

Amicus Curiae

Submitted by Washington Class Action

No. 82225-5

SUPREME COURT
OF THE STATE OF WASHINGTON

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 FLUORIDE CLASS ACTION
IN SUPPORT OF PETITIONERS

James Robert Deal
James Robert Deal Attorney PLLC
Attorney for Fluoride Class Action
Amicus Curiae

James Robert Deal Attorney PLLC
4130 166th Place SW
Lynnwood WA 98037
Attorney Phone: 425-771-1110
Attorney Fax: 425-776-8081
Attorney email: James@JamesRobertDeal.com
WSBA # 8103

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9 National Research Council, Fluoride in Drinking Water (2006) (Appendix A-1 to A-2 hereto)

I. IDENTITY AND INTEREST OF AMICUS I CURIAE

Fluoride Class Action is an association that opposes using public water systems to medicate people. The work of Fluoride Class Action may be viewed by going to the following web site:

<http://fluorideclassaction.com>.

It is the aim of Fluoride Class Action inspire class action and consumer protection attorneys to sue municipalities which deliver fluoridated water for harm done to those who consume the water. The aim is to serve as a repository of information about how to proceed with these cases and to make this information available.

Half of all fluoride ingested remains in the body and accumulates over the years in bones and other organs. To make a successful case against municipalities it is not necessary to prove that fluoride is the only cause of harms; it is only necessary to prove that fluoride exacerbates health problems and hastens death. For example, the lifespan of any person who died of kidney disease at an early age was probably shortened by his consumption of fluoride.

A preliminary step is to put municipalities on notice of potential liability and to inform their insurance carriers of potential liability. Insurance companies are not in the business of defending unreasonable and known risks. They will begin to limit and terminate coverage, and the foolish practice of water fluoridation will in many municipalities be terminated.

II. ISSUES ADDRESSED

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

III. BRIEF STATEMENT OF THE CASE

Fluoride Class Action adopts the Brief Statement of the Case in the Amici Curiae Brief of International Academy of Oral Medicine and Toxicology, Oregon Citizens for Safe Drinking Water, and Fluoride Action Network in Support of Petitioners ("IAOMT Amici Brief").

III. THE COURT SHOULD LOOK AT THE SCIENCE.

The case of *Kaul v Chehalis*, 45 Wn.2d 616, 277 P.2d 352 (1954), is one example of how scientific facts can impact the outcome of a case. The Kaul court agreed with the trial court's finding that fluoridation with sodium silicofluoride at 1 ppm was "wholesome," that fluoridation was beneficial to some, particularly young children, and harmful to no one. *Id.* at 621. The minority nevertheless made the argument that the insertion of medication into water violated individual liberty and the right of a person to control his/her own body. However, the minority argument rang a little hollow because the dissenters were bound by the fact that all parties considered fluoride both harmless and beneficial. If the 2006 NRC Report had been available in 1954, the decision might have been very different.

The Court requires that there be a necessary element which is "rationally related to" a "legitimate government purpose." *Dev. Servs. V. City Of Seattle*, 138 Wn.2d 107, 979 P.2d 387 (1999) at 120. This means the cost and the benefit must be weighed. If there is little or no benefit to fluoridation and significant cost or harm to those who drink the water, then the fluoridation decision fails the test. Thus, the Court must take the relevant science into account. I will list some of the relevant scientific and legal-scientific facts, many of which the Court can take judicial notice.

IV. WHEN CITY WATER IS FLUORIDATED, RESIDENTS CANNOT AVOID ITS EFFECTS.

The Kaul Court, apparently quoting from the trial court's findings stated:

If the water is fluoridated, it will be necessary for appellant and all other users "to use it for domestic purposes including drinking, because there is no other practical source of supply." Id. at 618. Contrast this with other medications or vitamins which the federal government requires be added to food. By law, white and brown flour must be fortified with calcium, iron, thiamin and niacin. Both lowfat and nonfat milk must be fortified with vitamin A. Individuals can choose to drink whole milk instead of lowfat or nonfat milk, which does not have to be fortified, and they can choose to eat bread made with whole wheat flour, which does not have to be enriched. So a person can easily avoid consuming these additives.

