IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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No. 00-2028
(D. Mass. No. 98-10267-RGS)

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

_____

APPELLANT UNITED STATES' OPENING BRIEF

_____

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to Local Rule 34.1 of this Court, the United States, as appellant, respectfully requests informs the Court that it believes oral argument in this case is essential because the case presents an important question of whether the district court had the equitable discretion to decline to issue an injunction in this case, thus allowing the appellee Massachusetts Water Resources Authority to fail to comply with the Safe Drinking Water Act and its regulations indefinitely.

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JURISDICTION

This appeal arises out of an enforcement action under the Safe Drinking Water Act, 42 U.S.C. 300f *et seq.*, brought by the United States on behalf of the Environmental Protection Agency against appellees the Massachusetts Water Resources Authority ("MWRA") and the Metropolitan District Commission

("MDC"). The district court had jurisdiction of this action under 28 U.S.C. 1331, 1345, and 1355, and 42 U.S.C. 300g-3(b).

On May 5, 2000, the district court denied the United States' request for an injunction. *United States v. MWRA*, 97 F. Supp. 2d 155 (D. Mass. 2000), Add. at 8-42.[1]/ The court subsequently entered Final Judgment disposing of all claims as to all parties on June 2, 2000. Add. at 43. The United States timely filed its notice of appeal on July 3, 2000. A at 1936. This Court has jurisdiction of this appeal pursuant to 28 U.S.C. 1291.

ISSUE PRESENTED

Whether the district court, having found that the MWRA had failed at least one of the filtration "avoidance criteria" of the Surface Water Treatment Rule, was required to order the MWRA to install filtration treatment because that regulation provides that failure of any of the avoidance criteria requires the installation of filtration treatment within 18 months of the failure.

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[1]/ "Add." references are to the addendum to the appellant's brief. "A." references are to the separately bound record appendix.

I. Statement of the Case.

A. Introduction

The United States brought suit under the Safe Drinking Water Act ("SDWA" or the "Act"), 40 U.S.C. 300f *et seq*., to compel the MWRA to install filtration treatment to protect the public from microbiological contaminants as required by the Act and the Surface Water Treatment Rule ("SWTR" or the "Rule"), 40 C.F.R. Part 141, Subpart H. The SWTR was the result of Congress' determination that filtration provided an increase in the protection of water quality. In its complaint, the United States alleged that the MWRA failed to meet regulatory "avoidance criteria" necessary to avoid the requirement to install filtration by and after December 30, 1991, and that accordingly the MWRA had to provide filtration treatment. Although the United States recognized that the district court retained flexibility on scheduling and other issues, it contended that the plain language of the SWTR required the district court to order the MWRA to install filtration upon failure of the MWRA's failure of the avoidance criteria. The United States moved for partial summary judgment on December 1, 1998, seeking an order (1) finding that the MWRA was in violation of the SDWA for its failure to provide filtration treatment, and (2) requiring the MWRA to achieve compliance with the Act by installing filtration facilities.2

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2 The motion for summary judgment did not request any relief from the other defendant-appellee in this action, the Metropolitan District Commission ("MDC").

The district court granted the United States' motion on the issue of the MWRA's liability, finding that the MWRA had failed the filtration avoidance criteria on numerous occasions, most recently in January 1999. *United States v. Massachusetts Water Resources Authority*, 48 F. Supp. 2d 65, 70 & n. 12, 72 (D. Mass. 1999) (*MWRA I*), Add. at 5-7. Nevertheless, the court did not order the MWRA to comply with the filtration requirement of the SWTR. Instead, the court held that it had equitable discretion to allow the MWRA to continue to operate its water system without filtration if the court determined, after taking evidence, that filtration was not necessary for the protection of public health. The court therefore set the case for trial on the public health issue. *MWRA I*, Add. at 6-7.

Believing the court's ruling to constitute a controlling question of law about which there was a substantial difference of opinion, the United States asked the district court to certify its ruling for interlocutory appeal under 28 U.S.C. 1292(b). The court granted that request, and the United States filed its petition for interlocutory appeal in this Court on July 9, 1999 (docketed as No. 99-1813). This Court denied the United States' petition without comment on October 13,

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While the MDC is responsible for (among other things) managing the Wachusett Reservoir, the Quabbin Reservoir, and the Ware River water supplies and for protecting their watersheds, responsibility for water treatment is allocated to the MWRA. A. 47-48. The MDC was named as a party to this action, however, because it owns and operates parts of the overall public water system operated by the MWRA (e.g. the Wachusett Reservoir), and thus would be subject to the ancillary watershed protection relief sought in the complaint.

1999.

The district court then held a trial to determine whether the MWRA should be relieved from its obligation to install filtration treatment. After taking testimony and receiving exhibits for twenty-four days, on May 5, 2000, the district court denied the United States' request for an injunction requiring the MWRA to install filtration. *United States v. MWRA*, 97 155, 187-89 (D. Mass. 2000) (*MWRA II*), Add. at 40-42. The district court entered final judgment on all remaining claims on June 2, 2000, Add. at 43, and the United States filed its Notice of Appeal on July 3, 2000. A at 1936.

B. Statutory and Regulatory Background

1. The Safe Drinking Water Act.

The Safe Drinking Water Act, 40 U.S.C. 300f, *et seq*., was enacted in 1974 with the general purpose of "assur[ing] that water supply systems serving the public meet 'minimum *national standards* for the protection of public health.'" *Mattoon v. City of Pittsfield*, 980 F.2d 1, 4 (1st Cir. 1992) (emphasis in the original), *quoting City of Evansville, Ind. v. Kentucky Liquid Recycling*, 604 F.2d 1008, 1016 n. 25 (7th Cir. 1979), *cert*. *denied*, 444 U.S. 1025 (1980). The SDWA authorizes the EPA to promulgate two basic types of standards to protect the quality of drinking water: maximum contaminant levels ("MCLs") and treatment techniques. 42 U.S.C. 300f(1)(C), 300g-1(a), 300g-1(b)(7)(A). MCLs are numerical standards that specify the maximum concentration of a contaminant

permissible in water delivered to consumers. "Public water systems are generally free to meet MCLs using any technology they desire." Novick, *Law of Environmental Protection*, 16.03[1][a] (1998); *see also* 42 U.S.C. 300g-1(b)(4)(E)(i). Treatment techniques, on the other hand, consist of engineering or design requirements, and public water systems comply with these regulations by installing the requisite treatment technique. Novick, *supra.* The EPA is authorized to promulgate treatment techniques if the Agency finds that it is not technologically or economically feasible to determine an MCL for a contaminant in drinking water that will ensure adequate public health protection. 42 U.S.C. 300g-1(7)(A).

In 1986 Congress amended the SDWA and directed EPA to promulgate "criteria under which filtration * * * is *required* as a treatment technique for public water systems supplied by surface water sources." 42 U.S.C. 300g-1(b)(7)(C)(i) (emphasis added). The Senate Report accompanying the bill that Congress enacted explained:

> The problem of viral and bacterial contamination of drinking water is addressed in the [SDWA] by the requirement that EPA issue criteria specifying those systems which must filter their surface water supplies and promulgate regulations requiring disinfection of all public water systems * * *.
> * * *
>
> Filtration and disinfection techniques have been widely proven to be effective in removing bacterial and some viral contaminants from water. The [SDWA] 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. 56, 99th Cong., 2d Sess. 2, 7, *reprinted in* 1986 U.S. Code Cong. & Ad. News 1566, 1567, 1572.

Congress also specified in the 1986 amendments to the SDWA a timetable for compliance with the filtration requirement. It gave state regulatory agencies 30 months after EPA's promulgation of federal regulations to make determinations regarding which systems are required to filter. Public water systems determined to require filtration had to install it within 18 months of the determination. 42 U.S.C. 300g-1(b)(7)(C)(ii), (iii). Based on this timetable, since the SWTR was promulgated on June 29, 1989, filtration determinations were to be made by December 30, 1991, and systems found to require filtration were to install it by June 29, 1993. *See* A. 1669-70; 40 C.F.R. 141.71 (introductory paragraph), 141.73 (introductory paragraph). Except for a limited statutory exception enacted in 1996 (42 U.S.C. 1412(b)(7)(C)(v)) and not applicable to the MWRA, Congress made no provision for exceptions once filtration has been required.

