

**Amicus Curiae**  
**Submitted by**  
**Washington Action for Safe Water**

No. 82225-5

SUPREME COURT  
OF THE STATE OF WASHINGTON

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CITY OF PORT ANGELES, Respondent,

v.

OUR WATER-OUR CHOICE, and PROTECT OUR WATERS,  
Petitioners,

v.

WASHINGTON DENTAL SERVICE FOUNDATION, LLC,  
Respondent.

AMICUS CURIAE BRIEF OF WASHINGTON ACTION FOR SAFE WATER IN SUPPORT OF  
PETITIONERS

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**I. IDENTITY AND INTEREST OF AMICUS I CURIAE**

The Amicus Curiae is Washington Action for Safe Water ("WASW"). Washington Action for Safe Water is a 501(c)(3) organization working to improve the quality of water in Washington State. As its policy, Washington Action for Safe Water believes that communities should not add substances to public water supplies for the medication of people.

**II. ISSUES ADDRESSED**

This Amicus Curiae Brief addresses Issues 1, 2, 4, and 5 presented in the Petition for Review at 1-2.

**III. BRIEF STATEMENT OF THE CASE**

WASW adopts the Brief Statement of the Case of the Amici Curiae Brief of International Academy of Oral Medicine and Toxicology and Fluoride Action Network in Support of Petitioners ("IAOMT Amici Brief").

**IV. THE INITIATIVE ORDINANCES DO NOT "PURSUE/AFFECT A PLAN ALREADY IN PLACE," THE CORPORATE CITY HAS POWER TO ENACT, AND THE INITIATIVE ORDINANCES ARE LEGISLATIVE**

The Opinion of the Court of Appeals, Div. II, ("Opinion") errs when it finds that the Initiative Ordinances "pursue/affect a plan already in place," such that it finds the Initiative Ordinances are administrative rather than legislative actions. The standards used to determine if an action is legislative or administrative are provided in Appellants' Opening Brief. There are two tests. Under the first test, an ordinance is administrative if "temporary" and of "special character" and is legislative if "permanent" and of "general character." The Opinion fails to apply this test, but the Initiative Ordinances are clearly permanent and of general application citywide. Under this first test the Initiative Ordinances are legislative.

Under the second test, an ordinance is legislative if it "prescribes a new policy or plan," and administrative if it "merely pursues a plan already adopted by the [city council], or some power superior to it." The new local water purity standards established by the Initiative Ordinances are a "new policy or plan" because they are the first citywide standards proposed to be adopted by the City. If this Court finds that the City has authority to adopt local water purity standards more restrictive than statewide standards, it should find that the Initiative Ordinances establishing these local standards are a "new policy or plan" of the City. This Court should find that these local standards do not pursue or affect the statewide standards. The statewide standards will remain in effect unmodified on a statewide basis and the City will abide by those standards.

The Initiative Ordinances are also a "new policy or plan" because for the first time, the Initiatives implement regulations, applicable to all citizens and for all public water supplies serving the City, that generally address substances added to the water supply to treat people as opposed to substances added to the water supply to treat water to make it safe and potable. It is the mission of WASW is to ensure public access to safe drinking water that is free of pollutants, impurities, additives and medicines.

Under the Initiative Ordinances, a water system operator and all members of the public are restricted from putting certain additives in public water supplies serving the City. The Initiative Ordinances generally do not address water additives permitted by state and federal law that are intended to treat the water to make it safe or potable.

The record shows that there are over 40 different chemicals that are used to treat water to make it safe, palatable and aesthetically acceptable. The Initiative Ordinances only provide a local restriction when the intent of the additive is to treat or prevent disease in people or otherwise affect bodily functions. The Initiative Ordinances are general in nature because they apply to all public water supplies serving the City and to all members of the public and they restrict all additives intended to treat or prevent disease in people.

**A. This Court Should Find That The City Has Authority To Adopt Citywide Water Supply Purity Standards More Restrictive Than The Statewide Standards (Petition Issue 1)**

Petition Issue 1 before this Court is whether the City has authority to adopt citywide water supply purity standards more restrictive than the statewide standards. The Opinion attempted to review statewide water supply laws. Additional clarifications are needed. The Opinion states: The Department of Health has authority under RCW 70.119.050 to adopt rules and regulations relating to public water systems.

While this is true, the purpose of Chapter 70.119 RCW is to provide for competent operators for public water systems. RCW 70.119.050 authorizes the Secretary to adopt regulations only regarding "certification of operators", "requirements for renewal of certification," and regulations "classifying water purification plants and distribution systems." Chapter 70.119 RCW does not address water additives and is not relevant to the Initiatives.