However, to avoid the fluoride in tap water is not so easy. One must avoid drinking and cooking with tap water. One must buy either a distiller or a reverse osmosis filter. A cheap Brita filter will not remove the tiny fluoride ion. See http://en.wikipedia.org/wiki/Purified_water, attached as Appendix *. Or one must buy distilled or spring water at the at much greater cost than tap water. Water weighs 8 pounds per gallon, so those who rely on public transit, will have a hard getting it home. Further, some bottled water contains fluoride, and labeling disclosure is not required. See 21 CFR 165.110; see 2006 NRC Report at 21-22; see Appendix *. Or one can buy five gallon jugs and journey to a well like the artesian well on 164th Street SW in Lynnwood, Washington, just to the west of I-5 on the north side of the street, or visit a friend who receives non-fluoridated water.

Further, one who wants to avoid fluoride must avoid restaurant food and Starbucks coffee, which are presumably made with fluoridated water. One must also inquire as to whether his bread is baked and his beer is brewed and his pop is bottled with fluoridated water.

As covered in the amicus brief of Reverend Lynn Lohr, a small but real portion of the population is hypersensitive to fluoride, and some of them must even avoid taking a bath or shower in fluoridated tap water. Clothes are washed in fluoridated water, and the fluoride is left in the clothes after the water evaporates. As one perspires during the day, the fluoride in clothes will bathe the skin. To avoid these problems one must buy a whole-house reverse osmosis filter, which is expensive. Go to Google and search for "whole house reverse osmosis water system," and see the attached price list labeled as Appendix *.

The point of this paragraph is to make it clear that if one lives in a fluoridated city, it is hard to avoid fluoride.

Further, there are sources of fluoride other than drinking water. The Environmental Working Group notes that there is up to 900 ppm of fluoride in dried eggs and that one-third of all eggs are dried and then added to food products. See Appendix *. Other foods may contain substantial fluoride residues from the use of fluoride as a pesticides and fumigants.

VI. IT IS HARD TO DETERMINE WHO HAS RESPONSIBILITY REGARDING FLUORIDATION.

The Centers for Disease Control (CDC) is probably the biggest cheerleader for drinking water fluoridation in the United States. See <http://www.cdc.gov/fluoridation>. Surgeon Generals have endorsed drinking water fluoridation as well. However, neither the CDC nor the Surgeon General has any jurisdiction over water fluoridation whatsoever.

As discussed in the IAOMT Amici Curiae brief at 8-9, 12-13, and 16-18, the US Federal Drug Administration (FDA) should have jurisdiction over fluoride added to water, simply because fluoridated

water meets the definition of a drug. The Food, Drug, and Cosmetics Act (FDCA) defines a drug as an article "intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animal. 21 U.S.C. 321 (g)(1)(B). See pp 8-9, 12-13, 16-17. Dental caries is a disease, and fluoride is added to water to prevent caries.

However, the FDA has not asserted jurisdiction over fluoride used to fluoridate water nor over the fluoride-water mixture called fluoridated water. The FDA has asserted jurisdiction over toothpaste and mouthwash, which are not to be swallowed, and has asserted limited jurisdiction over fluoridated bottled water. But the FDA has not asserted jurisdiction over the fluoride-water drug mixture.

A new section was added to the Safe Drinking Water Act (SDWA) in 1974 which specifically forbade the EPA from regulating the addition of fluoride to drinking water. The SDWA states at 42 USC 300g-1(b)(11):

No national primary drinking water regulation may require the addition of any substance for preventive health care purposes unrelated to contamination of drinking water.

However, the FDA and the EPA got together in 1979 and entered into an inter-agency treaty, a Memorandum of Understanding, numbered MOU 225-79-2001, labeled as Appendix *, in which the agencies agreed that the FDA would

"control bottled drinking water and water, and substances in water, used in food and for food processing."

On the other hand, the EPA would

"take appropriate measures, under the SDWA and/or TSCA [Toxic Substances Control Act], and FIFRA [Federal Insecticide, Fungicide, and Rodenticide Act], to control direct additives to drinking water (which encompass any substances purposely added to the water), and indirect additives (which encompass any substance which might leach from paints, coatings or other materials as an incidental result of drinking water contact), and other substances.

