UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 00-2028

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

MASSACHUSETTS WATER RESOURCES AUTHORITY and
METROPOLITAN DISTRICT COMMISSION,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF APPELLEE MASSACHUSETTS WATER RESOURCES AUTHORITY (As Corrected)

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ISSUE PRESENTED

Whether the district court had discretion to deny a request for an injunction seeking to compel a public water system to install filtration because of a single, technical, de minimis and already-remedied deviation from the criteria established by the Environmental Protection Agency (the "EPA") for remaining unfiltered?

STATEMENT OF THE CASE

The United States brought this action on February 12, 1998 under the Safe Drinking Water Act, 40 U.S.C. §300f et seq. (the "Act") and the Surface Water Treatment Rule, 40 C.F.R. Part 141, Subpart H (the "Rule"), seeking an order requiring the Massachusetts Water Resources Authority (the "Authority" or the "MWRA") to add filtration facilities to its public water system. (Add. 10.)[1] The district court granted the United States' motion for summary judgment in part on May 3, 1999, finding that the Authority had violated the Rule but concluding that the court had discretion not to order filtration as a remedy and set the case for trial "on the appropriate form of relief to be awarded to the United States." (Add. 7a.) Having sought and received from the district court certification of the issue whether the court had discretion not to require filtration in the circumstances, the United States filed a petition for leave to take an interlocutory appeal, which this Court denied on October 13, 1999. (Add. 10.) After a 24-day trial, the district court made findings of fact and conclusions of law denying the United States' request for an injunction on May 3, 2000 and entered final judgment for the Authority and co-defendant Metropolitan District Commission (the "MDC") on

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[1] For the Court's convenience, the Authority has followed the citation format used by the United States in its Brief. The Addendum to the United States' Brief ("US Brief") is cited as "Add."; the Appendix is cited as "A.". Testimony is cited by the surname of the witness, followed by a Roman numeral for the day of trial, then the number of the pertinent page of the trial transcript, e.g. "Aieta, XI: 12-14".

June 2, 2000. (Add. 8-42.) The United States filed a Notice of Appeal on July 3, 2000. (A. 1936.)

STATEMENT OF FACTS RELEVANT TO THE APPEAL

This statement is based in principal part on the district court's extensive findings of fact. The United States does not challenge any of those findings on appeal. (US Brief at 28 n.9.)[2] The statement includes both a summary of the underlying facts and an account of the prior proceedings because the two are intertwined in that, for example, both the administrative finding of compliance and the facts giving rise to the judicial finding of violation occurred after the commencement of the lawsuit.

I. Metropolitan Boston's Public Water System

When disease was first associated with contaminated drinking water in the Nineteenth Century, municipalities had two alternatives. The first – and it was the only alternative available to many North American cities – was to draw drinking water from contaminated industrial rivers and to attempt to remove the contaminants by filtration. (Aieta, XI: 12-14.) The second – available to those cities with both the opportunity and the foresight to seize it – was to secure sources of pure drinking water. (Id.)

Metropolitan Boston chose the latter course. Through the third quarter of the Nineteenth Century, Boston relied, successively, on wells and cisterns, water transported from Jamaica Pond through wooden pipes, an aqueduct from Lake Cochituate, a large storage reservoir in Chestnut Hill and a series of reservoirs fed

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[2] Although it "has chosen not to appeal the district court's findings of fact" (US Brief at 28 n.9), the United States refers at various points in its brief to evidence that is inconsistent with those findings and that was, necessarily, rejected by the Court as unpersuasive.

by the Sudbury River. (Add. 12.) In the 1890's, the Legislature directed the State Board of Health to explore a more permanent solution. (Id.)

The solution the Board settled upon lay in the pristine watersheds located to the west of Boston in Central Massachusetts. (Id.) The 63-billion gallon Wachusett Reservoir, formed by damming the Nashua River, was to provide Boston's water, with the potential for extensions to the Ware and Swift Rivers and, if necessitated in the distant future, the Westfield and the Deerfield. (Add. 12 n.6, 13.) A substantial motivation for securing these remote, pristine sources was distrust of reliance on filtration, a technology that could malfunction. (Add. 13.)

In the first half of the Twentieth Century, Boston moved forward with the expansion of its public water system outlined decades earlier. (Id.) An aqueduct captured the flow of the Ware River, and a dam on the Swift River created the 412-billion gallon Quabbin Reservoir, one of the largest man-made reservoirs in the world. (Id.) The architect of these improvements, like his predecessor, adamantly opposed filtration because of the possibility "that technological failure or human error might accidentally release polluted water into the public supply." (Add. 13 n.8.)

The Quabbin and Wachusett Reservoirs remain Metropolitan Boston's sources of drinking water today. Water flows from the Quabbin to the Wachusett. (Add. 21.) The watersheds of the two reservoirs each supply approximately half of Boston's water. (Add. 23.)

Historically, as at present, the water was treated by disinfection on its journey from the Wachusett Reservoir to Boston. (Add. 21-22.) From the Wachusett, the water flows through the Cosgrove Tunnel for eight miles to Marlborough, where it enters the 60-year old Hultman Aqueduct, which is the only means of bringing sufficient drinking water to the system that distributes it throughout Metropolitan Boston. (Add. 21; MacDonald, I: 34-35; Estes- Smargiassi, II: 69-70.)

Like Metropolitan Boston's source water supplies, its drinking water distribution systems were constructed in the late Nineteenth and early Twentieth Centuries. (Id.) The greater part of the systems is comprised of old, unlined cast iron pipes. (Id.) The average distribution pipe is approaching the end of its useful life, and historically, replacement or rehabilitation has been intermittent. (Add. 22 & n.40.) Many of the pipes are corroded or tuberculated and prone to leaks and water quality problems caused by intrusion of contaminants. (Add. 22.)

The Authority was established by statute in 1985. (Add. 14.) It has responsibility for the treatment of Metropolitan Boston's drinking water and its transport from the Wachusett Reservoir to local communities' distribution systems. (Id.) The Authority also finances protection and maintenance of the reservoirs and their watersheds, activities carried out by the MDC. (Id.)

II. The Federal Regulatory Scheme

A. The Statute and the Regulations

Congress enacted the Act in 1974 to ensure the safety of the nation's public water supply. (Add. 17-18.) Twelve years later, a congressional report found "[f]iltration and disinfection techniques have been widely proven to be effective in removing bacterial and some viral contaminants from water." (Add. 18 n.30.) Congress then required all public water systems to employ disinfection to inactivate those contaminants. See 42 U.S.C. §300g-1(b)(8). It also directed EPA to specify criteria for determining which of those systems should also be required to employ filtration to eliminate those contaminants, taking account of "the quality of source waters, protection afforded by watershed management, treatment practices (such as disinfection and length of water storage) and other factors relevant to protection of health." 42 U.S.C. §300g-1(b)(7)(C)(i).

EPA's response to the Congressional directive was to promulgate the Rule on June 29, 1989.[3] See 40 C.F.R. §141.70 et seq. The Rule provided that public water systems supplied by surface water may continue to operate without filtration if they met eleven criteria. See id. §141.71. Of these eleven criteria, which are sometimes referred to by the term "avoidance criteria," two concerned source water quality; four established minimum disinfection levels; and five involved system-specific watershed protection and operations requirements. See id.

On its face, the Rule suggested that, in order to remain unfiltered, a public water system had to meet all of the criteria on or before December 30, 1991. See id. However, an internal EPA guidance interpreted the Rule to give enforcement agencies discretion not to order filtration if it appeared that a public water system could establish compliance through intermediate measures. (Add. 19.) The agencies empowered to enforce the Rule included not only the EPA itself but also those state agencies determined by the EPA to have adopted drinking water standards at least as strict as those mandated by federal law. See 42 U.S.C. §§300g-1(b)(7)(C)(ii) and 300g-2(a). The EPA determined in 1993 that the Massachusetts Department of Environmental Protection (the "DEP") met that standard and has since taken no steps to revoke that determination. (Add. 18 & n.31.)

In 1996, Congress again amended the Act. (Add. 20.) This amendment directed the EPA to promulgate an Interim and Final Enhanced Rule addressing threats to the public health from the protozoan Cryptosporidium, which the Rule did not control, and disinfection by-products. (Add. 20 & n.35.) The Interim Enhanced Rule, which EPA promulgated on December 16, 1998 and which has not yet taken effect, will control Cryptosporidium by giving filtered systems credit for eliminating 99 percent of Cryptosporidium and, in essence, giving unfiltered

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[3] EPA's promulgation occurred 18 months after the deadline set by Congress. See 42 U.S.C. §300g-1(b)(7)(C)(i).

systems the same credit for extending existing watershed controls to cover Cryptosporidium. (Add. 20; A. 1626, 1627a, 1630a.) The 1996 amendment also allowed surface water systems who owned uninhabited watersheds to remain unfiltered even though they could not meet the avoidance criteria. See 42 U.S.C. §300g-1(b)(7)(C)(v).