The Opinion also states that RCW 70.119A.080 directs the Department of Health to ensure compliance with the Safe Drinking Water Act. This is correct. The Opinion states that pursuant to RCW 43.20.050(2)(a) the State Board of Health is charged with regulating the purity of public water systems. This is correct. RCW 70.142.010 directs the State Board of Health to set state standards for chemical contaminants in drinking water.

Chapter 246-290 WAC was adopted pursuant to the authority granted to the State Board by chapter 43.20 RCW considering RCW 43.20B.020 (concerning fees for services) and chapters 70.119 (public water supply systems - certification and regulation of operators), 70.119A (public water systems - penalties and compliance), 70.142 RCW (chemical contaminants and water quality) as well as chapters 70.116 (water system coordinated planning), 70.05 (local health departments) and 43.70 (State Department of Health) RCW. But nowhere in chapters 43.20, 43.20B, 70.119, 70.119A, 70.142, 70.116, 70.05, or 43.70 RCW or elsewhere, does the Legislature suggest that cities may not continue to use the authority granted to cities by RCW 35A.70.070 and chapter 35.88 RCW to set more stringent citywide standards for the purity of local public water supplies. This Court should harmonize all of these statutes. The statutes, read together, give authority to establish statewide water supply purity regulations to the State Board and Department of Health pursuant to RCW 43.20.050(2)(a) and RCW 70.119A.080 but give citywide authority to establish more restrictive local water supply purity regulations to the corporate city pursuant to RCW 35A.70.070 and chapter 35.88.

RCW 35.88.020 explicitly recognizes the statewide authority of the State Board of Health and the

citywide authority of the corporate city regarding purity of public water supplies: special police . . . may arrest [for actions which violate a corporate city] ordinance, against the purity of the water supply, or which violate any rule or regulation lawfully promulgated by the state board of health for the protection of the purity of such water supply.

This statute clearly expresses that corporate city ordinances are allowed regarding water supply purity and they are to be enforced along with state regulations regarding water supply purity. This Court should decide Issue 1 in favor of the Committees because the corporate city has authority to pass more restrictive ordinances regulating the purity of City water supplies.

**B. The Opinion Errs When It Does Not Harmonize The Statutes**

The Opinion states that RCW 70.142.040 and chapter 35.88 RCW cannot be harmonized because of the explicit grant of power in RCW 70.142.040. RCW 70.142.010 authorizes the State Board of Health to establish statewide maximum contaminant levels for public water supplies. RCW 70.142.040 authorizes county boards of health in counties with at least 125,000 people to set more stringent county maximum contaminant levels. Nowhere in the language of chapter 70.142 RCW does the statute expressly, or by necessary implication, preempt cities from setting more stringent city maximum contaminant levels. Nowhere in chapter 70.142 RCW is any state agency authorized to regulate additives to public water supplies that are intended to treat people instead of treating water. At most, one could argue that the language in RCW 70.142.040 by necessary implication preempted county boards of health in counties with less than 125,000 people from setting more stringent county maximum contaminant levels.

Because chapter 70.142 RCW is silent regarding whether cities can set city maximum contaminant levels, this Court should conclude that a city can even use local police power pursuant to Const. art. XI, sec. 11 to set more restrictive citywide maximum contaminant levels. But the fact that the Legislature in chapters 43.20, 70.142 RCW and elsewhere, explicitly gives the state board and department of health authority to set statewide water supply purity standards and gives certain county health departments the right to set more stringent county standards does not preempt or conflict and is not inconsistent with the Legislature's grant of power to cities in RCW 35A.70.070 and chapter 35.88 RCW to set even more restrictive city standards.

**C. Maximum Contaminant Levels Are Only Tangentially Related To The Issues Before This Court**

Maximum contaminant levels set by the state and relied upon by Division II in its Opinion, are only tangentially related to the issues before this Court. The concept of maximum contaminate levels was created by the federal Safe Drinking Water Act. The federal administrator of the Safe Drinking Water Act is the United States Environmental Protection Agency ("EPA"). The EPA was mandated to set federal maximum contaminant levels for drinking water supplies. In the process of setting such a maximum contaminant level ("MCL"), the EPA first sets a maximum contaminant level goal ("MCLG"). This goal is based solely on health safety as determined by the EPA. Then the EPA sets a MCL as close to the MCLG as feasible. Feasibility is determined taking into account the cost of cleaning up higher levels of contamination.

