No. 03-1640

In the Supreme Court of the United States

STATE OF NEBRASKA, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under the Safe Drinking Water Act, 42 U.S.C. 300f *et seq.*, the Environmental Protection Agency (EPA) is required to promulgate national standards for maximum contaminant levels (MCLs) in drinking water. In 2001, EPA published a final rule setting the MCL for arsenic at 0.01 milligrams per liter (mg/L). After notice and comment, EPA subsequently issued a clarification rule restating the specification of the MCL for arsenic as 0.010 mg/L. The question presented is as follows:

Whether EPA's clarification rule regarding the MCL for arsenic constitutes a valid exercise of the agency's authority to interpret its own regulations.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter*, but is reprinted in 89 Fed. Appx. 277.

JURISDICTION

The court of appeals entered its judgment on March 8, 2004. The petition for a writ of certiorari was filed on June 4, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1974, Congress enacted the Safe Drinking Water Act (SDWA), 42 U.S.C. 300f *et seq.*, in order to "assure that water supply systems serving the public

meet minimum national standards for protection of public health." H.R. Rep. No. 1185, 93d Cong., 2d Sess. 1 (1974). Under the SDWA, the Environmental Protection Agency (EPA) is required to promulgate national standards for maximum contaminant levels (MCLs) of certain substances in public water supplies. 42 U.S.C. 300g-1(b). A State may assume "primary enforcement responsibility" over public water systems within its jurisdiction, provided that, *inter alia*, the State adopts regulations that are at least as stringent as EPA's national regulations. 42 U.S.C. 300g-2(a). When EPA promulgates a new national regulation, a "primacy" State (*i.e.*, a State that has assumed primary enforcement responsibility under the SDWA) has two years to adopt a conforming state regulation (unless EPA grants an extension). 42 U.S.C. 300g-2(a)(1).

In 1942, the Public Health Service had established a national standard for arsenic of 0.05 milligrams per liter (mg/L), or 50 micrograms per liter (µg/L). 65 Fed. Reg. 38,894 (2000).[1] Upon enactment of the SDWA, EPA issued an interim regulation establishing 0.05 mg/L as the MCL for arsenic. 40 C.F.R. 141.11(b).

2. In 1996, Congress amended the SDWA to require EPA to issue a new national standard for arsenic by January 1, 2001. Pub. L. No. 104-182, § 109, 110 Stat. 1627 (42 U.S.C. 300g-1(b)(12)(A)(v)). In response, EPA proposed a rule reducing the MCL for arsenic from 0.05 mg/L to 0.005 mg/L. 65 Fed. Reg. at 38,888. Pursuant

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[1] Quantities of contaminants are sometimes expressed in parts per million (ppm) and parts per billion (ppb). Because one liter of pure water weighs exactly one kilogram at a certain temperature and atmospheric pressure, 1 mg/L is treated as the equivalent of 1 ppm, and 1 µg/L is treated as the equivalent of 1 ppb. For the sake of simplicity, we will use primarily the metric measures (mg/L and µg/L) in this brief.

to the requirements of the SDWA, EPA engaged in notice-and-comment rulemaking with respect to the proposed new MCL, and performed a comprehensive risk and cost analysis. See 42 U.S.C. 300g-1(b)(3)(C), (b)(12)(A)(v) and (d). On January 22, 2001, EPA published its final rule, adopting a new MCL for arsenic of 0.01 mg/L. 66 Fed. Reg. 6976. Although EPA subsequently delayed the effective date of the rule pending further review, the rule ultimately took efect unchanged. *Id.* at 16,134, 28,342; C.A. App. 226.[2] Public water systems are required to comply with the new arsenic standard by January 23, 2006. 40 C.F.R. 141.60(b)(4).[3]

Consistent with the MCLs for other contaminants (which are expressed in milligrams per liter), EPA specified the MCL for arsenic in the relevant regulation as "0.01 mg/L." 40 C.F.R. 141.62(b)(16) (2002). In a separate regulation adopted at the same time as the new arsenic MCL, however, EPA required covered water systems to report their arsenic results "to the nearest 0.001 mg/L." 40 C.F.R. 141.23(*i*)(4). In its notice of proposed rulemaking, EPA suggested that this reporting requirement was designed to ensure that "values between 0.010 mg/L and 0.014 mg/L will be

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[2] Some of the petitioners in this action challenged EPA's final rule on Commerce Clause and Tenth Amendment grounds, claiming that the SDWA impermissibly regulated the intrastate distribution and sale of drinking water and impermissibly operated directly on the States. The D.C. Circuit denied the petition for review. *Nebraska* v. *EPA*, 331 F.3d 995 (2003).