B. Regulatory Enforcement

Agencies charged with enforcement of the Act and the Rule interpreted them to permit public water systems which had not met the criteria for remaining unfiltered by December 1991 to establish compliance with the Act and the Rule by meeting those criteria thereafter, as opposed to requiring all of those systems to comply by installing filtration.[4] Those agencies permitted numerous systems to establish compliance in this manner. (A. 237-40, 250-51, 491-501, 551-52, 554- 56, 564-67, 569-93, 635-39, 657-66, 667-68, 674-79, 688-91.) For example, Portland, Maine was allowed to comply with the Act and the Rule by meeting the avoidance criteria despite acknowledging that it could not do so until it had constructed new ozonation disinfection facilities that could not be placed in operation until 1993. (A. 569, 694.) In some cases, a regulatory agency expressly interpreted the Act and the Rule to permit a public water system that had been determined not to have met the avoidance criteria in or before December 1991 to comply by meeting the criteria thereafter. (A. 591, 693.) The EPA, for example, ordered Unalaska,

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[4] As EPA's designee testified at deposition, after December 1991, "within the realm of options that a state could reasonably take would be to exercise discretion and put a facility on a schedule to meet various deficiencies that they had according to specific guidelines to meet avoidance criteria." (Exhibit 22 to Corrected Affidavit of Allison M. McLaughlin, filed Jan. 13, 1999, at 2-71. This page was designated for inclusion in the Joint Appendix but apparently omitted by inadvertence.)

Alaska to filter in 1993, then two years later found that the system had substantially met the avoidance criteria. (A. 635, 637-38.)

That same result obtained when a public water system had met the criteria for remaining unfiltered in or before December 1991 and subsequently failed. For example, after the Washington Department of Health determined it to have met the avoidance criteria, Seattle, Washington's Cedar source failed the coliform source water criterion in the summer of 1992. (A. 552, 1260-63.) Regarding the violation, in May 1994, the Washington Department of Health issued an administrative consent order that did not require Seattle to install filtration. (A. 552, 1260.)

III. The Authority's Compliance With The Act And The Rule

The Authority's system did not comply with the criteria for remaining unfiltered in or before December 1991 or receive a determination that it could do so in or about that time. (Add. 27, 30.) The principal reason why the Authority did not seek a system-wide waiver at that time was a then-unexplained failure of the Wachusett Reservoir to meet the coliform source water criterion in 1991. (Add. 27, 30.) DEP thereupon ordered the Authority to filter by June 30, 1993. (Add. 30.)

Because the Authority could not site, design and construct filtration facilities by June 1993, DEP, the MDC and the Authority negotiated an administrative consent order (the "ACO") to set the conditions for the Authority to establish compliance. (Id.) The final version of the ACO prescribed a "dual- track" to compliance. (Id.) On one track, the Authority was to implement a watershed protection plan for the Wachusett watershed and seek to demonstrate compliance with the avoidance criteria by 1998. (Id.) On the other track, the Authority was to proceed with siting and design of filtration facilities that were to be constructed in the event the Authority was unable to comply with the avoidance criteria. (Id.) DEP, the MDC,

and the Authority entered into the ACO incorporating the dual-track in June 1993. (Add. 31.)

For years, EPA supported the dual-track approach. (Add. 30-31.) In this regard, EPA's Associate Regional Counsel advised the Authority that, if it signed the ACO, EPA would defer enforcement action, while pointing out that, under the terms of the ACO, the Authority would have to construct filtration facilities unless it demonstrated by August 3, 1998[5] that it met the avoidance criteria. (Id.) In the years that followed, EPA's Regional Administrator stated in writing that watershed protection, sewering projects within the watershed and enhanced staffing all had to be in place by 1998 "'in order to avoid the necessity of constructing a filtration plant.'" (Add. 31.) The Authority carried out all of the tasks the EPA set for avoidance of filtration. (A. 1509-15.) At no time during this period did EPA suggest that the Authority's reliance was unjustified. (Add. 31.)

In the years between 1993 and 1998, the Authority achieved and projected compliance with the avoidance criteria. It determined the cause of previously unexplained source water coliform violations and eliminated them. (Add. 27; A. 1582.) It designed and built interim facilities that would achieve compliance with disinfection criteria. (A. 169; Estes-Smargiassi, II: 125-29, 144.) It instituted mandated system-specific watershed protection and operational procedures. (Ex. 394, 395, 484 at 7; Estes-Smargiassi, II: 99-104.)

EPA's attitude had changed by late 1997, leading to the filing of this lawsuit. On October 1, 1997, the Authority requested that DEP reconsider its filtration determination and permit the Authority to comply by meeting the avoidance criteria and to suspend design of filtration facilities. (Add. 31.) Without waiting for a decision by DEP, the EPA's Regional Administrator advised the Authority

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5 Amendments to the ACO changed this date, which was set at a date nine months prior to the planned start of construction of filtration facilities, to October 31, 1998. (Add. 30, n.74.)

that EPA had asked the Department of Justice to file an enforcement action, stating that "'[t]he MWRA did not meet [the avoidance criteria] in 1991, has not met them to this day, and will not meet them by next summer, either.'" (Add. 32.) The DEP agreed that the Authority did not meet all of the criteria for remaining unfiltered in late 1997, allowed it until October 31, 1998 to establish compliance with all of the criteria and, subsequently, required it to continue with design of filtration facilities at least until that date. (Add. 31-32.) Nevertheless, the United States filed this lawsuit on February 12, 1998. (Add. 32.)

The district court scheduled proceedings in the lawsuit so as to allow the state administrative process to conclude before dispositive action by a federal court. (Id.) According to the schedule established by the DEP, the Authority renewed its request for a determination that it could remain unfiltered on October 31, 1998. (Id.) In response to the renewed application, the DEP determined in December 1998 that the Authority met the avoidance criteria, that it had established compliance with the Act and the Rule by so doing, and that it must continue to meet the criteria in order to remain unfiltered. (Id.) It was in this factual context that the parties briefed the United States' motion for summary judgment directing the Authority to provide filtration.

IV. The Grant of Partial Summary Judgment

While the United States' motion for summary judgment was pending, the Authority reported an apparent violation of one of the avoidance criteria. (Add. 6, 28-29.) Those reports related to the fecal coliform source water criterion, which provided that no more that 10 percent of samples taken at the intake to a public water system in the previous six months could show, as measured by specified EPA-approved test protocols, more than 20 colony forming units of fecal coliform

bacteria ("cfus") per 100 ml of water. (Add. 28.) The Authority reported to DEP in January 1999 that of the samples taken in the previous six months fourteen, or one more than 10 percent, showed more than 20 cfus, with one of them showing 21 cfus. (Id.) As the Authority also reported to DEP, these results were measured by a method much more sensitive than those approved by the EPA; indeed, subsequent testing showed the Authority's method detected twice the number of cfus than did the approved methods. (Id.) On these facts, DEP did not find a violation of the avoidance criteria. (A. 1873-74.)

It was recognized that the fecal coliform levels reported in January 1999 did not constitute or indicate a threat to the public health. In the early 1990's, the Authority had determined that roosting gulls and other waterfowl were the principal source of seasonably high fecal coliform levels. (Add. 26 & n.61, 27-28.) Events in January 1999 confirmed this association. (Add. 27.) Birds do not carry protozoan contaminants infective to humans. (Add. 15, 27 n.65.)

Nevertheless, the district court reached a result different from DEP's. Based upon the Authority's report to DEP in January 1999, it found that the Authority had violated one of the avoidance criteria. (Add. 6, 28.) For this reason the court entered partial summary judgment that the Authority was in violation of the Act and the Rule. (Id.)

The district court, however, refused to enter judgment as a matter of law requiring the Authority to provide filtration. (Add. 6-7a.) Rather, the court concluded that, under the Act, it had discretion to determine whether filtration was required to protect the public health or whether the "MWRA's alternative strategy of ozonation, chlorination, and pipe replacement better serve Congress's objective of providing 'maximum feasible protection of the public health' than will EPA's insistence on filtration." (Add. 7-7a.) It therefore scheduled a trial as to the appropriate form of relief. (Add. 7a.)

V. The Trial

At trial, the district court heard evidence as to waterborne threats to the public health and the manner in which public water systems guard against them. The waterborne pathogens of most concern are bacteria, viruses and two protozoans, Giardia and Cryptosporidium. (Add. 14-17.) Public water systems with protected surface water supplies seek to reduce the threats these pathogens pose at three different stages (1) watershed protection to keep pathogens out of the source water, (2) treatment by disinfection and filtration to kill or remove pathogens present in the source water and (3) preventing intrusion or regrowth of pathogens in the treated water in the distribution system. (Add. 21-26.) The court then evaluated the alternatives put forward by the parties in light of the potential threats present in the MWRA system. (Add. 32-38.)