There were two problems with this deal. First only Congress can change a federal statute. Agencies cannot cede their authority to each other. Second, the FDA was ceding to the EPA all its authority "to control direct additives to drinking water." However, the EPA had been prohibited in 1974 from regulating any "substance for preventive health care purposes unrelated to contamination of drinking water." The FDA was ceding to the EPA a role it could legally not fill.

The net result was that neither agency was willing or legally capable of regulating the addition of fluoride to drinking water, although the illegal treaty made it appear that the EPA had such authority.

Next, in 1985 the EPA off loaded authority it did not have to regulate adding fluoride to drinking water to a trade association known as NSC International (NSF).

Who or what is NSF? I quote from Appendix *, a July 7, 2000, letter from Stan Hazan, then NSF general manager, to Rep. Ken Calvert:

NSF involvement in the evaluation of drinking water chemicals, including fluoride-based chemicals, began in 1985, when the U.S. EPA granted an NSF-led consortium of stakeholders the responsibility to develop consensus, health-based, quality specifications for drinking water treatment chemicals and drinking water system components (Attachment 1). EPA also requested development of a product testing and certification program that would allow for independent product evaluations for use by states, cities,

and water utilities, as a basis for product acceptance and use.

The original goal of the standard and certification program was to develop a preventative mechanism for selecting treatment chemicals that would not contribute harmful levels of contaminants to drinking water. The standards and the certification program were designed to be dynamic, to change as regulations change, and to constantly be tied to the requirements of the Safe Drinking Water Act and its drinking water quality regulations. In 1988, EPA terminated its informal chemical additives advisory program upon completion of the NSF standards and successful launch of the NSF product certification program [emphasis added].

NSF proceeded to construct NSF Rule 60, which is the logo which is stamped on every fluoride shipment bill of lading.

NSF 60 Drinking water treatment chemicals - Health effects was initially adopted in December 1987, and was last revised in May 2000. It establishes minimum human health effects requirements for the chemicals that are added directly to drinking water for its treatment or other purposes. The standard was developed using a consensus standards development process with representation of the major stakeholder interests, including product manufacturers [emphasis added].

So the industries which produce hydrofluosilicic acid are on the board which developed it.

The letter contains contradictory statements regarding testing of the fluoride product:

The standard requires that the manufacturer of a product submitted for certification provide toxicological information, if available. NSF requires that manufacturers seeking certification to the standard submit this information as part of their formulation or ingredient supplier submission.

However, the information submitted by the manufacturer is not available for the public to read:

Individual test reports, as well as formulation information are protected by nondisclosure agreements with certification clients.

NSF took over fluoride regulation from the EPA but NSF Standard 60 is a private document. To read it you must buy it for \$325. <http://www.techstreet.com/cgi-bin/results>. Do a Washington Request for Documents under the Public Records Act, RCW 42.56.080, addressed to a water district and ask for a copy of Standard 60. You will find out that the water districts do not even have a copy. So how can we have a WAC 246-290-220(3), which requires water districts to conform to a Standard 60 which most people and even most government officials have never seen?

Note that NSF follows the EPA 4 ppm Maximum Contaminant Level for fluoride:

NSF has based its certification on the product use not exceeding the EPA's MCL [maximum contaminant level] for fluoride. Contaminants in the finished drinking water are not permitted to exceed one-tenth of the EPA's regulated MCL (Maximum Contaminant Level) when the product is added to drinking water at its Maximum Use Level, unless it can be documented that a limited number of sources of the contaminant occur in drinking water.

However, NSF does not follow its own rule. Instead of setting a .4 ppm MAL, maximum allowable level, which would be one-tenth of the EPA 4.0 ppm MCL, it sets a 1.2 ppm MAL:

An MAL of greater than 10% of the MCL can be established by the certification body in limited cases if it

can be reasonably documented that there are no other significant sources of the same contaminant, that together, would result in the finished drinking water contaminant concentration exceeding the MCL. Fluoride has an MAL of 1.2 mg / liter, which is 30% of the MCL. This is justified on the basis of the limited number of other potential sources of fluoride ion to drinking water. For example, water that naturally contains sufficient fluoride is not additionally fluoridated, and fluoride is seldom present in other additives.