2. The Surface Water Treatment Rule.

The EPA promulgated the final SWTR on June 29, 1989. A. at 1646, codified at 40 C.F.R. Part 141, Subpart H. Its purpose is to protect the public against adverse health effects by requiring filtration and disinfection treatment of

drinking water to remove and inactivate microbiological pathogens. A. at 1647. In promulgating the SWTR, the EPA found that it is not technologically or economically feasible to measure the levels of these contaminants in drinking water to provide adequate assurance of the safety of drinking water, and therefore that a treatment technique regulation, rather than a MCL, was appropriate. *See* A. at 1654.

The microbial contaminants addressed by the SWTR about which Congress was concerned present significant health risks. One such pathogen is *Giardia*, a protozoan that is a human intestinal parasite and is the cause of giardiasis, a disease with symptoms ranging from mild to extremely debilitating. A. at 1625. A certain percentage of the exposed population will become chronically infected from *Giardia* and can be sick for as long as four to six months. A. 1625. Waterborne enteric viruses and bacteria can also make consumers ill in a variety of ways. *Id*.

Another dangerous microorganism is *Cryptosporidium*, which was emerging as a pathogen of concern around the time the SWTR was being issued. A. at 1648. Studies have shown that ingestion of relatively few *Cryptosporidium* oocysts can cause the illness cryptosporidiosis, which can result in death in some cases. *MWRA II*, Add. at 15; A. at 1625. There is no medication that can cure cryptosporidiosis, and a victim must rely on his or her own immune system to fight the disease. Thus, victims with weak immune systems are particularly at

risk. *Id*. In adopting the SWTR, EPA found that filtration treatment would provide additional protection against this pathogen, which is particularly resistant to disinfection. A. at 1648.

The problem of regulating pathogenic microorganisms in drinking water is made even more complicated by the limited ability of public health officials to detect waterborne illness in the public. Due to these limitations, it is believed that the official reports by the Centers for Disease Control ("CDC") unavoidably understate the actual number of waterborne disease outbreaks in the United States. A. at 1625. *See also* A. at 1654. "Outbreaks" in this context refer to cases in which a significant percentage of a population becomes sick at one time. *Id*. It is even more difficult to detect levels of waterborne illness below the outbreak level (i.e., "endemic" illness). *See* A. at 1625. Thus, EPA concluded that the absence of documented waterborne illness in a community does not prove that adequate water treatment is in place, and this also contributed to EPA's design of the treatment technique requirements of the SWTR. *See* A. at 1654.

For drinking water systems that use surface water sources, the SWTR establishes three basic treatment requirements. First, all systems covered by the Rule must provide treatment capable of removing or inactivating at least 99.9 percent of the *Giardia lamblia* and 99.99 percent of the viruses that may be in the water. 40 C.F.R. 141.70(a)(1) and (2). Second, all surface water systems must provide disinfection treatment. 40 C.F.R. 141.72(a), (b). Third, drinking water

systems using surface water sources must provide filtration treatment by June 29, 1993, subject to a narrow exception for those systems which could demonstrate by December 30, 1991, that they met all of the avoidance criteria set forth in 40 C.F.R. 141.71(a) and (b), and then continued to meet them thereafter. See 40 C.F.R. 141.71 (introductory paragraph), 141.71(c), and 141.73 (introductory paragraph); A. at 1664. The combination of disinfection and filtration is considered to be the optimal technology for most source waters because, among other reasons, of the benefits of providing "multiple barriers" of treatment. A. at 1664.

The SWTR is self-implementing in that, even if the absence of a filtration determination by the responsible regulatory agency, the Rule required a system to install filtration by June 29, 1993, unless the system met all of the filtration avoidance criteria by December 30, 1991. *MWRA I*, Add. at 3. Furthermore, public water systems that met the criteria by December 30, 1991, but later failed to meet one or more of the criteria, were similarly given 18 months from the date of the failure to provide filtration. *Id*.; 40 C.F.R. 141.71 (introductory paragraph), 141.71(c)(1), 141.73 (introductory paragraph); *see also* A. at 1659, 1169-70. There is no provision allowing a public water system to reopen a filtration determination already made, or to avoid filtration after the system has failed one or more of the criteria. *MWRA I*, Add. at 3. Accordingly, once the filtration requirement is triggered under the Rule, filtration must be installed

along with disinfection. And as noted earlier, filtration can also be required by a determination by a regulatory agency that filtration is necessary.

3. Implementation and Enforcement Authority under the SDWA.

The SDWA provides that States whose regulations have been approved by the EPA as being no less stringent than the federal regulations shall have "primary enforcement responsibility" for public water systems within the State. 42 U.S.C. 300g-2. The EPA granted primary enforcement responsibility for the SWTR to the Massachusetts Department of Environmental Protection ("DEP") in 1993. *See* 58 Fed. Reg. 34,583 (June 28, 1993). This grant of primary enforcement authority does not, however, bar EPA from bringing its own enforcement action under the SDWA. Specifically, the SDWA authorizes the EPA to commence a civil action to enforce the requirements of the Act "if, beyond the thirtieth day after" the EPA has given notice of a violation to the State and the defendant, "the State has not commenced appropriate enforcement action." 42 U.S.C. 300g-3(a)(1)(B).

The DEP's drinking water regulations, like the federal SWTR, provide that the filtration requirement is triggered by either a State filtration determination or a failure of the system to meet one or more of the filtration avoidance criteria by or after the 1991 regulatory deadline. 310 CMR 22.20A(2), introductory

paragraph. *See also* 310 CMR 22.20A(4), introductory paragraph. Moreover, the DEP regulations at 310 CMR 22.20A(7) explicitly provide that once the DEP makes a determination after a public hearing that filtration is required, the determination "will not be subject to further review * * *." 310 CMR 22.20A(7)(d). *See MWRA I*, Add. at 4.

II. STATEMENT OF FACTS

A. The MWRA Drinking Water System.

Since the MWRA's establishment in 1984, it has owned and operated the public water system that serves the metropolitan Boston area. This water system supplies water to at least 40 local municipal water systems and serves approximately two million people. The MWRA is responsible for providing the treatment required to comply with federal and state laws governing drinking water. *MWRA II*, Add. at 14.

The water supplied by the MWRA comes from the Wachusett Reservoir, located in the Towns of Boylston, West Boylston, Sterling, and Clinton, Massachusetts. *MWRA II*, Add. at 13. The Wachusett Reservoir is a surface water open to the atmosphere and subject to surface runoff. Therefore, it is subject to the SWTR. The Wachusett watershed contains several town centers, with typically dense commercial and residential development, and a growing population. *MWRA II*, Add. at 23 n. 46. Water quality sampling has established that microbiological contaminants, including fecal and total coliform bacteria,

Giardia lamblia, viruses, and *Cryptosporidium* are present in the Wachusett Reservoir, its tributaries, and its watershed. A. at 231, 1711, 1890; *MWRA II*, Add. at 17 n. 25.

The MWRA withdraws water from the Wachusett Reservoir at its Cosgrove Intake, located at the eastern edge of the reservoir, and sends it east through MWRA aqueducts or tunnels, including the Hultman Aqueduct, to the Norumbega Reservoir, an open storage reservoir located in Weston. *MWRA II*, Add. at 21. From the Norumbega Reservoir, the MWRA transfers the water farther east through MWRA aqueducts, tunnels, and pipes to local distribution systems in the metropolitan Boston region. *Id*. Currently, the Wachusett water is treated with chlorine at an interim treatment facility at the Cosgrove Intake, and again with chlorine and ammonia as it leaves the Norumbega Reservoir. *MWRA II*, Add. at 22. The MWRA has never provided filtration treatment for the water from the Wachusett Reservoir.