A. The Alternative Proposals

As a baseline, at the time of trial the Authority met the criteria promulgated by the EPA for the avoidance of filtration. (Add. 42 ¶ 26.) EPA's Massachusetts Drinking Water Coordinator Kevin Reilly conceded this point. (A. 1522-24, 1528-29, 1531-41.) He also agreed that a public water system that was meeting the avoidance criteria was adequately protecting the public health and that its water was safe to drink. (A. 1515-17.)

Despite having achieved compliance with the avoidance criteria, the Authority proposed to implement an integrated water quality improvement program involving enhancement of its system's protection of the public health at each stage where enhanced protection could be brought to bear. The first element in its plan

was to maintain and enhance current levels of protection of the Wachusett watershed. (Add. 25-26, 40.) The aim was to further reduce the already low levels of contaminants reaching the intake. (Id.)

Similarly, the Authority intended to make marked improvements in the existing treatment facilities that already meet the disinfection requirements for the avoidance of filtration. More specifically, the Authority planned to construct a new treatment plant that would replace chlorine, the disinfectant currently in use, with ozone, a superior disinfectant that kills many more pathogens, including Cryptosporidium. (Add. 22, 34, 35.) Chlorine, in the form of chloramine, would serve only as a secondary disinfectant to guard against bacterial regrowth in the distribution system. (Add. 32 n.83.) Use of ozone as a primary disinfectant decreases levels of possibly carcinogenic chlorine-generated by-products in drinking water. (Add. 34.) The Authority's planned new treatment plant has a modular design, which can accommodate conventional filtration or more advanced emerging technology, should additional treatment become necessary. (Add. 34-35.)

The Authority proposed to use funds that would have been required to install filtration facilities for rehabilitation of its and its member communities' distribution systems. Substantial portions of these distribution systems are comprised of old, unlined cast iron pipes. (Add. 22.) The age and deteriorated state of many of these pipes constitute the greatest threat of regrowth. (Add. 37.)

The alternative advocated by the United States emphasized only one of the three principal components of a public drinking water system. Specifically, the United States asked the district court to order the Authority to add an additional treatment barrier — removal by means of filtration — to disinfection by ozone. (Add. 32-33.) The benefits of adding filtration are elimination of higher percentages of pathogens, reliability through redundancy and reduction in levels of organic matter that could serve as food for bacteria in the distribution system.

(Add. 33-34.) As to the other two components of the system, it was the position of the United States that the Authority should voluntarily maintain its commitments to watershed protection and distribution system rehabilitation.

The Authority's experts testified that filtration was not necessary to protect the public health. (A. 1105, 1274; Daniel, V: 11-12.) Also, without contradiction, there was expert testimony that the Authority's alternative of disinfection using ozone and extensive watershed protection and distribution pipe rehabilitation provided protection to the public health for the Authority's service area greater than that which would be afforded by an alternative involving added treatment in the form of filtration and reduced levels of watershed protection and pipeline rehabilitation. (A. 1105.)

B. The District Court's Decision

The district court recognized that no treatment technology, including filtration, can eliminate all risk. (Add. 41, ¶21.) The court therefore began its consideration of the relative merits of the two alternatives by determining whether, without filtration, the Authority's water presented an unacceptable risk of waterborne illness. (Add. 38-40.) To make this determination, the court relied on a risk assessment performed by Dr. Charles Haas.[6] Dr. Haas focused his risk assessment on the threat posed by the protozoan pathogen Cryptosporidium. (Add. 39.) An outbreak of cryptosporidiosis in 1993 caused by a failure of Milwaukee's filtration

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[6] The court found that Dr. Haas was one of the authors most cited by the EPA as an authority on water quality issues, in contrast to the United States' witness on the subject, whose testimony the court discounted as it became apparent on cross-examination that he had "no expertise in water quality issues." (Add. 38 nn.98, 99.)

plant infected 800,000 and killed between 50 and 100 people.[7] (Add. 15.) Cryptosporidium is also the pathogen most resistant to disinfection. (Add. 39.)

Using conservative assumptions, Dr. Haas found no substantial risk from Cryptosporidium in the Authority's drinking water. (Add. 39-40.) In comparative terms, the Authority's untreated water had levels of Cryptosporidium lower than both the untreated water of several other large unfiltered systems and the treated water of numerous filtered systems. (Add. 40.) Using two different accepted risk assessment methods, Dr. Haas concluded that, if the Authority's treatment of ozonation without filtration killed 99 percent of Cryptosporidium entering the system, it would provide ten times the level of protection viewed as adequate by the EPA. (Add. 39-40.)

The district court found that the Authority's proposed treatment of ozone without filtration, in fact, would reliably kill 99 percent of Cryptosporidium. (Add. 35-36.) The Authority determined the combination of concentration of ozone and time of contact required to achieve this objective by means of an animal infectivity study, which the EPA acknowledged to be the best means of gauging the effectiveness of disinfection. (Add. 35.) Its designer configured the plant to provide greater than the requisite combination of concentration and contact time under conditions more stringent than those actually experienced in the MWRA system. (Add. 35-36.)

In sum, the district court found that the additional layer of treatment provided by filtration offered no significant benefit in the Authority's system. (Add. 41 ¶ 24, 42.) Even without ozonation or filtration, the most resistant pathogen Cryptosporidium poses no current threat. (Add. 41 ¶5.) Treatment by ozonation without filtration will adequately address any potential future threat. (Id. at ¶6.)

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[7] None of the ten outbreaks of cryptosporidiosis recorded in the United States between 1984 and 1995 were associated with unfiltered surface water systems. (Add. 15.)

Even if it were not to do so, the modular design of the Authority's new treatment plant and the availability of a complete design of a filtration component would permit the prompt installation of filtration. (Add. 42, ¶33.)

Having concluded that the United States' alternative offered no significant benefit in the treatment component of the Authority's system, the court found that it was inferior to the Authority's alternative in relation to the other two components of the system. As to watershed protection, the district court found that the past decade had seen continuing improvements, some gradual and some dramatic, in the Authority's system as a result of its efforts to avoid filtration. (Add. 40 ¶1.) Half of the eight significant improvements the court enumerated involved watershed protection. (Id.) The court found that installation of filtration would diminish support for these and other components of the watershed protection program. (Add. 40-41 ¶3.)

The court also found that the Authority's alternative offered greater protection of the public health in the third component of the Authority's system, its drinking water distribution pipes. Ozonation without filtration, the court acknowledged, could increase levels of organic matter and therefore contribute to regrowth in some distribution systems. (Add. 33-34, 37, 41 ¶¶13, 15.) However, the court found that regrowth was a system-specific issue and that, in the Authority's system, rehabilitation of aging, deteriorated pipes was a more effective means of combating regrowth than filtration. (Add. 37, 41 ¶16.) The costs of filtration, the district court found, would have a substantial adverse impact on the Authority's program to promote and support rehabilitation of these old, unlined cast iron pipes. (Add. 22, 41 ¶17.)

SUMMARY OF ARGUMENT

District courts sitting in equity, as a general rule, have broad remedial discretion. (See infra at 23-28.) Only an unequivocal statutory provision serves to

eliminate or narrow that discretion. Here, Congress has taken no such action. Neither the substantive terms of the Act nor its judicial enforcement provision indicate any such Congressional intent. The substantive provisions of the Act permit public water systems to protect the public interest either by providing filtration or by meeting the criteria established for remaining unfiltered and, as administered and interpreted by EPA and state agencies charged with enforcement of the law, to establish compliance by either of those means. (See infra at 29-40.) Far from being an unequivocal withdrawal of discretion, the section of the Act governing judicial enforcement is an enabling provision that merely directs the courts to emphasize protection of the public health in exercising their inherent discretion. (See infra at 40-50.)

Here, the district court properly exercised that discretion. The court correctly based its decision whether to issue an injunction on conditions existing at the time of the request for the injunction, while paying appropriate heed to historical experience. (See infra at 51-57.) The court correctly determined that no injunction was necessary to protect the public health and, indeed, that entering the requested injunction would have the effect of allocating resources in a manner that, on balance, would be less protective of the public health than the course of action that would follow without an injunction. (See infra at 57-60.)

STANDARD OF REVIEW

The grant or denial of injunctive relief is reviewed for an abuse of discretion. Lanier Prof. Servs., Inc. v. Ricci, 192 F.3d 1, 3 (1st Cir. 1999); Caroline T. v. Hudson School Distr., 915 F.2d 752, 754 (1st Cir. 1990). However, errors of law are reviewed de novo. Commercial Union Ins. Co. v. Seven Provinces Ins. Co., 217 F.3d 33, 40 (1st Cir. 2000).