The justification given is that there are no other sources of fluoride to add to the 30 percent load. However, there are many other sources of fluoride besides the fluoride added to drinking water, the greatest being naturally occurring fluoride. See 2006 NRC Report at 20. Appendix *. Again, NSF violates its own rule.

More importantly, note that NSF is using the SDWA 4.0 ppm MCL to authorize adding fluoride to water. Remember that the SDWA cannot "require the addition of any substance for preventive health care purposes unrelated to contamination of drinking water." The 4.0 ppm is not a license to add fluoride up to the 4.0 ppm level but a requirement to remove fluoride if the level exceeds 4.0 ppm. So the NSF is using the SDWA 4.0 ppm MCL to do something that the SDWA does not allow the EPA or the states as enforcers of the SDWA and perhaps even the municipalities as enforcers of the SDWA to do, that is to add fluoride to water. Maybe this shows that the people running the NSF do not understand what the SDWA did not allow.

So if the municipalities choose to fluoridate, they do it on their own, except that they are relying on the NSF for cover. In fact, Washington law, WAC 246-290-220(3), requires that any treatment chemicals with the exception of commercially retailed hypochlorite compounds such as Clorex, Purex, etc., added to water intended for potable use must comply with ANSI/NSF Standard 60.

By law, municipalities must conform to a sham law. I am trying to think of another situation where a state law requires a municipality to follow rules set up by a trade association. *

The February 2008 NSF Fact Sheet on Fluoridation Chemicals, Appendix *, contains more ironies. It says:

The NSF Joint Committee on Drinking Water Additives continues to review and maintain the standard annually. This committee consists of representatives from the original stakeholder groups as well as other regulatory, water utility and product manufacturing representatives. § Standard 60 § requires a toxicology review to determine that the product is safe at its maximum use level and to evaluate potential contaminations in the product. § A toxicology evaluation of test results is required to determine if any contaminant concentrations have the potential to cause adverse human health effects. § NSF also requires annual testing and toxicological evaluation of each NSF Certified product. NSF Certified products have the NSF Mark § on the product packaging § shipped with the product. The NSF standard requires that the treatment products added to drinking water, as well as any impurities in the products are supported by toxicological evaluation. § [F]luosilicic acid is produced by adding sulfuric acid to phosphate ore. This is typically done during the production of phosphate additives for agricultural fertilizers. § The most common contaminant detected in these products is arsenic §. The current MCL for arsenic is 10 ppb, the highest detection of arsenic from a fluoridation chemical was 0.6 ppb §. The third most common contaminant found is lead § with 0.6 ppb being the highest concentration detected [emphasis added].

However, the MCLG, the maximum contaminant level goal, for arsenic and lead are both zero. See 40 CFR 141.51, Appendix *. These chemicals are so nasty that there is no justification for adding any of them to drinking water. See Wikipedia article on Arsenic, Appendix *. Fluoride is a little more toxic than lead, a little less toxic than arsenic. However, the MCL for lead is 15 ppb; the MCL for arsenic is 10 ppb; but the MCL for fluoride is 4,000 ppb, that is 4.0 ppm. In the next section of this brief I will discuss how it has happened that we are adding these three toxic elements to our water and why we add so much more fluoride than the others.

If there is any doubt regarding the bogus nature of NSF Standard 60 certification, read through the NSF documents again looking for any reference to the results of the 2006 NRC Report. There is none. NSF standards are outdated. Look through the NSF web site at www.NSF.org for any toxicological studies. You will find none.

Blake Stark is the person at NSF International now in charge of fielding questions regarding Standard 60. I talk with Blake from time to time. His contact information is: 734-769-5480, Stark@NSF.org. Call him or e-mail him and ask him if NSF has any toxicological studies on hydrofluosilicic acid. He will answer, and he will say no. See an example of a Blake Stark response to a request for toxicological studies, labeled as Appendix *.