B. The MWRA's Failure to Comply with the SWTR.

Following promulgation of the SWTR in 1989, the MWRA concluded it could not satisfy the avoidance criteria, and on January 31, 1991, the MWRA notified the DEP that it would not be seeking to avoid the filtration requirement. *MWRA I*, Add. at 5. In January 1992, the DEP issued a determination that the MWRA was required to provide filtration for the Wachusett water supply system under the SDWA and federal regulations, as well as pursuant to state law and

regulations. *Id*. After a public hearing, on November 18, 1992, the EPA and the DEP jointly reaffirmed the earlier DEP determination that filtration was required. A. at 176-77.

Accordingly, the MWRA and the DEP began negotiating a proposed state administrative order requiring design and construction of filtration and disinfection facilities in compliance with state regulations. As part of these negotiations, the MWRA requested that a "reopener" be included in the state order that would allow the MWRA at a later date to seek state approval to avoid filtration. *MWRA I*, Add. at 5. EPA warned the MWRA and the DEP that such a reopener was not permissible under the SWTR. A. at 178-79; A. at 75-76.

During the negotiations, the MWRA completed its pilot plant testing program, and in May 1993 it submitted to the DEP a report recommending a treatment process that consisted of dissolved air flotation ("DAF"), filtration, and disinfection with ozone. *Id*. ¶ 52. The DEP approved the MWRA's recommendation on August 23, 1993. A. at 178.

In the meantime, on June 11, 1993, the DEP, the MWRA, and the MDC executed the DEP Administrative Consent Order (the "1993 ACO"). *MWRA I*, Add. at 5. The 1993 ACO created what became known as the "dual track" approach under which the MWRA was required to complete the design of the filtration plant by April 29, 1998, while holding out the possibility that if the MWRA met certain conditions by August 3, 1998, the DEP might not require

filtration to be installed. *Id.* These conditions included satisfaction by the MWRA of all filtration avoidance criteria. If these conditions were not met, then under the schedule attached to the 1993 ACO, construction of filtration and other treatment facilities for the Wachusett water supply had to be completed by December 31, 2001. *Id*. EPA was not a party to the 1993 ACO, and paragraph 45 of that document stated that "[n]othing in this Consent Order shall be construed to create or affect the rights of persons or entities who are not parties hereto." A. at 346.

EPA did not endorse that part of the 1993 ACO which purported to allow the MWRA to seek a waiver of its obligation to install filtration. For example, on June 3, 1993, EPA wrote to the DEP and the MWRA concerning the 1993 ACO. In this letter, EPA Region I stated that it had been preparing a federal enforcement action against the MWRA for its failure to comply with the SWTR, but that in light of the 1993 ACO, "the Region plans to put its federal enforcement action on hold." A. at 75. However, EPA Region I also made it clear that EPA was not agreeing that if the MWRA fully complied with the terms of the 1993 ACO by 1998, it could avoid installing filtration:

> we note that the EPA is not a party to the proposed Consent Order and will not be subject to its terms. The proposed Consent Order is being entered under State law. * * * The EPA reserves its rights to seek a court schedule or to take other federal enforcement action.

A. at 75-76.

In addition to this letter, EPA Region I warned MWRA on numerous occasions that EPA Headquarters held the opinion that the reopener provision was invalid under the SWTR, and thus even if all of the conditions of the 1993 ACO were met, EPA might still bring an enforcement action to require installation of filtration. A. at 419.

Regional Administrator John DeVillars expressed a similar uncertainty concerning whether, regardless of if the terms of the 1993 ACO were met, the MWRA could avoid its obligation to install filtration. In a May 5, 1995 letter, DeVillars responded to letter from Deborah D. Cary, Chair of the Wachusett and Sudbury Watershed Advisory Committee, who had written DeVillars asking whether, if sewers were installed in towns in the watershed, filtration would be required. DeVillars responded that while filtration would certainly be required if the sewers were not built, "I can give no guarantee the other way." A. 354.

Although not a party to the 1993 ACO, EPA did monitor the MWRA's performance of the obligations of that agreement. On November 14, 1996, EPA Regional Administrator John DeVillars wrote the MDC, the MWRA and the Executive Office of Environmental Affairs. A. 356. In this letter, DeVillars recognized that progress had been made by the MWRA and MDC in various projects to improve the quality of the MWRA's water. DeVillars also stated that it was possible that the MWRA might be able to avoid installing filtration. A. 358, 362. However, DeVillars concluded that "to avoid filtration, more needs to

be done." A. 362.

Regional Administrator DeVillars subsequently expressed growing dissatisfaction with MWRA's efforts to correct its noncompliance with the SDWA in letters dated January 8, 1997 and May 15, 1997, to the DEP, copies of which were sent to the MWRA and the MDC. A. at 105, 109. By the time of these letters, the MWRA had admitted that it would be unable to meet the ACO's deadlines for completing design and (if necessary) construction of the filtration plant. In the January 8th letter, DeVillars criticized the MWRA for its inability to meet deadlines in the 1993 ACO. *MWRA II*, Add. at 31. In the May 15th letter, DeVillars pointed out that the MWRA had failed to either meet the avoidance criteria of the SWTR by December 1991 or install filtration by June 29, 1993, as required by the Act. *Id*.; A. at 109.

On October 1, 1997, the MWRA and MDC jointly submitted a "Request for Review and Revision of DEP Determination that Filtration is Required for Wachusett Reservoir Pursuant to Paragraph 25 of Consent Order DEP File No. 92-513" ("Request for Revision"). *MWRA I*, Add. at 6. The request asked the DEP to reverse its decision that filtration was required and to allow the MWRA to cease further design work on the filtration facilities upon completion of 60 percent of the design. A. at 126; A. at 186-87.

On December 9, 1997, Regional Administrator DeVillars responded to the MWRA's proposal in a letter to the DEP, the MWRA, and the MDC in which he

stated that EPA had requested the Department of Justice to file an enforcement action against the MWRA that would seek, *inter alia*, "filtration * * * [and] measures to enhance protection of the Wachusett reservoirs * * * according to a clear, binding and expeditious schedule." A. at 126. DeVillars stated that the MWRA had not met the "avoidance criteria in 1991, has not met them to this day, and will not meet them by next summer, either." A. at 127; *MWRA II*, Add. at 32.

On December 12, 1997, the DEP issued a letter responding to the MWRA/MDC Request for Revision. *MWRA II*, Add. at 32. In this letter, the DEP found that the MWRA and MDC had not met all of the avoidance criteria. *Id*. Nevertheless, the DEP agreed that the MWRA could stop further design of the filtration facilities indefinitely and stated that the MWRA would be allowed another opportunity to seek state approval to avoid filtration by submitting further materials by October 31, 1998 -- three months later than the deadline in the ACO for seeking approval from the state to avoid installing filtration. *Id*.

Accordingly, on October 30, 1998, the MWRA submitted its second request to the DEP that it not be required to install filtration facilities, but instead be allowed to implement an alternative treatment proposal that utilizes ozone and chloramine disinfection without filtration (often referred to as the "ozone-only" proposal). A. at 188-89. On November 13, 1998, the DEP issued a determination approving the MWRA's request, and for the first time excusing the

MWRA under state law from filtering its water. *MWRA II*, Add. at 32.

C. The District Court's Summary Judgment Decision.

Meanwhile, on February 12, 1998, the United States filed its complaint in this action. After limited discovery, the United States moved for summary judgment, seeking an order (1) finding that the MWRA was in violation of the filtration requirement of the SWTR and the SDWA, and (2) requiring it to install filtration. In its motion, the United States explained that the violation of the SWTR and SDWA was not the MWRA's failure to meet the avoidance criteria, but rather the failure to provide filtration no later than 18 months after avoidance criteria were exceeded.