ARGUMENT

I. The District Court Had The Discretion To Order A Remedy Other Than Filtration

The district court's decision not issue an injunction requiring the Authority to filter the drinking water it supplies to Metropolitan Boston represented the careful and considered exercise of the court's equitable powers. It is well-established that a federal court sitting in equity has broad equitable discretion. This discretion permits a court not to issue an injunction even where there has been a statutory violation. These principles are fully applicable here.

A. Federal Courts Have Broad Equitable Discretion

This case involves the district court's exercise of its powers in equity. One of the hallmarks of equity is flexibility, specifically, the flexibility of the court to fashion a remedy appropriate to the circumstances. "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility, rather than rigidity, has distinguished it." Hecht v. Bowles, 321 U.S. 321, 329 (1944). Here, the equitable remedy the United States seeks is an injunction. It has long been the case that an injunction is not a remedy that issues as a matter of course. A federal court can decline to issue an injunction even where there has been a violation of the law. See id. at 327-28.

As the Supreme Court has consistently emphasized to the Circuit Courts of Appeals, these principles apply with full force in the context of environmental statutes. See Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 541-46 (1987) (reversing Court of Appeals' preliminary injunction under the Alaska National Interest Lands Conservation Act on the ground, inter alia, that the district

court had the discretion to decline to issue an injunction even though the statute had been violated); Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) (reversing order of injunction for a violation of the Clean Water Act on the ground that the district court had the discretion to decline to issue an injunction even though there had been a clear and ongoing violation of the statute); cf. Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., 528 U.S. 167, ___, 120 S. Ct. 693, 710 (2000) (Under Clean Water Act, "the district court has discretion to determine which form of relief is best suited, in the particular case, to abate current violations and deter future ones."); see also Tennessee Valley Auth. v. Hill, 437 U.S. 153, 193 (1978) ("It is correct, of course, that a federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of the law.").

In Romero-Barcelo, for example, the United States Navy had violated the Clean Water Act by discharging ordnance into the ocean without a permit. See 456 U.S. 307-08. The district court refused to enjoin the Navy's continued violations of the Clean Water Act while the Navy's application for the permit was pending. This Court overturned that decision, concluding that the exercise of traditional equitable discretion was inappropriate where there was an absolute statutory duty to obtain a permit. Id. at 309-11. The Supreme Court reversed. Acknowledging that the Navy was violating the Clean Water Act and that a permit was required, the Supreme Court nevertheless held that the federal courts retained discretion not to issue an injunction during the time the permit process was pending. Id. At 320. According to the Supreme Court, this Circuit Court of Appeals had erroneously focused on the integrity of the permit process rather than on the integrity of the Nation's water. Id. at 314. The Court concluded that the purpose of the Clean Water Act — to restore and maintain the integrity of the Nation's waters — would not be undermined by allowing the discharges to continue because the ordnance was not polluting the water. Id.

Similarly, in Village of Gambell, several Alaskan native villages sought to enjoin a proposed sale of oil leases on the ground that the Secretary of the Interior had not complied with the requirements of the Alaska National Interest Lands Conservation Act ("ANILCA"). See 480 U.S. at 534. ANILCA protects lands native Alaskans use for hunting, fishing and other "subsistence" purposes. Among other things, it requires the Secretary of the Interior to consider "alternatives" to leasing land that had "subsistence" uses. Id. at 535 & n.2. The villages alleged, and the district court found, that the Secretary had violated ANILCA by not considering alternatives to leasing land that had subsistence uses. Id. at 539-40. Nonetheless, the district court declined to enjoin preliminarily the proposed sale of oil leases, finding, among other things, that the proposed sales would not significantly restrict subsistence uses. The Court of Appeals for the Ninth Circuit reversed, holding that irreparable injury is presumed when the agency fails to evaluate thoroughly the environmental impact of a proposed action. Id. at 540-41. The Supreme Court reversed the decision of the Court of Appeals, stating that the Circuit Court "erroneously focused on the statutory procedure rather than on the underlying substantive policy the process was designed to effect — preservation of subsistence resources." Id. at 544. Because the district court's order declining to issue an injunction would not undermine the substantive policy — preservation of subsistence resources — it had the authority not to issue the injunction. Id. at 544-46.

In both Romero-Barcelo and Gambell, the parties seeking the injunction placed great reliance on Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978), and argued that the environmental statutes at issue had displaced the federal courts' general powers in equity. In Hill, the Supreme Court held that Congress, in the Endangered Species Act of 1973, had required the district court to enjoin the completion of the Tellico Dam in order to preserve the snail darter. See 437 U.S. at 193-99. As the Court made clear in both Romero-Barcelo and Village of

Gambell, however, the outcome in Hill turned on the specific language and purpose of the Endangered Species Act, which contained a "flat ban" on the destruction of critical habitats. It was conceded in Hill that completion of the dam would destroy the critical habitat of the snail darter. See 437 U.S. at 173-74. Thus, in Hill, "'[t]he purpose and language of the statute [not the bare fact of a statutory violation] limited the remedies available to the District Court; only an injunction could vindicate the objectives of the Act.'" Village of Gambell, 480 U.S. at 543, n.9 (quoting Romero-Barcelo, 456 U.S. at 314).

Of course, as the Court recognized in Romero-Barcelo and Gambell, a federal court does not have unlimited discretion in equity. "Congress may intervene and guide or control the exercise of the courts' discretion." Romero- Barcelo, 456 U.S. at 313. Nevertheless, if Congress so intends to limit the federal courts' discretion in equity, it must do so clearly and unequivocally. A federal court called upon to issue an injunction for a violation of a federal statute should not "lightly assume that Congress has intended to depart from established principles." Id.; see also Village of Gambell, 480 U.S. at 542. Rather, "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." Romero-Barcelo, 456 U.S. at 313 (internal quotation marks omitted); see also Village of Gambell, 480 U.S. at 542 (quoting Romero-Barcelo).

B. The District Court Properly Applied These Principles To This Case

Under these well-established principles, the district court had discretion to decline to issue the injunction requested by the United States. Nothing in the Act either in so many words or by a necessary or inescapable inference compelled the district court to order an injunction requiring filtration. To the contrary, the district

court's actions are fully consistent with the objective of the substantive provisions of the Act and the Rule and with the judicial enforcement provisions of the Act.

1. The district court's order is consistent with the substantive provisions of the Act and the Rule.

Consideration of the substantive policies of the Act makes clear that this case is not, as the United States claims, "controlled by the holding" in Hill. See US Brief at 42; see also id. at 39-46. In Hill, the relevant statute contained a "flat ban" on the challenged conduct, and the only way to vindicate the substantive objectives of the Endangered Species Act was to enjoin the construction of the dam. That is not the case here. Nowhere in the Act is there a "flat ban" on systems that do not use filtration. Nor, for that matter, does such a ban exist in the regulations. "Congress, in other words, stopped short of ordering filtration as an all-encompassing preventive." (Add. 18.)[8]

In framing the Act, Congress adopted a more flexible approach to furthering the statutory objective of protecting the public health. Rather than mandate filtration for all public water systems using surface water sources, Congress directed the EPA to establish "criteria under which filtration . . . is required" for such systems. This direction indicates a determination that all surface water systems need not filter their drinking water. See 42 U.S.C. §300g-1(b)(7)(C)(i). EPA responded by promulgating the avoidance criteria. Accordingly, a public water system using surface water as its source complies with the pertinent substantive provisions of the Act and the Rule if it either provides filtration or meets the avoidance criteria.

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[8] This Circuit has not interpreted Hill as broadly as the United States would have it do so here. See Strahan v. Coxe, 127 F.3d 155, 171 (1st Cir. 1997). In Strahan, the plaintiff asked for a specific mandatory injunction where the district court found that the Commonwealth of Massachusetts had violated the Endangered Species Act, but the district court declined to issue the requested injunction. In affirming the district court, this Circuit stated that "[t]he district court was not required to go any farther than ensuring that any violation would end." Id.

Meeting the avoidance criteria, EPA acknowledges, adequately protects the public health. (A. 1515-17.)

It was in this context that the district court made its decision. Specifically, the district court found that there had been a "single instance of noncompliance with the fecal coliform avoidance criterion of the [Rule]." (Add. 42, ¶ 31.) That instance of noncompliance, the court found, occurred in January 1999. (Add. 42, ¶ 28.) The district court further found that the Authority's "system is in present compliance with the filtration avoidance criteria of the [Rule]." (Add. 42, ¶ 26 & n.108 (the violation was "minor and remediable").) Based on those findings, which have not been challenged on appeal, the district court concluded that an order requiring filtration was not warranted. The district court did, however, maintain jurisdiction over the case to determine "whether at some future date, relief of the kind requested by the United States is warranted." (Add. 42.)