The Safe Drinking Water Act is intended to set standards for when and how contaminants should be cleaned-up in public water supplies. It is not intended to regulate additions of any substance to public

water supplies unrelated to cleaning up contaminants. The Safe Drinking Water Act and State implementation of this Act in chapters 43.20 and 70.142 RCW and in other statutes and in WAC 173-200-020, WAC 246-290-72012, and other regulations focuses on identifying contaminants in public water supplies and setting MCLG health safety limits and treatment technique feasible MLCs for identified contaminants. The treatment techniques include additives, but just for the purpose of reducing existing contaminants.

Therefore, the Safe Drinking Water Act and State implementation in Chapter 70.142 RCW and WAC 246-290-72012 is only tangentially related to the Initiatives because the fundamental and overriding purpose of the Initiatives is only to provide a local restriction when the intent of the additive is to treat or prevent disease in people. The Initiative Ordinances generally do not address water additives permitted by state and federal law and regulation that are intended to treat the water to make it safe or potable. The Opinion errs when it refuses to harmonize the statutes and refuses to find that the corporate city is authorized by the Legislature to set citywide water purity standards that are more restrictive than statewide standards. Because the corporate city has its own authority granted by the Legislature as well as police power authority granted by the Constitution to protect the health of local citizens, the Initiative Ordinances create a "new policy or plan" citywide and are therefore legislative. The statewide standards are not modified or affected and continue to be in force statewide and in the City. Certainly, the Initiative Ordinances are not pursuing any statewide plan. There is no statewide plan in any of the statutes identified to generally regulate all possible additives to public water supplies that are intended to treat or prevent disease. This Court should find in Petitioners' favor on Petition Issues 1 and 2.

**D. Each Initiative Ordinance Calls For Additions Of Hexafluorosilicic Acid Solution To The Municipal Water Supply To "Cease" Thirty Days After Certification Of An Approved Initiative**

Each Initiative Ordinance calls for additions of hexafluorosilicic acid solution to the municipal water supply to "cease" thirty days after certification of an approved Initiative. Hexafluorosilicic acid is the additive used to put fluoride in the City of Port Angeles Municipal water supply. It is well understood that fluoride is added to drinking water with intent to treat and prevent the disease commonly known as tooth decay. Because the addition of hexafluorosilicic acid to public water supplies is intended to mitigate and prevent tooth decay, it is subject to the restrictions provided by the Initiative Ordinances. It is an additive put in the water to treat people and not an additive to treat the water to make it safe and potable. It is important to observe that the Initiative Ordinances are much broader than just stopping fluoridation of the City municipal water supply. The Initiative Ordinances permanently restrict the adding of any drug, or other substance intended to treat people, to any public water supply serving the City now or in the future, by an action of any member of the public.

**E. Putting Drugs Or Substances That Treat People Into Public Water Supplies Can Harm People**

Putting fluoride, and more particularly hexafluorosilicic acid, in community drinking water is very controversial. WASW attaches to this Brief as Appendix B hereto, a 1999 article from the Journal of Land Use and Environmental Law that discusses the legal history of fluoridation. The article quotes Justice Rand in his opinion in finding that a statute that allowed municipal corporations to treat public water supplies to make the vended water "pure and wholesome" could not be interpreted to allow fluoridation:

But it is not to promote the ordinary use of water as a physical requisite for the body that fluoridation is proposed. That process has a distinct and different purpose; it is not a means to an end of wholesome water for water's function but to an end of a special health purpose for which water supply is made use of as a means.

The article reports on three superior court cases where American judges heard evidence pro and con on fluoridation and all three found fluoridation either unsafe or ineffective or both.

According to the data provided in February, 2008 by the national certification agency for fluoridation chemicals forty-three percent of fluoridation products add arsenic that will be measurable in the finished fluoridated water. But the MCLG health safety limit for arsenic has been set at zero since January, 2006. Any addition of arsenic by water fluoridation products will increase arsenic contamination above the MCLG health safety limit. While the EPA and the State have not yet found it "feasible" to remove arsenic below 0.05 ppb from drinking water, WASW contends that water is not safe and potable when additives, not otherwise required for making water wholesome, increase any contaminant level above the MCLG health safety limit established by both the EPA and the State. It can no longer be said that such fluoridated water is wholesome.

It is controversial as to whether fluoridation is safe and effective. There is evidence of benefit and harm. But this is typical of drugs and other substances that treat people. While the treatment may benefit some people, it will likely harm others. There is certainly sufficient evidence of harm in the record to justify exercising corporate City power to protect citizens' health by restricting the addition of such substances into any of the City's public water supplies.