In support of its motion, the United States relied on water quality samples taken by the MWRA and other incontrovertible facts that established the MWRA's failure to meet one or more of the avoidance criteria at 40 C.F.R. 141.71 by the regulatory deadline of December 30, 1991, and on multiple occasions since then. The MWRA's own data showed that it had failed to meet the source water fecal coliform criterion at 40 C.F.R. 141.71(a)(1) and the disinfection contact time criterion at 40 C.F.R. 141.71(b)(1)(i) as of December 30, 1991. Additionally, the MWRA had failed to meet the source water fecal coliform criterion, the disinfection contact time criterion, and the distribution system total coliform criterion at 40 C.F.R. 141.71(b)(5) on numerous occasions thereafter. A. at 190-91, 194-95, 203, 208-09, 213-15. Accordingly, the United States argued that the

SDWA and the SWTR had required the MWRA to provide filtration since June 29, 1993 (18 months after the December 31, 1991, regulatory deadline), and that the MWRA should therefore be ordered to comply with the Act and the Rule.

In ruling on the United States' motion for summary judgment, the district court stated that it was "undisputed" that the MWRA had not met the avoidance criteria as of December 30, 1991. *MWRA I*, Add. at 6 & n.12. The court also stated that it was "undisputed that MWRA periodically failed to meet one or more of the avoidance criteria between January 1992 and July 1998." *Id*. Finally, the court found that even after the November 13, 1998, determination by the Massachusetts DEP that purported to relieve the MWRA of the obligation to install filtration, the MWRA failed to meet the source water fecal coliform avoidance criterion in January 1999. *MWRA I*, Add. at 6-7; A. at 455-59.[3]

Addressing the United States' argument that the failures to satisfy the SWTR's avoidance criteria obligated the MWRA to install filtration, the district court recognized that "this is a fair reading of the SWTR * * *." *MWRA I*, Add.

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3 Because of the January 1999 criterion failure, the district court did not need to resolve arguments made by the MWRA that because of the amended state ACO and other events, the date by which it had to establish compliance with the avoidance criteria was October 31, 1998, as stated in the amended ACO, instead of the date established by the regulation of December 30, 1991. *MWRA I*, Add. at 6. Even if this argument were correct (and the United States contends that it is not), the January 1999 criterion failure meant that the MWRA had triggered the filtration requirement regardless of the effect of the 1993 ACO, and should have been required to install filtration eighteen months after the failure to meet the avoidance criterion. *Id*.

at 7. Nevertheless, the district court concluded that despite the language of the SWTR mandating filtration where an avoidance criterion was not met, the court retained the power to relieve the MWRA of its obligation to install filtration. Specifically, the court asserted that under the judicial enforcement provision of the SDWA, 42 U.S.C. 300g-3(b), it retained equitable discretion to fashion the most appropriate remedy, and that such a remedy might not include filtration. The district court held that this provision showed no congressional intent to override a district court's traditional equitable discretion. *Id*. Accordingly, the court concluded that before an injunction could issue, a trial was necessary to determine the "narrow" issue of whether "the MWRA's alternative strategy of ozonation, chlorination, and pipe replacement [will] better serve Congress's objective of providing 'maximum feasible protection of the public health' than will EPA's insistence on filtration?" *MWRA I*, Add. at 7A.

D. The Trial.

1. The Evidence Presented at Trial.

The district court received testimony and evidence for twenty-four days between December 1999 - February 2000. The testimony was lengthy and often complex: twenty-three witnesses, almost all of whom were experts, testified, and the court entered 524 exhibits into evidence.

At trial, the United States presented evidence to establish that in order to provide the maximum feasible protection of public health, the MWRA would have

to install a filtration system, in addition to the ozone and chloramine4 disinfection proposed by the MWRA, as part of its water treatment process. For its part, the MWRA attempted to show that its alternative proposal for a treatment system that relies on ozone for primary disinfection, with chloramination for secondary disinfection, would be adequate to protect public health.

The evidence presented by the United States established that a filtration plant that incorporates dissolved air floatation (DAF),5 when combined with ozone disinfection, as contemplated in the MWRA's original design proposal for its filtration system ("filtration option"), would remove, at minimum, an additional 2 logs (100 times) of particulate contaminants such as *Cryptosporidium* oocysts over and above the disinfection inactivation rate that the MWRA claimed could be achieved by its non-filtration ozone alternative.6 *MWRA II*, Add. at 41.

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4 Chloramine is a commonly used disinfectant that combines chlorine and ammonia.

5 DAF is an alternative to typical sedimentation processes used to augment the filtration process and involves the introduction of dissolved air into the water. The particulate matter in the water sticks to the air bubbles, and they float to the surface where they are removed.

Although DAF treatment is not required by the SWTR, the United States has sought the installation of DAF treatment in this case because it was recommended by the MWRA and approved by the DEP after years of pilot studies, and was included as part of the filtration alternative designed by the MWRA. An injunction that did not include DAF as part of the filtration alternative would entail years of further delay while new pilot studies and design efforts were conducted.

6 *Cryptosporidium* inactivation or removal is often used as an indicator of

Evidence was also offered to show that the filtration option provides better, more reliable treatment against the protozoan pathogen *Giardia*. *See* Trial Exhibit 127, p. C-4. In addition, evidence was presented to establish that the filtration option would require the use of smaller amounts of disinfectant, thereby reducing unwanted DBPs in the water, and would result in better water aesthetics. *MWRA II*, Add. at 34, 41. Finally, there was evidence presented to show that, insofar as the filtration option incorporates more contaminant "barriers" than the ozone-only non-filtration alternative (i.e., disinfection plus physical removal through DAF and filtration), it provides redundancy in the event of the failure of one barrier as well as greater contaminant removal and inactivation. *MWRA II*, 97 F. Supp. 2d at 33.

While acknowledging that ozone is a good disinfectant and is more effective than chlorine and some other disinfectants, the United States also presented evidence to establish that, in addition to being less effective than disinfection plus filtration, ozone treatment without the use of filtration can actually increase levels of bacteria and other microbes in water systems under some conditions. Ozone reacts with natural organic matter in water by breaking down large organic molecules and converting them into smaller, lower molecular weight organic molecules that act as 'food' that can support and stimulate the regrowth of bacteria and other microorganisms within distribution system pipes. *MWRA II*,

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treatment efficacy because of its particular resistance to disinfectants and the potential gravity of the illness it causes, as discussed earlier in this brief.

Add. at 33. Ozonation without filtration could therefore result in a potentially unacceptable level of bacterial regrowth in the MWRA distribution system. *MWRA II*, Add. at 33, 41.

The MWRA, on the other hand, presented evidence in support of its claim that the ozone-only alternative was capable of achieving at least a 2 log inactivation of *Cryptosporidium*, the stated minimum requirement for filtered systems set forth in an addition to the SWTR that will take effect in 2001,[7] using estimates based on animal infectivity studies. *MWRA II*, Add. at 35. The MWRA also offered evidence intended to establish that although the ozone-only alternative may not remove or inactivate as many pathogens or other contaminants as would the filtration option, the risk of illness from water treated with ozone and chloramine only was within what it characterized as 'acceptable' limits. *MWRA II*, Add. at 38-40. In addition, evidence was presented by the MWRA that suggested that there was minimal risk of bacterial or microbial regrowth from the ozone-only option. *MWRA II*, Add. at 37-39.

2. The District Court's Decision.

As complex and lengthy as the trial was, the court's factual findings and

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[7] An augmentation to SWTR, known as the Interim Enhanced Surface Water Treatment Rule, or IESWTR, does not change the filtration requirement for systems that did not meet the avoidance criteria by December 30, 1991, or any time thereafter.

legal conclusions relevant to the United States' appeal can be briefly summarized. Despite efforts by the MWRA to persuade the court that it had not failed the fecal coliform avoidance criterion in January 1999, the district court confirmed the ruling it had made on the summary judgment motion that the MWRA had exceeded this criterion. *MWRA II*, Add. at 28-29.

Turning to the issue of whether the proposed filtration plant was superior to an ozone-only treatment system, the court concluded:

> Ozonation plus DAF/filtration is a superior technology, offering greater protection against excessive levels of regrowth, a minimum of a two log increase in the capacity of the treatment plant to inactivate *Cyptosporidium*, and better water aesthetics.