It is difficult to contend, as the United States does, that these actions of the district court did harm to the substantive policies of the Act and as a result, that the substantive terms of the Act deprive the court of discretion not to order filtration. Yet this proposition is exactly what the United States must establish in order to show that the district court lacked the discretion to decline to issue the requested injunction. See Village of Gambell, 480 U.S. at 544 (focusing question of whether a district court had discretion to decline to issue and injunction on whether a court's denial of a request for injunctive relief would undermine the substantive policy of the statute); Romero-Barcelo, 456 U.S. at 314 (same); Sierra Club v. Marsh, 872 F.2d 497 (1st Cir. 1989) (inquiry focuses on the substantive policy of the statute). On the record, the United States cannot make the requisite showing. The Authority proved it was meeting the avoidance criteria and therefore adequately protecting the public health. Far from undermining the Act, the district court's order effectuates the substantive policies of the Act.

Because an injunction was not necessary to give force to the policies the Act furthers, the district court had the discretion to deny the requested injunction. See also Conservation Law Found. v. Busey, 79 F.3d 1250, 1271-72 (1st Cir. 1996) (district court had discretion under NEPA to balance harms before entering an injunction for violation of NEPA and properly determined that injunction was not appropriate, particularly, where the plaintiffs seeking the injunction had not requested such relief until significant financial commitments to the project had been made); Town of Huntington v. Marsh, 884 F.2d 648 (2d Cir. 1989) (district court had discretion to balance equities in determining whether to issue an injunction where there had been a violation of the Ocean Dumping Act and NEPA); Essex County Preservation Ass'n v. Campbell, 536 F.2d 956, 963 (1st Cir. 1976) (district court had authority to decline to issue preliminary injunction even though there had been "technical noncompliance" with the Highway Act).[9]

In an effort to avoid this result, the United States attempts to exalt to the level of substantive statutory requirements the provisions of the Rule — and, to a lesser extent, the Act — establishing timetables for meeting the avoidance criteria and providing filtration. The timetables in the Act and the Rule provide, in substance, for public drinking water systems that do not meet the avoidance criteria by

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[9] The Circuit Court cases the United States cites, United States v. City of Painesville, Ohio, 644 F.2d 1186 (6th Cir. 1981), and Commodity Futures Trading Comm'n v. Hunt, 591 F.2d 1211 (7th Cir. 1979), do not support a different result. Both cases pre-date Romero-Barcelo and were, therefore, decided without reference to the rule of statutory construction set forth in Romero-Barcelo. Hunt actually supports the district court's view in this case. In Hunt, the court recognized that (1) injunctive relief is never automatic, (2) the trial court had discretion not to issue an injunction, and (3) in exercising that discretion the district court was to consider the likelihood of future violation. 591 F.2d at 1220. The issue in Hunt was whether the district court appropriately exercised its discretion when the record showed a likelihood of future violations. In this case, there was no finding that the Authority would violate the avoidance criteria in the future.

December 1991 to be ordered to provide filtration by June 1993. A system which does neither violates at least the procedural requirements of the Act and the Rule. An additional timetable in the Rule, which is particularly pertinent in light of the findings of the district court, provides that any system determined to have met the avoidance criteria which subsequently violates them must provide filtration within 18 months. A system which does not do so violates at least the procedural requirements of the Rule.

The United States misses the point by contending that a system chargeable with such a violation can come into compliance with the Act and/or the Rule only by providing filtration and that it remains permanently out of compliance unless or until it provides filtration. What is at issue here is not whether the Authority can in some sense be said to be in "violation" but whether the action or inaction said to constitute that violation is of a nature that forecloses exercise of a district court's remedial discretion. To the extent that the Authority's violation is "permanent" or "continuing," it is simply because the Authority failed to meet the deadlines set forth in the Act or the Rule for meeting the avoidance criteria or providing filtration. Violations of those deadlines, however, do not create conflict with the substantive purposes of the statute.

Accordingly, under the principles set forth in Romero-Barcelo, this type of "permanent" statutory violation does not require a district court to issue an injunction. In Village of Gambell, for example, the Secretary of the Interior violated the statute by failing, as the statute required, to consider alternatives before selling the oil leases. Similarly, in Town of Huntington v. Marsh, 884 F.2d 648, 649-51 (2d Cir. 1989), the defendant, the Army Corps of Engineers, had allowed dumping and issued permits to allow dumping at a site that had been designated as a dumping site in violation of the Ocean Dumping Act and the National Environmental Policy Act. In that case, the Corps violated both statutes by dumping and issuing permits for dumping without considering, as required by

the statutes, the specified criteria for designation of a dumping site and the types, quantities and effects of the dumping on the site. In each case the violation was "permanent," in the sense that the defendants were never going to comply with those statutory requirements. Nevertheless, in each case, the court held that, under Romero-Barcelo, the district court had the authority to decline to issue an injunction. See Village of Gambell, 480 U.S. at 544-46; Town of Huntington, 884 F.2d at 651-54.

Moreover, the United States' characterization of the Authority as being in continuing violation of the Act and the Rule is not a necessary reading of the statute and the regulation or even the better reading. December 1991, the logic of the United States' argument runs, is the last date for compliance with the Act and the Rule by meeting the avoidance criteria. By that reasoning, June 1993 would be the last date for compliance with the Act and the Rule by filtration, and all systems that met neither the December 1991 nor the June 1993 deadline would be condemned to the status of perpetual violators. Of course, as the EPA has recognized, the Act does not produce this result. Systems that violate the Act by missing a deadline are no more permanently out of compliance than the EPA is permanently out of compliance with the Act because it did not issue the Rule until 18 months after the deadline set by Congress. Violators, the EPA acknowledges, may come back into compliance, and there is no logically necessary reason why a system which has missed deadlines for both meeting the avoidance criteria and providing filtration should not be able to conform to the substantive requirements of the law by means of achieving either compliance alternative.

In fact, in administering the Act, the EPA and state agencies to whom it delegated its enforcement authority interpreted the Act to permit a system that did not meet the avoidance criteria in December 1991 but later improved its source water and treatment facilities to establish compliance by subsequently meeting the criteria. This type of established administrative practice by a government agency

as to the interpretation of a statute it is charged with enforcing, the United States Supreme Court has said, is instructive as to the construction of the statute. Cf. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 41-42 (1983) ("'A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress'") (quoting, Atchison, T. & S.F.R. Co. V. Wichita Board of Trade, 412 U.S. 800, 807-08 (1973)); see also Thomas Jefferson University v. Shalala, 512 U.S. 504, 524 n.3 (1994) (Thomas, J., dissenting) ("The prior inconsistent conduct of the agency is quite relevant — not because her inconsistency 'estops' her from changing her view — but rather because agency conduct, no less than express statements, can effect a construction of statutes or regulations" (internal citation omitted)); Martin v. Occupational Safety and Health Rev'w Comm'n, 499 U.S. 144, 156-57 (1991); Federal Deposit Ins. Corp. v. Philadelphia Gear Co., 476 U.S. 426, 438-39 (1986).[10]

There is no question that, in its administration of the Act and the Rule, the EPA construed them to afford discretion to permit public water systems which missed both the December 1991 and June 1993 deadlines to come into compliance by meeting the avoidace criteria. "[A]n internal guidance issued by the EPA in 1992 gave state enforcement agencies discretion to defer a final filtration determination if it appeared that a water system through intermediate measures could bring itself

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[10] One form of agency interpretation that is not instructive as to statutory construction is an interpretation asserted in a lawsuit. To illustrate, this Court has ruled that, when the EPA's position "has been tailored to and articulated specifically for purposes of this particular litigation," it would "not be given any special weight." Commonwealth of Massachusetts v. Blackstone Valley Elec. Co., 67 F.3d 981, 991 (1st Cir. 1995). Thus, the position of the EPA and the United States — tailored for this particular litigation — that the Act requires any system which did not achieve compliance with the avoidance criteria by December 1991 to filter is entitled to no deference here.

into compliance." (Add. 19.)[11] EPA's actions, no less than its words, show that it construed the Act to permit a system to come into compliance by meeting the avoidance criteria after 1991. It allowed Portland, Maine, Juneau, Alaska and many other systems to come into compliance by meeting the avoidance criteria even though they did not meet the criteria until years after December 1991. (See supra at 9.)