Note that the February 2008 NSF Fact Sheet on Fluoridation Chemicals discusses "fluosilicic acid." Fluosilicic acid and hexafluorosilicic acid are the same thing as fluosilicic acid. See Wikipedia article on Hexafluorosilicic acid, Appendix *. Note also that it is "fluorosilicic acid which Port Angeles is adding to city water." See the October 28, 2008, letter from Gregg Grunenfelder of the Department of health to Eloise Kailin, Appendix *. Mr. Grunenfelder says:

[W]e rely on national certification protocols to ensure the safety of water additives. Specifically, Washington Administrative Code 246-290-220(3), requires that: "Any treatment chemicals § must comply with ANSI/NSF Standard 60§. Since the fluoridation product being used by the city of Port Angeles is certified under NSF Standard 60, the city's use of this product is in compliance with state law.

So this is how the shell game works. Most people naively assume that the EPA has jurisdiction over drinking water fluoridation through the SDWA. The EPA helped start NSF and gave it legitimacy. The NSF pretends to be authoritative, and so people trust it when its fact sheet mentions health and safety, inspections, and toxicology. What is going on is that the NSF is pretending to do what the EPA by law was unable to do, to regulate the addition of fluoride to water.

Remember, as I explained in the Adams- Martin amicus brief at 15-16, the EPA 4 ppm limit is not an authorization to add fluoride up to 4 ppm, but a requirement that if fluoride occurs naturally or perhaps through pollution at greater than 4 ppm it must be removed. The SDWA, enforced by the EPA, authorizes adding chemicals, but only those which will remove contaminants.

Water commissioners like Grunenfelder are deceived by the shell game. This is a different kind of shell game. In the old days there was a pea under one of the walnut shells. In this case, there is no pea under any of the shells.

Tudor Davies, former director of the Office of Science and Technology for the EPA stated in his April 2, 1998, letter to George Glasser, Appendix *, the following:

In the United States, there are no Federal safety standards which are applicable to drinking water additive, including those intended for use in fluoridating water. In the past the EPA assisted the States and public water systems through the issuance of advisory opinions on acceptability of many additive chemicals.

However, the Federal advisory program was terminated on October 4, 1988, and EPA assisted in establishment of voluntary product standards at NSF International (NSF) §. NSF Standard 60 § was developed by NSF by a consortium of representatives from utilities, government, manufacturers and the public health community.

No federal agency regulates fluoride added to drinking water, so we must ask if there is a Washington agency which regulates fluoride added to drinking water? The Department of Health is the lead agency to enforce the SDWA, but it is forbidden by the SDWA from requiring the addition to water of "any substance for preventive health care purposes unrelated to contamination of drinking water." See the Adams-Martin Amicus Brief at 14-15. Further, the Department of Health does not require the addition of fluoride to water, it merely says that if a municipality fluoridates it must follow certain fluoridation practices. WAC 246-290-460. The municipalities make the decision to fluoridate.

V. WHERE DOES FLUORIDE COME FROM?

As noted above on page *, Gregg Grunenfelder of the Department of Health said that the fluoride added to Port Angeles water is fluosilicic acid. Recall that the February 2008 NSF Fact Sheet on Fluoridation Chemicals mentioned above says that fluosilicic acid is generally produced by adding sulfuric acid to phosphate ore to make fertilizer.

Fluoride can come from aluminum and steel plants, where it is used as a flux to lower the melting point of the metal. It is used in great quantity to produce uranium because fluorine dissolves uranium to produce uranium hexafluoride. However, by far the biggest source of fluoride is the production of super-phosphate fertilizer.

In order to produce phosphorus that can be quickly absorbed by plants, raw phosphate ore must be processed to produce commercial phosphate fertilizer. Phosphate ore contains many heavy metals and is around 4% fluoride. Sulfuric acid is added to the ore. Fluoride gasses are produced. In the past they were vented up the smokestack, and entire counties were poisoned by the fluoride fumes. Today the fumes must pass through a scrubber liquor, which captures most of the fluoride along with the heavy metals. The raw scrubber liquor is put in tankers with no filtration or any further processing and shipped to thousands of water districts around the world, including Port Angeles.