MWRA II, Add. at 41. The court also found that "ozonation [without filtration] has the potential of stimulating an unacceptable level of regrowth in the MWRA system." *Id*. Furthermore, the court found that "[a]n advantage of DAF/Filtration stems from its * * * 'multiple barrier approach.'" *MWRA II*, Add. at 33.

Nevertheless, the court declined to order MWRA to install filtration treatment, stating that "[t]he case for DAF/filtration of MWRA water, while ably presented, has not been made, either from a cost-benefit perspective, or independently, as a matter of scientific necessity." *MWRA II*, Add. at 42.[8]

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[8] We note that a number of statutes prohibit an agency from considering costs in issuing regulations. *See, e.g. American Trucking Association v. U.S. EPA*, 175 F.3d 1027, 1040 (D.C. Cir. 1999). This case was recently argued in the Supreme

Among the reasons that the court reached this decision were its belief that (1) replacement of corroded pipe, flushing of pipes, and corrosion control would be more effective than filtration in combating regrowth; (2) the costs of installing filtration would have a significant impact on the MWRA's program of assisting communities with pipe replacement; and (3) the risk posed to the public by an ozone-only system "is within acceptable levels." *Id*. The court concluded that

> The "ozone-only" option favored by the MWRA is a sound alternative to DAF/filtration when competing demands for limited resources and the level of risk from all potential threats to the safety of MWRA water are considered.

MWRA II, Add. at 42.[9] As a result, the court denied the United States' request for an injunction to compel the MWRA to install filtration treatment, and later entered final judgment for the MWRA and the MDC.

SUMMARY OF ARGUMENT

To protect human health, Congress directed the EPA, in the Safe Drinking Water Act, to establish "criteria under which filtration * * * is required as a

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Court as *American Trucking Association v. Browner*, No. 99-1927.

[9] The United States strongly believes that there is no adequate basis for many of the district court's findings of fact, particularly those relating to the significance and meaning of various water quality data and the risk factors associated with the Wachusett Reservoir water and its watershed. However, the United States has chosen not to appeal the district court's findings of fact because they are not

treatment technique for public water systems supplied by surface water sources." 42 U.S.C. 300g-1(b)(7)(C)(i). EPA promulgated the criteria in the Surface Water Treatment Rule ("SWTR"), which requires a drinking water system to install filtration if it fails one of the regulatory avoidance criteria by or after December 31, 1991. The district ruled on the summary judgment and again at trial that the MWRA had failed to meet at least one of the avoidance criteria. Therefore, the SDWA and the SWTR required the district court to order the MWRA to install filtration.

Nevertheless, the district court held that it had the equitable power to allow the MWRA to permanently violate the SWTR and the SDWA by not filtering its water, and it refused to compel the MWRA to install filtration. This holding is inconsistent with the SDWA and goes well beyond established law on the scope of the equitable discretion of a federal district court. While that case law allows a court considerable discretion to determine the time by which a violator must comply with the law, or in fashioning a remedy where the remedy has not already been established by statute or regulation, it does not allow a court to permit a party to remain in violation of statutes or regulations indefinitely where the party has no intention of ever bringing itself into compliance. Where the requirements of a statute or a regulation will not be met absent court intervention, a district court must issue an injunction requiring compliance.

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determinative of this appeal.

In substance, the trial conducted by the district court amounted to a reexamination of the wisdom of the SWTR, long after EPA had promulgated the regulation and the time for challenging it had passed, thus effectively ignoring the judicial review provision for SDWA regulations contained in 42 U.S.C. 300j-7. As such, the trial was an usurpation of the role Congress vested in EPA as the agency best suited to determine the appropriate drinking water standards to protect human health. If other courts follow the holding of the district court here, a host of regulations could be attacked in enforcement proceedings on the basis of cost-effectiveness or public health necessity, even though the executive branch had already considered those issues in promulgating the regulations at issue, and Congress has established time limits on challenges to the regulations. This, in turn, could lead to almost endless challenges to regulations designed to protect public health and safety after the rulemaking process has been completed and would deprive the public of its right to the level of protection specified by Congress or the EPA in duly adopted regulations.

On the relevant facts as found by the district court, it should have ordered the MWRA to install filtration.

ARGUMENT

The MWRA's Failure to Satisfy the Avoidance Criteria Mandated that the District Court Order the Installation of Filtration.

A. Standard of Review.

Errors of law in a bench trial are reviewed *de novo*. *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 152 (1st Cir. 1990).

B. The SDWA and the SWTR Required the District Court to Issue an Order Compelling the MWRA to Install Filtration Based on MWRA's Failure to Meet the Avoidance Criteria.

The language of the SWTR states that any failure of the avoidance criteria requires a public water system to install filtration:

> A public water system that uses a surface water source or a ground water source under the direct influence of surface water, and does not meet all of the criteria in § 141.71 (a) and (b) for avoiding filtration, *must provide treatment consisting of both disinfection, as specified in § 141.72(b), and filtration treatment* which complies with the requirements of paragraph (a), (b), (c), (d), or (e) of this section by June 29, 1993, or within 18 months of the failure to meet any one of the criteria for avoiding filtration in § 141.71 (a) and (b), whichever is later.

40 C.F.R. 141.73 (emphasis added). As we show below, the MWRA failed various avoidance criteria on numerous occasions before and after December 30, 1991. As a result, it is required by the SDWA and the SWTR to install filtration treatment.

1. The MWRA Failed the Avoidance Criteria of the SWTR.

In ruling on the United States' summary judgment motion, the district court found that the MWRA had admitted that it had exceeded the fecal coliform avoidance criterion in January 1999. *MWRA I*, Add. at 5. At trial, the MWRA sought to recant its admission. *MWRA II*, Add. at 28. In substance, the MWRA argued that the test method it used was more accurate than a particular EPA-approved method, that the other EPA-approved method would likely not have detected an exceedance of the criterion standard, and that it should therefore not be charged with a failure of the fecal coliform avoidance criterion. *Id.*

In its "Ultimate Conclusions of Fact and Law," the district court held that the MWRA's reliance on a more sensitive testing method "was a fact of no legal significance." *MWRA II*, Add. at 42. Moreover, the district court also stated the MWRA waived this argument by not raising it in its opposition to the Government's motion for summary judgment. *MWRA II*, Add. at 29. Additionally, the court noted that even if MWRA were correct, then it would have failed another avoidance criterion as well:

> if fecal coliform concentrations are disregarded, the avoidance criterion defaults to a total coliform count which is not permitted to exceed 100 cfu per 100 ml. 40 C.F.R. § 141.71(a). That Wachusett water failed this standard several times between 1997 and 1999 * * * is not disputed by the MWRA.

MWRA II, Add. at 29.

While finding that the MWRA failed to meet the avoidance criterion in

January 1999, the district court did not address MWRA's other avoidance criteria failures. Although the failure to meet only one avoidance criterion is sufficient to require filtration to be installed, the district court erred in not considering the other avoidance criteria failures. Those included the source water fecal coliform avoidance criterion (40 C.F.R.141.71(a)(1)); the distribution system total coliform avoidance criterion (40 C.F.R.141.71(b)(5)); the disinfection contact time avoidance criterion (40 C.F.R. 141.71(b)(1)(i)); the disinfection redundancy avoidance criterion (40 C.F.R. 141.71(b)(1)(ii), 141.72(a)(2)); the watershed protection criterion (40 C.F.R. 141.71(b)(2)); and the avoidance criterion at 40 C.F.R. 141.71(b)(3), which requires that the public water system must undergo an annual on-site inspection of its watershed control program and disinfection treatment processes by State or State-designated sanitary engineers or other similar individuals. A. at 59, 190-91, 194-95, 203, 208-09, 213-15.

The district court concluded that past failures to meet the avoidance criteria had occurred at least through July 1998, but did not rely on them in either ruling on summary judgment motion or on the United States' request for an injunction at trial, apparently finding that the January 1999 failure was sufficient. *See MWRA I*, Add. at 6 n. 12 ("The dispute [over the magnitude of MWRA's past failures] is immaterial given the MWRA's concession that subsequent to the DEP's 1998 filtration avoidance determination, it fell out of compliance, albeit marginally, with the fecal coliform criterion.").