EPA's actions with respect to the Authority were, prior to 1997, entirely consistent with the approach taken elsewhere and provide strong evidence of its interpretation of the statute. After encouraging the "dual-track" consent order between the Authority, the MDC and the DEP, the EPA repeatedly reaffirmed that the decision whether the Authority must filter would be made in 1998 and urged the Authority to improve its system in order to avoid filtration. As the district court found, "EPA was supportive of the dual-track approach" (Add. 30) and "participated in the development of both tracks, recommending filtration options and advising the MWRA on the steps that had to be taken to satisfy the avoidance criteria." (Add. 31.) "Throughout [the period 1993-1996] the EPA gave no hint that it was dissatisfied with the deferral of the DEP's final filtration decision."[12] (Add. 31.) To the contrary, the Regional Administrator warned in 1996 that "in

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11 The guidance expressly stated that one of the "two appropriate actions" "to bring [a system which did not meet the avoidance criteria in December 1991] into compliance with the rule" was "an action which orders the system to correct the deficiency in its operations and therefore meet the avoidance criteria or the disinfection requirements." (A. 397-98.)

12 The United States' argument to the contrary (US Brief at 16) is irrelevant, given its concession that it "has chosen not to appeal the district court's findings of fact". Id. at 28 n.9. In any event, its view of the record is clearly contradicted by the statements made at the time by EPA's Office of Regional Counsel. (Add. 30; see, e.g., A. 634 ("I also said that while we were open to having [DEP] reconsider the need for filtration in the unlikely event that MWRA could make the technical case, I did not think it was a good idea to flag this in the consent agreement ....").)

order to avoid filtration, more still needs to be done" (Add. 31) and earlier had stated that "[t]he final answer on whether filtration is needed will be made in 1998, by the state Department of Environmental Protection, but subject to Environmental Protection Agency (EPA) review." (Id.) These actions are entirely inconsistent with EPA's current litigation posture.

Similarly, state agencies to which EPA delegated enforcement responsibility interpreted the Act and the Rule to allow systems in noncompliance to make necessary improvements in order to avoid filtration. (See supra at 8-9.) Seattle, for example, was faced with a situation remarkably similar to the Authority's. It met the avoidance criteria, then failed the source water fecal coliform criterion. Rather than require filtration, the State of Washington issued an administrative consent order allowing the system to remain unfiltered.[13] (A. 552, 1260-63). The Commonwealth of Massachusetts took similar steps with regard to the Authority, initially entering into a consent order allowing the Authority until 1998 to meet the criteria, then finding compliance with the avoidance criteria and not ordering filtration despite an apparent violation of the source water fecal coliform criterion. (Add. 32.)

Any attempt by the United States to argue, as it did below, that when the EPA or a state allowed a system to avoid filtration by satisfying the avoidance criteria after the statutory deadline, it was simply exercising its enforcement discretion merely serves to emphasize that the choice of remedy is discretionary for agencies charged with enforcement of the Act and the Rule. However the United States may characterize their actions, the EPA and the state agencies to which it delegated its authority interpreted the substantive provisions of the Act and Rule to give them discretion in choosing an appropriate remedy for a violation. Unless Congress

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[13] These events occurred years prior to passage of an amendment of the Act allowing systems with watersheds like Seattle to remain unfiltered regardless whether they met the avoidance criteria.

unequivocally mandated a different result, district courts have no less discretion to grant or deny injunctive relief.

2. The judicial enforcement provision of the Act does not require that the district court order filtration.

The judicial enforcement provision of the Act no more deprives district courts of discretion than do its substantive terms. In its brief, the United States discusses at length the judicial enforcement section of the Act, 42 U.S.C. §300g-3(b), and argues that section 300g-3(b) does not authorize the district court to exercise its discretion as it did here. See US Brief at 36-39. However, as the district court properly recognized, this provision does not deprive the court of its equitable discretion.

> Section 300g-3(b) provides, in pertinent part:
> The court may enter, in an action brought under this subsection, such judgment as protection of public health may require, taking into consideration the time necessary to comply and the availability of alternative water supplies; and, if the court determines that there has been a violation of the regulation or schedule or other requirement with respect to which the action was brought, the court may, taking into account the seriousness of the violation, the population at risk, and other appropriate factors, impose on the violator a civil penalty of [sic] not to exceed $25,000 for each day in which such violation occurs.

42 U.SC.A. §300g-3(b).

Notably, this provision uses the permissive "may enter" as opposed to the mandatory "shall" enter, a fact some courts have viewed as preserving for the courts discretion as to whether to order an injunction. See Roche Prods. Inc. v. Bolar Pharmaceutical Co., 733 F.2d 858, 865 (Fed. Cir. 1984) (superseded by statute on other grounds) (construing 35 U.S.C. §283, which authorizes the issuance of injunctions for violation of patent rights, as "clearly mak[ing] the issuance of an injunction discretionary," because the statute says that the court "may grant" relief "in accordance with the principles of equity"); Federal Trade

Comm'n v. Weyerhaeuser Co., 665 F.2d 1072, 1084 (D.C. Cir. 1981) (court had discretion to decline to issue a preliminary injunction under Section 13(b) of the FTC Act because, inter alia, the statute "speaks of relief the court 'may' (not shall) grant"); cf. ABC, Inc. v. Primetime 24, 184 F.3d 348, 354 (4th Cir. 1999) (contrasting enforcement language of Satellite Home Viewer Act applicable to repeat violations, 17 U.S.C. §119(a)(5)(B)(ii), which says "shall order," with the enforcement provision applicable to those that do not rise to a pattern and practice, 17 U.S.C. §119(a)(5)(A), which says "may . . grant"; the latter anticipates the "full exercise of the discretion of the district court").

More fundamentally, however, there is nothing in section 300g-3(b) requiring a district court to issue an injunction ordering filtration. Section 300g-3(b) is an enabling provision directing the court that it may issue "such judgment as protection of public health may require, taking into consideration the time necessary to comply and the availability of alternative water supplies." Section 300g-3(b) makes "protection of public health," not "filtration" (or specific enforcement of EPA orders), the polestar of the district court's enforcement of the Act. The district court properly inferred from this language that section 300g-3(b) had not stripped the court of its equitable discretion to fashion an appropriate remedy that might not include filtration.

The United States' argument that section 300g-3(b) does not authorize the district court to exercise its equitable discretion, see, e.g., US Brief at 37, entirely misreads Romero-Barcelo. Under Romero-Barcelo and its progeny, the general background presumption is that, absent a statement from Congress to the contrary, a federal court retains its full range of equitable discretion. See Romero-Barcelo, 456 U.S. at 313. Where a statute is silent, or unclear, the federal court is deemed to retain its full range of equitable discretion. Id. Thus, the relevant question for purposes of this appeal is whether the Act clearly *deprives* the district court of its equitable discretion with respect to filtration, not whether the Act *grants* the

district court equitable discretion with respect to filtration. By its terms, section 300g-3(b), does not deprive the district court of any discretion.

While, as the United States points out, section 300g-3(b) does authorize the EPA to bring suit to "require compliance with any applicable requirement" and directs the court to take into consideration the time necessary to "comply," such direction does not mean, as the United States asserts, that section 300g-3(b) *requires* that the district court issue an injunction for every violation of the statute. As the Supreme Court recognized in Romero-Barcelo, "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." 456 U.S. at 313; see also Village of Gambell, 480 U.S. at 542 (same); Hecht Co. v. Bowles, 321 U.S. 321, 328-29 (1944) (statute granting jurisdiction to the federal courts "to enforce compliance" did not impose a duty on the courts to do so "under any and all circumstances.").

This case is quite similar to Hecht. That case involved the construction of section 205(a) of the Emergency Price Control Act of 1942 ("EPCA"). Section 205(a) provided that "upon a showing by the Administrator that [a] person has engaged or is about to engage in [any acts or practices that violate the act] a permanent or temporary injunction, restraining order, or other order shall be granted without bond." 321 U.S. at 322. The defendant in Hecht had committed a number of violations of the EPCA, although the violations were corrected and the defendant had taken vigorous steps to prevent recurrence of the violations. Id. at 325-26. The Administrator sued in federal court, asking for an injunction under section 205(a), and the district court declined to issue an injunction. Pointing to the mandatory language of section 205(a), the Administrator argued that the district court was required to issue an injunction. The Supreme Court held that section 205(a) imposed no such obligation on the district court. According to the

Supreme Court, neither the language nor the history of section 205(a) were sufficiently plain to compel the inference that Congress had intended to depart from traditional equity practices. See id. at 329-31. Even Congress' use of the mandatory "shall" was insufficient to establish that the district court had been deprived of its discretion: "We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." Id. at 329. To the extent that such language created an ambiguity, it was resolved in favor of an interpretation that preserved the courts' traditional powers in equity. See id.