Common fluoride is the unprocessed slurry liquor left over after phosphate fertilizer, aluminum, steel, or uranium is produced. It is filth. Although it is diluted 180,000 times, it is still filth.

The phosphate fertilizer industry is itself a pollution nightmare. In addition to producing millions of gallons of fluoride, it also yields millions of tons of useless left over "gypsum." Gypsum is mostly silicon. This pretty white small gravel gypsum would be perfect for building roadbed foundations, but unfortunately it is radioactive. So it is dredged from fluoride cooling ponds and stacked in gigantic piles a hundred feet high which surround the ponds and extend over areas the size of cities. There it will remain for all eternity. See the attached Appendix * entitled Bone Valley, an article from Wikipedia describing how one region where phosphate fertilizer and fluoride are produced.

Unfortunately, a sink hole opened up under a gypsum pile in Florida, and thousands of tons of gypsum fell into the Florida aquifer, permanently polluting the river of water that runs under the state. See photos attached and labeled as Appendix *. See Appendix * for more scandalous information about the phosphate fertilizer industry. For a satellite's eye view of wreckage in another area go to <http://maps.google.com> and do a search for "Purvis Still White Springs Florida." Click on "satellite" view.

X. WHY DO WE FLUORIDATE?

Christopher Bryson describes how it came about in his book *The Fluoride Deception*. Just as there were captains of industry and public relations experts who convinced us that cigarettes, asbestos, tetraethyl lead, and DDT, there were leaders in the aluminum industry who believed that naturally occurring calcium fluoride reduced caries but who also had excess fluoride to sell. The Mellon Institute which had promoted asbestos, knowing it was harmful, promoted fluoride fraudulently. There was a lot of toxic fluoride waste to get rid of, and there was money to be made.

Port Angeles pays around \$520 per ton for this fraudulent chemical. See the invoice for a 12 ton load that cost the City \$6,214. Fluoride producers turned a waste product into a profit center. One estimate is that 200,000 tons of fluoride is sold yearly for drinking water fluoridation. That adds up to a \$104 million per year industry. Fluoride promoters made large donations to dental schools, and dentists became their best lieutenants. People do sometimes believe in lies. For centuries the majority believed slavery was God's will, that women were inferior, and that Jews were evil.

Opposition to fluoridation has also been muted because fluoridation opponents, due to pressure from the pro-fluoridation lobby, have been denied research funding, driven from academic positions, and lampooned as kooks. Back in the 1950s the John Birch Society opposed fluoridation as a communist conspiracy. The Birchers were derided as paranoid conspiracy theorists, and scientific opponents were classed with the Birchers and thus marginalized. The Birchers were wrong: Fluoride is not a communist conspiracy; it is a uranium, fertilizer, and aluminum industry conspiracy.

XI. CONCLUSION

Fluoride Class Action opposes putting medications in public water supplies. It 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 fluoride and other drugs.

Dated this 22nd day of January, 2010.

Respectfully submitted,

James Robert Deal Attorney PLLC

By: _____

James Robert Deal WSBA No. 8103

Attorney for Amicus WASW

CERTIFICATE OF SERVICE

I certify that on the 22nd day of January, 2010, I caused a true and correct copy of this certificate and the Amicus Curiae Brief of Washington Action for Safe Water In Support of Petitioners and Motion to File Amici Curiae Brief to be served on the following by first class mail with proper postage:

Counsel for Washington Dental Service Foundation, LLC:

Roger Pearce/P. Steven DiJulio
Foster Pepper PLLC
1111 Third Ave., Ste. 3400
Seattle, WA 98101-3299
Email: Roger Pearce <pearr@foster.com>

Counsel for the City of Port Angeles:

William Bloor
Port Angeles City Attorney
321 E 5th Street
Port Angeles, WA 98362
Email: William Bloor wbloor@cityofpa.us

Counsel for Petitioners:

Gerald Steel
Gerald Steel PE
7303 Young Rd. NW
Olympia WA 98502
Email: Gerald Steel geraldsteel@yahoo.com

Dated this 19th day of January, 2010 at Lynnwood, Washington.

James Robert Deal