While the district court was correct that a single failure to meet the avoidance criteria triggers the application of the SWTR, the district court's reason for not considering the other avoidance criteria failures in ruling on the United States' summary judgment motion is unclear. The court did state that in its view, the November 1998 determination by the DEP that the MWRA had met the avoidance criteria "might have been conclusive of the litigation * * *" but for the January 1999 fecal coliform avoidance criterion exceedance. *MWRA I*, Add. at 6.

However, the proposition that the DEP's November 1998 determination could have been conclusive of the litigation is incorrect, and the court's basis for suggesting it is also unclear. The SWTR requires a system that has failed to meet one or more of the avoidance criteria to install filtration; neither the Rule nor the DEP's own rule allows for a second chance to correct past failures, and thus the DEP did not have the ability to excuse past failures. *MWRA I*, Add. at 3-4. Additionally, the 1998 determination by the DEP that the MWRA need not install filtration was not binding on the United States. Under 42 U.S.C. 300g-3(a), if EPA gives thirty days notice to a state that has primary enforcement responsibility for public water systems that a public water system in that state is not in compliance with any requirement of the SDWA, EPA can bring its own enforcement action if, after the expiration of the thirty day notice period, the state "has not commenced appropriate enforcement action * * *." Once the thirty day

period has elapsed, and the federal action has been filed, subsequent state action will not divest the United States of its power to maintain its enforcement action. *See United States v. City of North Adams*, 777 F. Supp. 61, 69-70 (D. Mass. 1991) (in SDWA enforcement action, United States retained right to maintain enforcement action where state failed to file its own enforcement action within thirty day notice period, despite later state settlement with defendant).

Here, the United States filed its enforcement action on February 12, 1998, well before the November 13, 1998, DEP determination that the MWRA had met the avoidance criteria and would not be required to install filtration. Thus, that determination could not prevent the United States from continuing its previously filed enforcement action that was based on criteria failures that predated the January 1999 failure. Accordingly, the court should have considered the prior failures in ruling on the motion for summary judgment and on the request for an injunction at trial.

Of course, the one avoidance criterion failure found by the district court is sufficient under the SWTR to require the MWRA to install filtration. The point of the other criteria failures is that they show the MWRA actually should have installed filtration years earlier.

2. The District Court Erred in Ignoring the Mandate of the Statute and the Regulation to Require Filtration.

Despite finding that the MWRA had failed at least one of the filtration

avoidance criteria, the district court erroneously concluded that it could ignore the plain language of the SWTR and the SDWA based on two miscalculations of law. First, the court misread language in the judicial enforcement provision of the SDWA that refers to the role of public health considerations in determining the appropriate remedy for violations of the SDWA. 42 U.S.C. 300g-3(b), quoted at *MWRA I*, Add. at 7. Second, the district court misapplied *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982), construing the Supreme Court's discussion of the scope of a court's equitable discretion to issue an injunction as allowing it to permit the MWRA to refuse to ever comply with the Act and the Rule. *MWRA II*, Add. at 7.

First, the district court has misconstrued the language of 42 U.S.C. 300g-3(b). This enforcement provision authorizes EPA to file a civil action in district court "to require compliance with any applicable requirement [under the SDWA]," but later adds that the court may enter "such judgment as protection of public health may require, taking into consideration the time necessary to comply and the availability of alternative water supplies * * *." The district court relied on the latter language in ruling that Congress had not intended to limit the court's equitable discretion in fashioning a remedy under the SDWA. *MWRA I*, Add. at 7. This provision does give a district court considerable discretion to determine the *time* by which a violator must comply with a statute or regulation, and it also allows the court to specify interim measures to protect human health during the

time it takes for the defendant to bring itself into compliance with the Act. However, this provision does not grant a district court the authority to allow statutory or regulatory violation to continue indefinitely. Indeed, the language of Section 300g-3(b) cited above highlights the ultimate statutory objective of compliance: it authorizes EPA to bring an action "to require *compliance* with any applicable requirement * * *" (emphasis added), and courts are directed in issuing injunctions to "tak[e] into consideration the time necessary to *comply* * * *." (emphasis added). As these provisions show, Section 300g-3(b) was meant to ensure compliance with the SDWA and its regulations, and not to allow, as the district court did here, a violator of the Act to continue its violations indefinitely.

The United States' understanding of Section 300g- 3(b)was confirmed by the Second Circuit in *United States v. City of New York*, 198 F.3d 360, 366 (2d Cir. 1999), another case involving the SWTR. In that case, a group sought to intervene in proceedings to enter a consent decree between the United States and the City requiring installation of filtration. The intervenors argued that filtration was not necessary, and that under Section 300g-(b), the district court had the discretion not to order filtration, essentially the same argument adopted by the district court here. The Second Circuit disagreed:

> Our conclusion is not altered by appellants' interesting, but ultimately unpersuasive argument that, since the SDWA authorizes a court to enter "such judgment as protection of public health may require," 42

> U.S.C. 300g-3(b), the district court has the power to refuse to order filtration in this action; and therefore appellants' head-on challenge to filtration is centrally relevant to the action. *We think that the equitable power vested in the district court by the SDWA is more circumscribed than intervenors propose; it is available to ensure compliance with the statute and the regulations promulgated thereunder, not to rework or reject these legislative regulatory determinations*. Indeed, the very statutory provision on which appellants rely focuses almost entirely on compliance issues. *See id.* (instructing courts to consider "the time necessary to comply" and authorizing the imposition of civil penalties where "there has been a violation of the regulation or schedule or other requirement").

emphasis added.

If the plain language of the statute were not clear enough, the legislative history of 42 U.S.C. 300g-3(b) shows that Congress intended to limit a court's equitable discretion in enforcing requirements of the SDWA. As Representative Rogers, Chairman of the House subcommittee responsible for the SDWA, stated:

> The courts may consider the time it will take for any system – making all good faith efforts – to comply and the availability of alternative sources of drinking water. But the purpose of permitting consideration of these factors is to assure that the public health will be protected to the maximum extent feasible as soon as possible, without cutting any community off from all sources of drinking water. Traditional balancing of the equities is not intended, as evidenced by the change in the language of section 1414(b) from that which was contained in the enforcement section of H.R. 1059. Nor is it necessary for the Administrator to prove that any violation of regulations has caused or is likely to cause specific adverse health effects. This is to be presumed by the court, unless the regulation is arbitrary and capricious or otherwise not in accordance with law.

Cong. Rec. 93d Congress, Vol. 120, Part 27, p. 36373 (Nov. 19, 1974)

The district court has also misunderstood the holding and applicability of

the Supreme Court's decision in *Romero-Barcelo*. This is demonstrated by a comparison of *Romero-Barcelo* with the leading Supreme Court case on the subject of the requirement of a court order to ensure compliance with a statute, *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). In *Hill*, the district court had refused to issue an injunction prohibiting the completion of the Tellico Dam even though it found that the dam would destroy the only known habitat of an endangered species of perch known as the snail darter. 437 U.S. 153-54. At that time, Section 7 of the Endangered Species Act ("ESA") barred federal agencies from taking action that would result in destruction or modification of the habitat of endangered or threatened species. 16 U.S.C. 1536 (1976 ed.).10

The district court concluded that completion of the Dam would violate Section 7 of the ESA by jeopardizing the continued existence of the snail darter and by destroying its habitat. Nevertheless, it declined to issue an injunction because the Tellico Dam had been under construction for years before the passage of the ESA, and had almost been finished when that statute became law. The Sixth Circuit subsequently reversed, holding that the broad language of the ESA required the issuance of an injunction to halt construction of the dam because

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10 This section of the ESA has since been amended, but not in such a way as to overturn the holding in *TVA v. Hill*. *See Hawksbill Sea Turtle v. Federal Emergency Management Agency*, 126 F.3d 461, 478 n. 13 (3d Cir. 1997) ("Nothing in the amendments [to the ESA] or their history suggests that Congress intended to overrule *TVA v. Hill* or to deflate its prioritization of endangered species by returning equitable discretion to the courts.").

there was no other way to comply with the statute. 437 U.S. at 173, 194-95.