[3] The SDWA requires EPA to review and revise, as appropriate, its national standards every six years. 42 U.S.C. 300g-1(b)(9). The next review of the arsenic standard is already ongoing and is scheduled to be completed by August 2008. 68 Fed. Reg. 14,503 (2003).

averaged to the nearest 0.001 mg/L," rather than rounded down to "one significant figure" (*i.e.*, 0.01 mg/L). 65 Fed. Reg. at 38,918-38,919. Moreover, in the preamble to the final rule, EPA stated that "the enforceable MCL is 0.01 mg/L, which is the same as 10 micrograms per liter (µg/L) or 10 parts per billion (ppb)." 66 Fed. Reg. at 6981. EPA noted in the opening paragraph of the preamble that it would thenceforth refer to the arsenic concentration in micrograms per liter (µg/L), *id.* at 6979, and proceeded to do so consistently in the detailed risk and cost analysis required by the SDWA, *e.g.*, *id.* at 7010-7020. And in its official guidance concerning the new rule, EPA cited the arsenic reporting regulation for the proposition that it had "clearly intended 10 ppb (0.010 mg/L) to be used for determining compliance." C.A. App. 228.

3. After EPA's regulations took effect, some States and other affected entities expressed concern that, under the specified MCL of 0.01 mg/L, public water systems with arsenic levels as high as 14.9 µg/L (or 0.0149 mg/L) could round downward to 0.01 mg/L and thereby claim that they were in compliance with the regulations. See, *e.g.*, C.A. App. 429-430. Although EPA believed that the regulations unambiguously established that the MCL of 0.01 mg/L was identical to 10 µg/L (*i.e.*, 10 parts per billion), and thus precluded the type of rounding that had been suggested, EPA recognized that the specification of the MCL as 0.01 mg/L could lead to confusion and unnecessary transaction costs, especially in "primacy" States that were required to adopt new regulations of their own. 67 Fed. Reg. 78,205 (2002). Consequently, EPA proposed a clarification rule that restated the specification of the MCL for arsenic as 0.010 mg/L. *Id.* at 78,203. On

March 25, 2003, after notice and comment, EPA promulgated the clarification. 68 Fed. Reg. 14,502.

4. Petitioners, the State of Nebraska and various municipalities and public water systems, challenged EPA's clarification rule in the United States Court of Appeals for the District of Columbia Circuit under the SDWA's judicial-review provision. See 42 U.S.C. 300j-7(a). Petitioners contended, *inter alia*, that the clarification rule was invalid because EPA had failed to perform a comprehensive risk and cost analysis or meet other procedural requirements for rulemaking under the SDWA. See Pet. C.A. Br. 13-16; Pet. C.A. Reply Br. 3-6.

The court of appeals denied the petition for review in an unpublished *per curiam* order. Pet. App. 1-3. The court reasoned that "the EPA's decision to clarify the technical expression of the arsenic Maximum Contaminant Level (MCL) by adding an extra zero to the technical expression of the MCL as measured in mg/L does not alter the substance of the 10 parts per billion MCL established" in the original rule. *Id.* at 1. The court noted that EPA had consistently interpreted its regulations as establishing an MCL of 10 µg/L, and reasoned that EPA's interpretation of its own regulations was entitled to deference unless the interpretation was "plainly erroneous" or "inconsistent with the regulation." *Id.* at 2 (quoting *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997)). The court concluded that the interpretation in this case was neither, and was therefore entitled to deference. *Ibid.*

The court of appeals rejected petitioners' reliance on a 1981 guidance document, which suggested that levels of contaminants need only be reported in a form containing the same number of significant digits as the MCL. Pet. App. 2. The court observed that, notwith-

standing the earlier guidance document, the reporting provision of the arsenic rule specifically required that arsenic levels be reported to the nearest 0.001 mg/L, and an example in the rule confirmed that arsenic levels were to be rounded to the nearest 0.001 mg/L. *Ibid.* The court therefore concluded that "the EPA's reference to its 1981 guidance document does not demonstrate the EPA promulgated a new arsenic MCL" in its clarification rule. *Ibid.*[4]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court. Further review is therefore not warranted.