So it is here. As in Hecht, the district court was faced with, at most, a past act of noncompliance with a regulation that was promptly remedied. As in Hecht, given the steps that the Authority has taken to ensure compliance with the avoidance criteria, future violations are not likely. As in Hecht, the language, history and structure of section 300g-3(b) do not compel the conclusion that Congress intended to mandate an injunction ordering filtration for every violation of the statute. If anything, the United States' case here is much weaker than it was in Hecht because (1) section 300g-3(b) of the Act, unlike section 205(a) of the EPCA, is phrased in permissive, rather than mandatory, terms and (2) the noncompliance in this case was, according to the district court, "minor." (Add. 42 n.108.) See Roche Products, 733 F.2d at 867 ("If an injunction was not mandatory in Hecht v. Bowles, the more permissive statutory language here makes it a fortiori that an injunction is not mandatory now.").

To the extent that resort to legislative history is at all appropriate here,[14] the legislative history the United States cites, see US Brief at 39, does not establish

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[14] Resort to legislative history is generally appropriate only where statutory language is ambiguous. See Davila-Perez v. Lockheed Martin Corp., 202 F.3d 464, 468 (1st Cir. 2000) ("We begin with the language of the statute, and only if the statute is ambiguous or leads to an unreasonable interpretation do we turn to the legislative history and other aids."). Here, the plain language of section 300g-

that section 300g-3(b) was intended to deprive the district court of the discretion it exercised in this case. In the remarks of Representative Rogers, quoted by the United States, the congressman stated only that the "[t]raditional balancing of equities is not intended" by the proposed judicial enforcement provision, and he emphasized that a court, in fashioning a remedy, should ensure that the "public health will be protected to the maximum extent feasible." Similarly, the House Report accompanying the Act, states that the courts are directed to "give utmost weight to the Committee's paramount objective of providing maximum feasible protection of the public health at the times specified in the bill." House Report No. 93-1185, 1974 U.S.C.C.A.N. at 6476. There is no suggestion in this legislative history that section 300g-3(b) was intended to create a per se rule that courts, when faced with a violation of the Act, must order filtration.

What the legislative history shows is that Congress intended courts to give utmost importance to the statutory aim of protecting public health, rather than to apply the traditional balancing of equities that would apply to litigation between private parties. Cf. Weyerhaeuser, 665 F.2d at 1081 (district court not deprived of equitable discretion even where legislative history said that traditional equity standard should not apply). It does not, however, "mandate remedial rigidity." Id. at 1084 (internal quotations omitted).

Moreover, to the extent that "maximum feasible protection" is Congress's aim, the statute makes clear that where the avoidance criteria are met, filtration is not required to meet this goal. Indeed, the Senate Report accompanying the 1986 amendments to the Act emphasizes that "[t]he [Act] requires the Administrator to promulgate treatment technique regulations for filtration and disinfection to assure that all public water systems are providing basic health protection to their customers." S. Rep. No. 99-56 at 7, 1986 U.S.C.C.A.N. 1566. As the EPA

3(b) does not deprive the district court of its equitable discretion, and there is no need to resort to the legislative history.

conceded, satisfying the avoidance criteria sufficiently protects public health. (A. 1515-17.) [15]

Finally, although the United States places great emphasis on dictum from United States v. City of New York, 198 F.3d 360 (2d Cir. 1999), to support the proposition that section 300g-3(b) deprives the court of equitable discretion, a close analysis of the case demonstrates that the Court of Appeals for the Second Circuit did not address that issue. At the outset, the procedural posture of the case was quite different. The underlying action in City of New York involved the enforcement of a consent order, pursuant to which the City had agreed to filter (because, among other things, the City agreed that it could not meet the avoidance criteria). And the narrow issue raised on the appeal was whether the district court had abused its discretion in denying the motion to intervene of a coalition opposed to filtration. Moreover, in City of New York, that coalition was asking the court to find in Section 300g-3(b) the authority to make a "head-on challenge to filtration." Id. At 366. In this case, the Authority never argued, and the district court never found, that section 300g-3(b) gave it authority to engage in a "head-on

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15 As the district court recognized (Add. 7a) there are many good reasons why Congress does not restrict the district courts' equitable discretion. Discretion gives courts the ability to fashion remedies for de minimis violations or for circumstances not contemplated by the legislation. An instructive case in this regard is United States v. City of San Diego, 1994 WL 521216, 38 ERC 1718 (S.D. Cal. 1994), which, although unpublished (see FRAP Local Rule 36.1), was cited by the district court. (Add. 7a.) In that case, which arose under the Clean Water Act, San Diego had entered into a consent decree with the United States to provide secondary treatment for its sewage. After improving its existing sewage treatment system, San Diego opposed the entry of the consent decree on the ground that it was unnecessary. In light of the changed circumstances, the Court refused to enter the consent decree or otherwise direct that San Diego provide secondary treatment to its wastewater on the ground, inter alia, that the improvements made by San Diego provided an equivalent environmental benefit. Enforcing the consent decree, the court found, would require an "immense, costly, and wasteful program."

challenge to filtration." The issue here is much narrower, namely whether the Act deprives the district court of the equitable discretion to fashion an appropriate remedy short of filtration where there has been a minor and remediable violation of the source water fecal coliform avoidance criterion. The City of New York did not say that section 300g-3(b) would require an order of filtration under such circumstances. Indeed, what the district court did here is quite consistent with the language from the Second Circuit quoted by the United States, because, in this case, the Authority is in current compliance with the Rule and Act. Thus, to the extent that section 300g-3(b) requires the district court to "ensure compliance" with the statute and regulations, such a result has been accomplished here. Nothing in the City of New York says that "compliance" necessarily means an order requiring filtration.

Indeed, the contrasts between this case and the City of New York illustrate why the discretion of the district court should not be constrained here. The United States argues in this regard that Congress intended to rely upon administrative expertise rather than judicial discretion in determining what result best serves the public health. See US Brief at 48-54. What the United States neglects to mention is that, in this case, the EPA delegated the exercise of that expertise to the DEP. (Add. 17 & n.31.) The DEP determined in 1998 that the Authority met the avoidance criteria, and it did not determine that the events culminating in January 1999 constituted a violation of the avoidance criteria. (Add. 32.) This case is before the Court only because the United States did not accept the result of the administrative process. Here, the United States is in the position of the coalition in City of New York. Having itself invoked the equitable powers of the district court in an effort to overturn an administrative decision, the United States is ill-positioned to contend that the court is deprived of its inherent equitable discretion and must defer to administrative expertise.

II. The District Court Properly Determined That The Act Did Not Require It To Order Filtration Based Upon Either Historical Violations Or A Single, Easily Remediable Recent Violation

A. The Court Properly Focused On The Authority's Compliance After 1998

In its brief, the United States suggests, without fully articulating, that the Court erred in not fully considering the status of the Wachusett supply between 1991 and 1998. (US Brief at 33-34, 43.) To the contrary, the district court did consider evidence of Rule violations during that time period[16] but, in determining the appropriate remedy, properly focused on the state of the system in 1998 and beyond, the period specified by the Commonwealth and EPA.

1. The court appropriately considered existing, rather than historical, problems.

In its decision, the district court correctly examined existing conditions in the Authority's system to determine whether an injunction should issue. Injunctions should be narrowly tailored to prevent harm that presently exists or harm that is currently threatened and not to address problems which may have occurred in the past. As this Court has explained, "[i]njunctions must be tailored to the specific harm to be prevented." Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 217 F.3d 8, 14 (1st Cir. 2000). Moreover, an injunction should be issued only "to prevent existing or presently threatened injuries." Connecticut v. Massachusetts, 282 U.S. 660, 674 (1931). See also Unistrut Corp. v. Power, 280 F.2d 18, 23 (1st Cir. 1960) ("An injunction looks toward the future."). Those propositions are consistent with the view that the "historic injunctive process was designed to deter, not to punish." Hecht, 321 U.S. at 329.

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16 In fact, the United States has not argued that any proffered evidence of noncompliance prior to 1998 was excluded by the district court.

It would be illogical and improper to require the Authority to take any action to remedy problems which existed, for example, in 1995 but since have been solved. Thus, the district court properly focused its analysis on the conditions as they existed at the summary judgment stage and, subsequently, at trial.

2. The district court properly focused on the time period set by the Commonwealth with EPA's support.

In determining that filtration was not required to protect public health, the district court followed the framework established by the Commonwealth, under its authority delegated from EPA, and supported by EPA. Under the Consent Order, the final decision on filtration was to be made based upon the condition of the system in 1998. The Authority relied upon the Consent Order and the promises by EPA that the decision would be made in 1998. Thus, as the district court found, "in the last decade," the Authority "sought to renovate [its] system to avoid filtration." (Add. 40 ¶1.) "EPA was supportive of the dual-track approach" (Add. 30) and "participated in the development of both tracks, recommending filtration options and advising the [Authority] on the steps that had to be taken to satisfy the avoidance criteria." (Add. 31.) "Throughout [the period 1993-1996] the EPA gave no hint that it was dissatisfied with the deferral of the DEP's final filtration decision." (Id.) It would have been manifestly inequitable to change the rules after the Authority spent millions of dollars to meet the avoidance criteria by 1998. (A. 808-10.)