Affirming the Sixth Circuit, the Supreme Court had this to say concerning a court's equitable power to temper an injunction in the interest of reasonableness even though to do so would not comply with the statute:

> Here we are urged to view the Endangered Species Act "reasonably" and hence to shape a remedy "that accords with some modicum of common sense and the public weal." [citation omitted] But is that our function? We have no expert knowledge on the subject of endangered species, much less do we have a mandate from the people to strike a balance of equities on the side of the Tellico Dam. Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as "institutionalized caution."

437 U.S. at 194. Moreover, the Court added:

> [w]hile "it is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 1 Cranch 137, 177 (1803), it is equally -- and emphatically -- the exclusive province of Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.

Id.

By contrast, in *Weinberger v. Romero-Barcelo*, the plaintiffs sought an injunction to halt immediately the Navy's discharge of ordinance into the ocean because it had not first obtained a Clean Water Act permit as required by the statute. The Supreme Court held that under that statute the district court had the

equitable discretion to refuse to order the Navy to terminate its discharges while it sought the necessary permit. 456 U.S. at 313-14, 318. The Court distinguished *Hill* by noting that "[a]n injunction [requiring immediate cessation of the unpermitted discharge] is not the only means of achieving compliance" under the Clean Water Act. 456 U.S. at 314. The Court also noted that the district court had ordered the Navy to obtain the required permit under the Clean Water Act. 456 U.S. at 305. Thus, the district court did not excuse the Navy permanently from its statutory obligations; it merely allowed the Navy to continue its operations while it achieved compliance with the Clean Water Act. The Supreme Court ruled that the district court's order, which required that compliance be attained over time, represented an exercise of judicial discretion that was consistent with the language and intent of the Clean Water Act.

As this comparison of the two cases shows, the United States' suit against the MWRA is controlled by the holding in *Hill*, and nothing in *Romero-Barcelo* supports the district court's decision to allow the MWRA not to comply with the law. In *Romero-Barcelo*, at issue was whether immediate cessation of the violation was required, to which the Court said no, if compliance was attained over time. Here, the United States does not seek immediate compliance with the Act; rather, the issue is whether the MWRA will *ever* be required to achieve compliance with the SWTR, despite its intention not to do so. The answer from the district court was that it had determined that compliance with the regulation

was not necessary. This conclusion is not supported by the holding of *Romero-Barcelo*.

Moreover, in *Romero-Barcelo* the Court distinguished *Hill* by noting that in that case "only an injunction could vindicate the objectives of the [ESA]." 465 U.S. at 313. Here Congress directed EPA to promulgate national primary drinking water regulations that specify the "criteria under which filtration * * * *is required*" as a treatment technique for public water systems supplied by surface water sources, and set a deadline for the installation of filtration plants where the standards were not met. 42 U.S.C. 300g-1(b)(7)(C)(i)-(iv)(emphasis added). EPA promulgated the criteria in the SWTR, and set the Rule's deadlines to match the deadlines in the SDWA. The Rule is clear that any system that could not meet the avoidance criteria in 1991 was required to install filtration, as was any system that met the criteria in 1991, but later failed to do so. *See* 40 C.F.R. 141.70(b), 141.71. The Rule is also clear that, having failed to meet one or more of the avoidance criteria after 1991, a system cannot comply by subsequently again meeting all of the criteria; instead, installation of filtration remains mandatory. *Id*. Thus, as in *Hill*, only an injunction requiring compliance with the Act -- which necessarily means an injunction to install filtration -- can vindicate the objectives of the statute and the regulation.

This interpretation of the scope of a court's equitable discretion is consistent with other cases that, like this case, concern an injunction needed to enforce the

requirements of a statute. In those cases, the traditional considerations applicable to private actions, such as irreparable injury and a balancing of the equities, are not controlling, and an injunction prohibiting a party from engaging in conduct that violates the provisions of the statute is the appropriate remedy when there is a likelihood that, unless enjoined, the violations will continue. For example, in *United States v. City of Painesville, Ohio*, 644 F.2d 1186 (6th Cir.), *cert. denied* 454 U.S. 894 (1981), the Sixth Circuit, citing Hill, held that the district court was required to order injunctive relief compelling compliance with the statutory requirements upon a finding of liability, once negotiations on a plan to bring the defendant into compliance had broken down:

> By enacting the Clean Air Act, Congress established a high priority for the control of air pollution. The legislature recognized that compliance would be expensive in some cases, but the choice was made to require compliance with the standards promulgated by EPA. Having made that choice, Congress did not contemplate that its decision would be thwarted by judicial reluctance to require compliance when enforcement proceedings are brought and liability is proven. Accordingly, this Court holds that the district court was required to order injunctive relief upon its finding of liability, once negotiations for a compliance plan broke down.

644 F.2d at 1194. *See* also, Commodity *Futures Trading Comm'n v. Hunt*, 591 F.2d 1211, 1220 (7th Cir.1979) ("Once a violation [of the statute] is demonstrated, the moving party need only show that there is a likelihood of future violations [to obtain an injunction]."). Here, the MWRA's violation of the SDWA -- through its failure to provide filtration as required by the SWTR -- will

continue absent an injunction requiring compliance.

Hill also addresses the district court's argument that the absence of express language in the enforcement provision of the SDWA, 42 U.S.C. 300g-3(b), limiting a court's exercise of equitable discretion means that the court had the power to deny an injunction here. In *Hill*, Justice Rehnquist noted in dissent that the provision of the ESA authorizing injunctive relief "merely provides that 'any person may commence a civil suit on his own behalf * * * to enjoin any person, including the United States and any other governmental instrumentality or agency * * * who is alleged to be in violation of any provision of this chapter.'" *Hill*, 437 U.S. at 211. He argued that the absence of specific language in this provision requiring issuance of an injunction where a species would otherwise be destroyed gave the district court the discretion not to enjoin the completion of the Tellico Dam. This argument, however, did not convince the majority that the district court could exercise equitable discretion to deny an injunction that was necessary to ensure compliance with a statutory directive. Thus, even if Section 300g-3(b) lacked the express emphasis on compliance or the legislative history noted above showing that a court's equitable discretion was to be constrained, an injunction would still be required because the SWTR makes clear that only an order to filter will bring about compliance with the requirements of the regulation and the statute.

Further evidence that Congress did not intend to allow the courts to

override EPA's regulatory determinations is found in the structure of the SDWA, which shows that when Congress intended to allow a public water system otherwise subject to the Act's filtration requirement to comply by means of any technology other than filtration, it did so explicitly. In 1996 Congress amended the SDWA to expressly allow certain systems that, unlike the MWRA, have uninhabited, undeveloped watersheds in consolidated ownership, and having control over access to, and activities in, those watersheds, despite having failed to meet the avoidance criteria, to avoid having to install filtration. 42 U.S.C. 300g-1(b)(7)(C)(v). This provision demonstrates a congressional understanding that a statutory amendment was needed to allow a system that did not qualify for filtration avoidance under the SWTR nevertheless to be excused from filtration, and that the exception would be confined to narrow circumstances. The MWRA does not qualify for this limited exception to the SWTR, because, among other things, it does not have an uninhabited, undeveloped watershed in consolidated ownership. In any event, Congress' decision to legislate a specific exception for these systems shows that it believed that, absent this exception, courts would be required to order these systems to install filtration. The district court's ruling, which in effect creates an additional exception from the filtration requirement -- when a system can convince a district court that it may not need filtration -- amounts to a judicial rewriting of the statute and regulation.

Of course, even under the SWTR, the district court retains considerable

discretion for matters other than the necessity to install filtration when avoidance criteria have not been met. For example, the court has latitude to tailor its injunctive relief in light of a realistic timetable for constructing a filtration plant. See 42 U.S.C. 300g-3 (court may consider "the time necessary to comply and the availability of alternative water supplies"). Thus, the court here would have authority to adjust the construction timetable. Nevertheless, the district court is obligated to "order relief that will achieve *compliance* * * *." *Romero-Barcelo*, 456 U.S. at 318 (emphasis added). This will not occur under the district court's ruling -- the statute and regulation require filtration to be installed, and the district court did not have discretion to allow the MWRA to remain out of compliance with the SDWA and SWTR permanently.