**F. Choosing To Restrict The Addition Into Public Water Supplies Of Drugs And Other Substances That May Benefit or Harm People Is Inherently Legislative**

Choosing to restrict the addition into any public water supply of drugs and other substances that may benefit or harm people is inherently a legislative action. It is a "new policy and plan" and it applies generally to all public water systems serving the City (now or in the future), and to all substances intended to treat people, and to all persons whether associated with a water system operation or not. But the Initiatives also require judgment balancing benefits and harms for all citizens drinking public water in the City. This goes beyond the scope of any administrative decision.

Consider fluoridation as an example of putting additives that treat people into a public water system. While there is no statute that explicitly allows fluoridation, there is a state regulation governing the administrative aspects of fluoridation. The regulation provides administrative requirements "where fluoridation is practiced." But the choice to practice fluoridation is the fundamental decision and that decision remains legislative.

Similarly, for all drugs or substances that treat people, the choice to restrict their use in all public water systems serving the City is legislative. It is legislative because this new policy applies to any person who would seek to add such substances to public water supplies. The initiative Ordinances impact every person who drinks from public water supplies in the City.

The Initiatives offer the voters a choice as to whether to prohibit fluoridation and other drugs in all public water supplies serving the City or whether to allow fluoridation and other drugs in the public water supplies only if the FDA finds the drugs safe and effective and no contaminants are increased above the MCLG health safety limits.

**V. CITY FLUORIDATED WATER IS A DRUG THAT IS UNAPPROVED, MISBRANDED, ADULTERATED, AND ILLEGALLY MANUFACTURED AND DISPENSED BY THE CITY**

WASW joins the analysis in the IAOMT Amici Brief that City fluoridated water is an unapproved, misbranded, and adulterated drug illegally manufactured and dispensed by the City. The FFDCA defines drugs as including "articles intended for use in the . . . mitigation, treatment, or prevention of disease. The State defines drugs as substances intended for use in the . . . mitigation, treatment, or prevention of disease. The common perception of fluoridated water's ability to mitigate and prevent tooth decay when ingested, whether flawed or correct, is enough to designate City Fluoridated Water as a drug. The Initiatives, if approved, would prohibit the City from continuing to illegally manufacture and dispense an illegal, adulterated, misbranded legend drug in the City's municipal water supply.

**VI. THE CORPORATE CITY THROUGH THE INITIATIVE POWER MAY DECIDE TO PROHIBIT OR LIMIT THE PUTTING OF DRUGS IN PUBLIC WATER SUPPLIES SERVING THE CITY TO BENEFIT THE HEALTH OF ITS CITIZENS**

The Corporate City through the initiative power may decide to prohibit or limit the putting of drugs or similar substances in public water supplies serving the City to benefit the health of its citizens. The corporate City has legislative authority to adopt the ordinances under RCW 35A.70.070 and chapter 35.88 RCW and has constitutional authority to adopt the ordinances under Const. art. XI, sec. 11.

The Initiative Ordinances do not conflict with any general law. Consistent with 2008 AGO No. 5, the power to operate a water utility does not include police power to fluoridate or otherwise medicate a public water supply. Therefore regulations regarding medicating public water supplies do not interfere with any exclusive power of the City Council to operate a water utility. Therefore this Court should find that the corporate City has authority to adopt the Initiative Ordinances.

The Initiative Ordinances apply to any person who would put a regulated substance into any public water supply serving the City. Therefore, the Initiative Ordinances are of general character. The Initiative Ordinances are permanent. The City currently has no citywide local water supply purity ordinances and so the Initiative Ordinances are new policy. The Initiative Ordinances do not pursue or affect any regulations adopted by the State Board or Department of Health or the State Board of Pharmacy and all such regulations will continue to be in full force and effect inside the City. Therefore the Initiative Ordinances are legislative.

In pre-election review of a local initiative, this Court should find that courts should not seek to determine if proposed local initiative ordinances would be lawful, if approved. Because the corporate City has "authority to enact" and because the Initiative Ordinances are legislative, and because there are no procedural challenges, this Court should issue a decree pursuant to RCW 35.17.290 to place both Initiatives on the ballot.

**VII. CONCLUSION**

WASW opposes putting medications in public water supplies. WASW requests that this Court allow the Initiatives to be put on the ballot in Port Angeles so the citizens can decide if they want to have their public water supplies free of drugs and similar substances.

Dated this 19th day of January, 2010.

Respectfully submitted,

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