1. The court of appeals correctly concluded that EPA's clarification rule is valid.

a. EPA's original rule unambiguously established an MCL of 10 µg/L. Although EPA did specify the MCL for arsenic in the relevant regulation as "0.01 mg/L," 40 C.F.R. 141.62(b)(16) (2002), EPA also required covered water systems to report their arsenic results to an extra significant digit, 40 C.F.R. 141.23(*i*)(4). Petitioners offer no explanation why EPA would have required covered water systems to *report* their arsenic results to the nearest 0.001 mg/L if those systems could *comply* with the MCL for arsenic simply by rounding downward to the nearest 0.01 mg/L. Moreover, although EPA specified the MCL for arsenic in milligrams per liter (consistent with the MCLs for

[4] The court of appeals summarily rejected petitioners' claims that EPA also violated the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*, and the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, in promulgating the clarification rule. Pet. App. 2-3. Petitioners do not pursue those claims in the petition.

other contaminants), the preamble to the rule expressly equates 0.01 mg/L with 10 µg/L, 66 Fed. Reg. at 6981, and is replete with references to "a final MCL of 10 µg/L," *e.g.*, *id.* at 7020. Indeed, the risk and cost analysis contained in the rule explicitly compares the risks and costs of an MCL of 10 µg/L with those of potential MCLs of 3, 5, and 20 µg/L. *E.g.*, *id.* at 7010-7020. In light of that analysis, it would be perverse to suggest that EPA, in its original rule, effectively adopted an MCL of 14.9 µg/L (as would ostensibly be the case if covered water systems were allowed to round downward to the nearest 0.01 mg/L).

b. Even assuming *arguendo* that EPA's original rule was ambiguous, moreover, petitioners effectively concede (Pet. 8) that EPA's subsequent interpretation of that rule was reasonable.[5] This Court has consistently held that an agency's interpretation of its own regulations is entitled to substantial deference. See, *e.g.*, *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 387–388 (2003); *Barnhart* v. *Walton*, 535 U.S. 212, 217 (2002); *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).[6] Nothing in

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[5] At one point, petitioners do argue (Pet. 7) that EPA was changing, rather than interpreting, its original rule in promulgating its clarification rule. Petitioners, however, make no effort to establish the necessary premise to that argument: namely, that the original rule unambiguously established an MCL other than 10 µg/L.

[6] Petitioners seemingly contend (Pet. 7-8) that *Auer* does not provide a basis for deferring to an agency's interpretation of its own regulations. The portion of *Auer* on which petitioners rely, however, does not address the question whether an agency's interpretation of its own regulations is entitled to deference, but instead addresses the distinct, and threshold, question whether an agency's *regulation* interpreting a *statute* is entitled to deference. See 519 U.S. at 456-459. The language petitioners quote (Pet. 4, 6)

those decisions suggests that an agency must go through formal rulemaking in order to receive deference for its interpretation of its own regulations; to the contrary, in *Auer*, this Court deferred to an interpretation contained in an *amicus* brief filed by the agency in question. See 519 U.S. at 561. Assuming *arguendo* that EPA's original rule was ambiguous, therefore, EPA went beyond what was required by providing the opportunity for comment before issuing its clarification rule; indeed, EPA's clarification rule did nothing more than codify an interpretation that EPA had already set out in its official guidance on the original rule. See C.A. App. 228.

2. Petitioners contend (Pet. 5-7) that EPA failed to comply with the statutory requirement that "[a]ny revision of a national primary drinking water regulation shall be promulgated in accordance with" the various procedural requirements of Section 300g-1(b)(9) of the SDWA. 42 U.S.C. 300g-1(b)(9). By its terms, however, that requirement is inapposite where EPA is not actually "revisi[ng]" an existing regulation by changing an unambiguous substantive requirement, but is at most merely clarifying an ambiguity in the regulation.[7] EPA and the court of appeals correctly concluded that no "revision" occurred here.

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from *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), is inapposite for the same reason.

[7] Under petitioners' plenary construction of the term "revision," EPA would apparently lack the authority even to correct typographical errors in its SDWA regulations without repeating every step originally undertaken to support the issuance of the regulations pursuant to the procedural requirements of Section 300g-1. EPA has recently exercised such authority. See 69 Fed. Reg. 38,850 (2004).

Finally, requiring EPA to perform a comprehensive risk and cost analysis and comply with the SDWA's other procedural requirements before issuing a clarification rule would be little more than an empty exercise in this case. In promulgating its original rule setting the MCL for arsenic at 0.01 mg/L, EPA expressly used an MCL of 10 µg/L in its risk and cost analysis. *E.g.*, 66 Fed. Reg. at 7010-7020. If petitioners were correct that a new risk and cost analysis was required, therefore, EPA could have satisfied that requirement simply by republishing its earlier risk and cost analysis together with the clarification rule. And to the extent that petitioners are implicitly seeking to raise substantive concerns about an MCL of 10 µg/L by forcing EPA to comply a second time with the SDWA's procedural requirements, petitioners had the opportunity to express those concerns in EPA's rulemaking process for the original rule, and indeed did so. See C.A. App. 295-311. In any event, because the court of appeals' unpublished decision is correct and does not conflict with any decisions of this Court, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2004