C. Congress Vested in EPA, Not the Courts, the Determination of When to Require Filtration to Protect Public Health.

The district court sought to resolve at trial whether, independent of the MWRA's failure to meet the avoidance criteria, it should require filtration of the MWRA's water supply in light of public health considerations and of the court's assessment of costs and benefits. The court conducted a twenty-four day trial at which almost every witness was an expert, and 524 exhibits were entered into evidence. At the conclusion of this lengthy and expensive process, the court's opinion was that filtration was not needed because the added protection provided by filtration did not warrant the resulting cost. *MWRA II*, Add. at 42.

The trial thus constituted an examination by the district court of the wisdom of the SWTR as applied to the MWRA. However, Congress has by statute vested the EPA, and not the courts, with the responsibility of determining through a public-notice-and-comment rulemaking process under what conditions filtration would be required for public water systems. No judicial review of the SWTR was sought by the MWRA or anyone else within 45 days of the promulgation of the SWTR, as required by 42 U.S.C. 300j-7(a). Thereafter, the Act expressly precludes judicial review of its primary drinking water regulations such as the SWTR "in any civil or criminal proceeding for enforcement * * *." *Id*.. *See WNRL v. EPA*, 793 F.2d 194, 198 (8th Cir. 1986). At this point, as the Second Circuit stated in *United States v. City of New York*, 198 F.3d 360, 366 (2d Cir. 1999), "the decision to filtrate or not is a policy choice that Congress seems to have made and that, in any event, is beyond our judicial function."

Allowing a district court to determine what circumstances mandate compliance with the filtration requirement of the SDWA and the SWTR frustrates Congress' delegation of rule-making authority to EPA to determine the specific criteria for filtration. The purpose of this delegation was to allow the agency with the relevant technical expertise to give substance to the Act's filtration requirement. As the Supreme Court has stated "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative

regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837, 843-44 (1984) (emphasis added). *See also Mattoon v. City of Pittsfield*, 980 F.2d 1, 4-5 (1st Cir. 1992) ("the regulatory scheme established under the SDWA evinces a clear congressional intention to entrust the regulation of public drinking water systems to an expert regulatory agency rather than the courts."). The SWTR is just such a legislative regulation.

Although this case may involve rapidly changing scientific and technological issues, this does not change the analysis. It is well established that courts should not ignore an affirmative legal requirement, such as the provision of filtration treatment, when the political branches have already determined that law to be desirable and necessary. This is especially true in the areas of science and technology. *See Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997) ("[W]hen a legislature undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation." (citation omitted)); *see also FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) ("[A] legislative choice is not subject to courtroom fact-finding * * *."); *Terrace Gardens Plaza, Inc., v. NLRB*, 91 F.3d 222, 228 (D.C. Cir. 1996) (court may not promulgate new administrative rules, or exceptions to existing rules, based on its interpretation of statutory purpose); *National Paint & Coatings Ass'n v. Chicago*, 45 F.3d 1124, 1127 (7th

Cir. 1995) (court usurped power of legislative body when it took evidence regarding wisdom of statutory provision).

The district court speculates that "Congress might not have wanted to eliminate judicial discretion in ordering compliance with the SDWA * * * [because t]echnology evolves more rapidly than typically does legislation, and there is an inherent danger in attempting to legislate today's science as the foreordained solution for tomorrow's problems." *MWRA I*, Add. at 7A. Even if this were an accurate assessment of the status of the filtration requirement, it is for Congress and the expert agencies to evaluate the technologies in the legislative and/or rulemaking processes suited to such inquiries, rather than for individual courts to make these decisions in specific enforcement cases. Furthermore, the district court's hypothetical concerns about legislation lagging behind science is unfounded in the case of the filtration requirement of the statute. The filtration requirement was recently reconsidered in the 1996 SDWA Amendments, and the only adjustment made was the limited alternative to the filtration provision discussed at page 45 above. Moreover, EPA affirmatively reiterated in 1998 in promulgating the Interim Enhanced Surface Water Treatment Rule ("IESTWR") that the SWTR requirements, including its filtration requirement, must continue to be complied with, and that the IESTWR requirements are in addition to the requirements of the SWTR. 63 Fed. Reg. 69478, 69484 (Dec. 16, 1998); *see also* 40 C.F.R. 141.170(a). Thus, neither Congress nor the EPA has shown any

uncertainty about the necessity of filtration, and the district court's decision to embark on its own inquiry does not fill a gap in legislative or regulatory activity. Rather, it flies in the face of direct legislative and agency consideration.

The district court also sought to justify its decision not to require MWRA to install filtration despite its undisputed health benefits by asserting that the cost of filtration would harm other programs that might help improve the quality of the water supplied by the MWRA. Specifically, the court expressed concern that the cost of filtration would detract from the MWRA's efforts to provide funding to encourage local communities to accelerate their pipeline rehabilitation programs, and that installing filtration would lead to increased pressure to allow greater recreational use of certain protected land in the Wachusett watershed. *MWRA II*, Add. at 41-42. Even if these concerns had validity (and the United States introduced substantial evidence at trial to show that the cost of filtration was affordable and should not have a significant impact on pipe replacement or watershed protection), it was still improper for the district court to decide that there were alternative measures better suited to solve water quality problems than that selected by Congress and implemented by EPA. As the Supreme Court stated in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959), "[i]f there are alternative ways of solving a problem, we do not sit to determine which is best suited to achieve a valid state objective."

The district court apparently based its decision, to a large degree, on its own judgment that the MWRA's non-filtration treatment alternative, while not as effective as the proposed filtration treatment alternative, was cheaper, and any public health risk posed by consumption of the non-filtered water was "within acceptable levels." *MWRA II*, Add. at 41. In other words, the court performed its own cost-benefit analysis on the SWTR filtration requirement and the MWRA alternative proposal, and decided that the MWRA alternative is more cost-effective. While EPA strongly disagrees with the court's analysis, and presented substantial and convincing evidence at trial that the health risks associated with the MWRA alternative have been underestimated, that the benefits of the filtration process were substantial, and that the cost of filtration was affordable, that is beside the point. It was EPA, and not the courts, that Congress charged with the task of determining under what circumstances a water system must implement filtration, and EPA has done so in the SWTR.

In the case of the SWTR, EPA needed to act decisively to determine filtration requirements -- it could not subject the public to a decade of delay while public water suppliers dragged their heels trying to show that they could eventually meet the filtration avoidance criteria through alternative treatment methods. Rather, EPA chose what the Supreme Court referred to in the context of *TVA v. Hill* as "institutionalized caution." 437 U.S. at 194. The district court should have abided by that decision.

Having found that the MWRA was in violation of an avoidance criterion, there was no reason for the district court to hold a lengthy trial at which it reviewed the considerations evaluated by EPA -- as directed by Congress -- in its decision to adopt the SWTR. Rather, the district court should have followed the plain language of the SWTR, and ordered the MWRA to install filtration to protect public health. EPA is now seeking to enforce that Rule in order to ensure that the public health protections envisioned by Congress in enacting the SDWA are realized in the communities served by the MWRA and in other communities across the United States.

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed and remanded with instructions to grant the United States' request for an injunction compelling MWRA to install filtration as part of its water treatment system and to set an appropriate schedule to bring the MWRA into compliance with the SDWA and the SWTR.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATIONS

I certify that the this brief complies with the type volume limitation set forth in Rule 32(a)(7)(C) of the Federal Rules of Civil Procedure. The brief contains 12,874 words.

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CERTIFICATE OF SERVICE

I, Robert H. Oakley, hereby certify that on November 13, 2000, I served two copies of the foregoing Opening Brief of the United States, and one copy on computer diskette, on the following persons by Federal Express, Overnight Delivery:

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