers intended.

III.

IN ENACTING THE ARSENIC RULE'S CCR REQUIRMENTS, EPA EXCEEDED ITS POWER UNDER THE SDWA AND VIOLATED PETITIONERS' FIRST AMENDMENT RIGHTS.

The SDWA provides for the notification of each person served by a public water system when it fails to comply with applicable MCL or monitoring requirement. 42 U.S.C. § 300g-3(c). The SDWA further requires annual CCRs be sent to members/consumers. If a system has a detected a regulated contaminant, then it is required to notify its users of the MCLG, the MCL, the level of such contaminant in the system, and for any regulated contaminant for which there has been a violation of the MCL during the year concerned, a "brief statement in plain language regarding the health concerns that resulted in regulation of such contaminant," as provided by EPA. 42 U.S.C. § 300g-3(c)(4)(B). EPA

> may, but not for more than 3 regulated contaminants, . . . require a consumer confidence report . . . to include the brief statement in plain language regarding the health concerns that resulted in the regulation of the contaminant or contaminants concerned . . . .

42 U.S.C. § 300g-3(c)(4)(B).

Not only does EPA require far more information be included in CCRs than provided for by statute, 40 C.F.R. § 141.153, but EPA also requires additional health information be disseminated for four contaminants, not the mere three provided for by the SDWA. 40 C.F.R. § 141.154; 66 Fed. Reg. at 6991. Assuming that the Arsenic Rule is within Congress's commerce power, which Petitioners dispute, EPA's authority is limited to that delegated to it by Congress. The Arsenic Rule's CCR requirements for systems with arsenic levels below the MCL exceeds EPA's authority under the SDWA and violates Petitioners' First Amendment rights.

A. The Arsenic Rule's Special CCR Requirements Exceeds EPA's Authority Under the SDWA.

The Arsenic Rule specifically requires "special arsenic-specific reporting requirements" for systems with arsenic levels below the MCL, including not only CCR health effects language which is identical to that required under the SDWA for systems in violation of the MCL, but also a "special informational statement" that is different from the health effects language required for an MCL violation. 66 Fed. Reg. at 6991. The standard CCR health effects language is:

> Some people who drink water containing arsenic in excess of the MCL over many years could experience skin damage or problems with their circulatory system and may have an increased risk of getting cancer.

40 C.F.R. § 141, Subpt. O, App. A. However, the "special informational statement" states:

> While your drinking water meets EPA's standard for arsenic, it does contain low levels of arsenic. EPA's standard balances the current understanding of arsenic's possible health effects against the costs of removing arsenic from drinking water. EPA continues to research the health effects of low level of arsenic, which is a mineral known to cause cancer in humans at high concentrations and is linked to other health effects such as skin damage and circulatory problems.

40 C.F.R. § 141.154(b)(1); 66 Fed. Reg. at 6991.

When reviewing EPA's actions, this Court must first decide whether the statute is ambiguous. *See Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984); *see also* Richard J. Pierce, Jr., Essay: Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions, 41 Vand. L. Rev. 301, 302 (1988). If congressional intent is clear, the Court must give effect to the intent of Congress. *Id.* If the statute is ambiguous, then the Court must determine whether the agency's interpretation is a reasonable construction of the statute. *Id*.

The SDWA is not ambiguous in defining the contents of CCRs. *See* 42 U.S.C. § 300g-3(c)(4)(B). It provides for specific notification requirements and articulates the situations in which supplemental notification may be required and the limitations thereon. EPA may only require health effects language for violations of a SDWA standard or for 3 regulated contaminates as specified in § 300g-3(c)(4)(B), and that language must be the same as that required for violations of the standard. The SDWA contains no provisions for any alternative language or for EPA to arbitrarily expand its reporting requirements.

EPA's rationale for requiring additional language is that "consumers should be aware of the uncertainties surrounding the risks presented even by very low levels of arsenic." 66 Fed. Reg. at 6991. EPA has had years to facilitate scientific review of the arsenic standard. Petitioners agree that uncertainties remain, primarily because EPA failed to timely follow up on relevant research on populations in the United States and to perform a proper cost-benefit analysis. Petitioners disagree with EPA's statement that it has "balanced" the "current understandings" of arsenic's possible health effects against the cost of removing arsenic from drinking water.