Had the court ruled otherwise, it would have been required to address the much more troubling issue whether the equitable remedy of an injunction was not available to the United States because of its conduct in encouraging the Authority to make improvements to its system in order to avoid filtration by 1998 and then claiming that 1998 was too late. Like other litigants, the government may not obtain injunctive relief if its own conduct does not entitle it to equity. See Texaco

Puerto Rico v. Department of Consumer Affairs, 60 F.3d 867,878-81 (1st Cir 1995). Whether a plaintiff's conduct is such as to bar equitable relief presents fact specific issues requiring a searching inquiry and foreclosing disposition as a matter of law. E.g., Brooks v. Bank of Boulder, 911 F. Supp. 470, 476 (D. Colo 1996); Broadcast Music, Inc. v. Hearst/ABC Viacom Entertainment Servs., 746 F. Supp. 320, 329-30 (S.D.N.Y. 1990).

The principle that a party who behaves inequitably should be denied the relief it seeks generally is analyzed in terms of one or the other of the doctrines of "equitable estoppel" and "unclean hands." These doctrines, to be sure, apply to the government differently than to private litigants, for it does not serve the principle of separation of powers for the courts to bind the government to every incorrect interpretation of a statute made by an agency charged with its administration. Falcone v. Pierce, 864 F.2d 226, 228-29 (1st Cir. 1988). However, where (1) the "Government [has] engaged in 'affirmative misconduct,'" Akbarin v. Immigration and Naturalization Serv., 669 F.2d 839, 842 (1st Cir. 1982); (2) the government officer who induced the reliance was acting within his authority, see, e.g., Hachikian v. F.D.I.C., 96 F.3d 502, 505 (1st Cir. 1996); and (3) the unfairness to a party of denying estoppel outweighs "the importance to the public of enforcing the underlying congressional policy," Best v. Stetson, 691 F.2d 42, 44 (1st Cir. 1982), the government may be denied equitable relief. This standard applies particularly where the government tries to enforce a statute for actions the regulated community had every reason to believe were not covered. See, e.g., United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655 (1973). Here, of course, the EPA, including its Regional Administrator, repeatedly stated that the decision whether the Authority must filter would be made in 1998, which is the very position it now contends is contrary to law.

Where the information relied upon is authorized by the government agency, one of the principal concerns of denying the equitable relief sought by a government

vanishes. See Hachikian, 96 F.3d at 505. Thus, if the Act is to be construed to require that Authority's pre-1998 violations mandate filtration, this case must be remanded for a determination by the district court of the validity of the Authority's defenses of unclean hands and estoppel.[17]

3. The United States has waived any argument that pre-1998 violations require an order.

It is unclear, based on the United States' presentation, whether it seeks reversal of the district court's order on the ground that it abused its discretion by not considering claimed violations of the avoidance criteria by the Authority that pre-date the January 1999 violation found to have occurred by the district court. The Issue Presented by the United States in its Brief is limited to the question of the district court's equitable discretion where there has been a violation of "at least one" of filtration avoidance criteria. US Brief at 2.[18] With respect to the other violations, the United States says that "[t]he point of the other criteria failures is

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[17] The Authority asserted the defenses of unclean hands and estoppel and argued that they should preclude summary judgment. (Answer, at 5-6 [Fifth and Eighth defenses]; Memorandum of Defendant Massachusetts Water Resources Authority in Opposition to Motion for Partial Summary Judgment, filed Jan. 7, 1999, at 26-29).

[18] The Issue Presented in the United States' brief is quite different from the two issues identified in the United States' Designation of Issues, which focus (1) on the court's discretion to decline to issue an injunction where there had been "multiple" failures of the avoidance criteria both before and after the deadlines set in the regulation and (2) whether the district court erred in "not considering most of the past exceedances of the avoidance criterion (sic)" and in "failing to limit its consideration to whether the filtration system sought by the United States was the most protective of human health." Appellant The United States Designation of Issues and Contents of the Appendix, filed Oct. 20, 2000 at 1-2. Based on this change in scope of the description of the issue, it is fair to infer that the United States has chosen to limit its appeal to the question whether the district court had any discretion to decline an injunction based upon the single 1999 violation and not whether it erred by nor ordering filtration based upon earlier violations.

that they show that the [Authority] actually should have installed filtration years earlier." U.S. Brief at 36. Under the circumstances, any claim of error based on the district court's not having consider claimed failures prior to 1999 has been waived. See King v. Town of Hanover, 116 F.3d 965, 970 (1st Cir. 1997) ("[A] litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace.") (internal quotations omitted).

B. The Court Considered The Historical Conditions of the System.

To the extent that historical conditions of the Authority's system are relevant, the district court gave them due consideration in determining whether to issue an injunction. It evaluated the conditions of the system over time and determined that there has been "continuing improvement, in some respects gradual, in others dramatic." (Add. 40 ¶1.) The court noted "[t]he sharp drop in levels of fecal coliform recorded at the Intake after the full implementation of the gull harassment program in 1993." (Add. 27.) The court further noted that with the removal from service of open storage reservoirs, community compliance with the Total Coliform Rule had "improved substantially" since the mid-1990s, when there had been regulatory violations (Add. 29) and ultimately determined that the system was in compliance with all avoidance criteria. (Add. 42 ¶26.) Rather than ignore these circumstances, as the United States suggests, the court appropriately analyzed the causes of the earlier violations and determined that because these problems had been solved by the time of trial, filtration was not warranted. See Hecht, 321 U.S. at 327-330 (holding that injunction not required, in part, because threat of future statutory violations had been reduced by defendant's cooperative actions); Connecticut, 282 U.S. at 673-74 (no injunction should issue without threat of future harm).

C. In Exercising Its Discretion, The District Court Correctly Determined That Filtration Was Not Necessary And Chose The Alternative That Could Not Be Mandated By Statute But Provides The Greatest Protection Of Public Health

The district court did not enter an order in response to the United States' request for an injunction because no order was necessary to protect the public health. At the time of trial, the Authority met the criteria established by the EPA for the avoidance of filtration. (Add. 42.) As would be expected in those circumstances EPA's witness acknowledged at trial that a public water system which meets those criteria adequately protects the public health. (A. 1515-17.)

Indeed, by refusing to order filtration of the Authority's supply, the district court reached a result that produced greater protection of the public health than would mandating filtration. In the Authority's public drinking water system, the court found, filtration would provide very little additional protection to the public health. (Add. 35-42.) In this regard, public drinking water systems have three principal components: (1) a source, which for surface water systems like the Authority is one or more watersheds, (2) treatment and transport facilities and (3) a distribution system. The injunction requested by the United States focused on the second of the three components, seeking to improve it by adding an additional layer of treatment, which would remove a large percentage of those pathogens present in the source water that other treatment had not inactivated.[19] (Add. 32-34.) Although this additional layer of treatment might provide great benefit for systems with highly contaminated source water and traditional disinfection, the Authority's source water contains few contaminants, and the new disinfection facilities it is constructing will inactivate virtually all of them. (Add. 35-38, 41 ¶¶ 5, 8, 9.)

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[19] This additional treatment offered potential benefits for the distribution system that the district court found were outweighed by the Authority's planned improvements to the distribution system. (Add. 37.)

Not only would the injunction requested by the Court not have produced any substantial additional protection of the public health in the context of the Authority's system, it also would have diverted resources, the court found, from programs that offer a greater public health benefit. The Court found credible the testimony of the Authority's witnesses that ordering filtration would decrease support for the watershed protection program that is responsible for maintaining the low levels of contaminants entering the Authority's system. (Add. 40-41 ¶ 3.) Similarly, the court found that ordering filtration would divert funds from an ongoing program to rehabilitate the component of the system most in need of improvement, Metropolitan Boston's old and deteriorated distribution pipelines. (Add. 41 ¶ 17.)

In sum, the decision of the district court to deny the United States' request for an injunction and not to enter an order had the effect of providing the greatest feasible protection for the public health. In so doing, it best served the substantive policies of the Act and the Rule.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court.

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CERTIFICATE OF FILING AND SERVICE

I, Jonathan M. Ettinger, hereby certify pursuant to F.R.A.P. 25 (d) that on January 3, 2000,

1. I sent an original and nine copies, including a computer-readable version, of the foregoing Brief of Appellee Massachusetts Water Resources Authority by hand to:

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