Petitioners believe the mandated statement is inflammatory and has the potential to unnecessarily burden PWS members or customers. If EPA wants to advertise the uncertainty of its

regulatory findings, it is free to do so. However, Congress has not granted it the authority to require Petitioners to do so on its behalf.

B. The Arsenic Rule's Special CCR Requirements Violate Petitioners' First Amendment Rights.

"The right not to speak inheres in political and commercial speech alike, and extends to statements of fact as well as statements of opinion." 16A Am. Jur. 2d § 462 (*citing International Dairy Foods Ass'n v. Amestoy,* 92 F.3d 67 (2nd Cir. 1996).

> The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the "discussion, debate, and the dissemination of information and ideas" that the First Amendment seeks to foster.

Pacific Gas and Elec. Co. v. Public Utilities Com'n of California, 475 U.S. 1, 8 (1986) (*quoting First National Bank of Boston v. Bellotti, supra,* 435 U.S., at 783 (citations omitted). "The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas. . . . There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." *Id*. (citations omitted).

> Three characteristics of a regulatory scheme are to be analyzed when determining whether the freedom of speech protected by the First Amendment has been abridged: (1) whether the regulations impose a restraint on the freedom to communicate any message to any audience, (2) whether the regulations compel any person to engage in any actual or symbolic speech, and (3) whether the regulations compel the endorsement or require the financing of any political or ideological views.

Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 469-470, 117 S.Ct. 2130, 2138 (1997) (internal citations omitted). Analyzing the Arsenic Rule with respect to these characteristics affirms that the Rule abridges Petitioners' First Amendment Rights.

First, 42 U.S.C. § 300g-3(c)(4)(B) provides for Petitioners to include additional information they deem appropriate in their CCRs, but such additional information must be prepared in consultation with the Primacy Agency (i.e. it is subject to EPA approval). *See* 40 C.F.R. § 141.154(b). Second, 42 U.S.C. § 300g-3(c)(4)(B) and 40 C.F.R. § 141.154(b) explicitly require Petitioners' to engage in actual written speech. Finally, Petitioners believe the statements made to be political or ideological statements that Petitioners disagree with.

Petitioners believe that a strict scrutiny standard should apply in this instance, because the SDWA does not regulate a "commercial" activity – there is no requirement that a PWS sell anything, and an extended family that merely shares a common well could qualify as a CWS under the SDWA. However, even in scrutinizing a regulation of commercial speech, a court must determine whether the regulation directly advances a substantial government interest and is no more extensive than necessary to serve that interest. See Rubin v. Coors Brewing Company, 514 U.S. 476, 476 (1995) (*citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)).

"Compelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." *Pacific Gas and Elec. Co.*, 475 U.S. at 9. EPA set the agenda in this rulemaking. If there is any "uncertainty," it is due to their regulatory activities. If EPA feels that the uncertainty of their rulemaking is substantial enough to warrant public notice, then perhaps they should reconsider the rule in its entirety. However, in the event EPA chooses to defend its rulemaking, then Petitioners should not be compelled to make a public statement referring to EPA's "balancing" process and

implying that the standard should be lower than EPA determined it should be. Furthermore, if EPA wants to advertise its "uncertainty," then it is free to do so at any time utilizing its own resources.

The Arsenic Rule's CCR requirements exceed those authorized by the SDWA and violate Petitioners' First Amendment rights. Therefore, to the extent that they exceed the express provisions of the SDWA, they should be invalidated.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court hold that the SDWA and the Arsenic Rule, to the extent that they regulate public health by requiring intrastate water systems to treat for noncontagious contaminants, exceed Congress' Commerce Clause authority and violate the Tenth Amendment. This Court should hold that the SDWA and the Arsenic Rule provisions are invalid insofar as they require special health effects language for PWSs that are not in violation of the arsenic MCL.

Respectfully submitted,

_____

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Dated this 21st day of October, 2002.

CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32(a)(7)(C), and Circuit Rule 32(a)(3)(c), the undersigned counsel hereby certifies that this brief contains less than 14,000 words and therefore complies with this Court's type-volume limitation.

_____

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CERTIFICATE OF SERVICE

It is hereby certified that two true and accurate copies of the foregoing Joint Brief of Petitioners and Petitioner-Intervenors have been served upon the parties herein by placing said copies in the United States Mail, first class postage prepaid, addressed to the following:

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