IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

REPLY BRIEF FOR APPELLANT UNITED STATES

DONALD K. STERN
United States Attorney

GEORGE B. HENDERSON, II
Assistant United States Attorney
United States Courthouse
Suite 9200
Boston, MA 02210

LOIS J. SCHIFFER
Assistant Attorney General
Environmental & Natural Resources Division

GREER S. GOLDMAN
BRIAN DONOHUE
STEVE KELLER
ROBERT H. OAKLEY
Attorneys
U.S. Department of Justice
P.O. Box 23795
Washington, D.C. 20026

TABLE OF CONTENTS

PAGE

PAGE

PAGE

TABLE OF AUTHORITIES

CASES:

PAGE

STATUTES:

REGULATIONS:

MISCELLANEOUS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

REPLY BRIEF OF THE UNITED STATES

INTRODUCTION

In its opening brief, the United States showed that in 42 U.S.C. 300g-1(b)(7)(C)(i), Congress directed EPA to promulgate "criteria under which filtration * * * is *required* as a treatment technique for public water systems supplied by surface water sources." (emphasis added). EPA complied with this congressional mandate by issuing the Surface Water Treatment Rule (SWTR), the explicit terms of which provide that unless drinking water systems using surface water supplies met

certain requirements by December 30, 1991, referred to as "avoidance criteria," those systems must have installed filtration by June 29, 1993. *See* A. 1669-70; 40 C.F.R. 141.71 (introductory paragraph), 141.73 (introductory paragraph). Furthermore, even those public water systems that met all of the criteria by December 30, 1991, still had to install filtration within 18 months after any subsequent failure to meet any of the avoidance criteria. 40 C.F.R. 141.73. *See also* Preamble to SWTR, A. 1670 ("beginning 30 months after promulgation [of the SWTR], if a system fails to meet any one of the criteria for avoiding filtration, even if the system was meeting all criteria up to that point, it must install filtration * * * within 18 months of the failure."). There is no provision in the SWTR allowing a public water system to avoid filtration after the system has failed one or more of the criteria. *MWRA I*, Add. at 3. There is also no provision for reopening a determination that a particular system must filter its water. *See MWRA I*, Add. at 3. Recognizing that a public water system is capable of delivering life-threatening organisms to millions of consumers, the Rule adopts a stringent approach to compliance and public health protection by requiring installation of both filtration and disinfection for systems unable to continuously meet the avoidance criteria. *MWRA I* , Add. at 7.

The district court found the MWRA had failed to meet avoidance criteria on numerous occasions, most recently in January 1999, a finding that the MWRA does not challenge. Nevertheless, the district court refused to order the MWRA to comply with the SWTR by installing filtration, allowing the MWRA to remain in noncompliance with the SWTR indefinitely. As we established in our opening brief, the equitable discretion of a district court does not extend to condoning permanent violations of the law.

The MWRA's brief fails to demonstrate the contrary. Additionally, the MWRA never advances a convincing interpretation of the SWTR under which it is in compliance with the SWTR. Accordingly, the district court's decision should be reversed.

I. The District Court Erred as Matter of Law in Concluding that It Had the Discretion Not to Enjoin the MWRA to Comply with the Filtration Requirement of the SWTR.

A. Federal Courts Do Not Have the Discretion to Allow Permanent, Ongoing Violations of Federal Statutes or Regulations.

In an effort to support the district court's decision, the MWRA relies on the well-worn principle that federal district courts have substantial equitable discretion in deciding whether to issue an injunction where there has been a violation of federal law or regulation, relying on *The Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944), *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531 (1987), and

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982). None of these cases address the situation at issue here, where the plain language of the SWTR requires that once a triggering event has occurred, specific relief -- installation of filtration -- is necessary to comply with the statute. Moreover, none of these cases establish that the district courts could allow permanent non-compliance with the substantive standards of a statute or regulation. Rather, in the cases cited by the MWRA either the violations had been corrected and were unlikely to resume (*The Hecht Co.*), or compliance could be achieved at a later date (*Village of Gambell*), or the violator was pursuing compliance as ordered by the court (*Romero-Barcelo*).

In *Hecht v. Bowles*, 321 U.S. 321 (1944), at issue was a department store's failure to comply with a complex set of price control regulations. The Supreme Court noted that "[t]here is no doubt of petitioner's good faith and diligence," past violations had been corrected, and "vigorous steps were taken by The Hecht Company to prevent these mistakes or further mistakes in the future." 321 U.S. at 325-26. Accordingly, an injunction was not necessary to ensure future compliance with the statute.

In *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531 (1987), the issue was whether the Secretary of the Interior had erred in issuing initial leases to oil companies allowing them to conduct exploration (but not drilling or production)

operations in the Bering Sea without first complying with the provisions of the Alaska National Interest Lands Conservation Act ("ANILCA"), which required an investigation and hearing before activities could be allowed that might interfere with aboriginal subsistence hunting rights. The Ninth Circuit had held that these facts required issuance of an injunction, but the Supreme Court reversed, emphasizing that an injunction was not the only way to meet the goals of the statute. 480 U.S. at 544. Because further approvals by the Secretary were needed before development and production commenced (480 U.S. at 538 n. 6), these later approvals meant that "the Secretary could meaningfully comply with ANILCA * * * in conjunction with his review of production and development plans." 480 U.S. at 544. Additionally, because the lease in question was only for exploration, there was no threat to hunting rights in the interim. 480 U.S. at 544 & n. 10. Thus, because an alternative basis existed to comply with ANILCA in the future, no preliminary injunction was required.

As for *Romero-Barcelo*, there the district court merely declined to enjoin the Navy from discharging ordnance into the ocean without a Clean Water Act permit while the Navy obtained the requisite permit. The Court recognized that compliance with the statute was ultimately necessary, 456 U.S. at 309 ("violations of the Act 'must be cured'" (citation omitted)), but because the Navy had been ordered to achieve compliance with the statute by obtaining a Clean Water Act

permit, the district court was not obligated to halt discharges if it determined that such an order was not necessary in the interim. 456 U.S. at 310, 315. Thus, because the Navy was taking steps to bring itself into compliance with the statute, no injunction had to be issued.

Neither *Hecht*, *Gambell*, nor *Romero-Barcelo* supports the MWRA's position in this case. The SWTR and the SDWA clearly require that due to the MWRA's failure to satisfy various avoidance criteria, the MWRA must treat its drinking water using a more protective system combining filtration and disinfection technologies. Yet, in this case the district court has authorized the MWRA to avoid filtration indefinitely in violation of the SDWA and the SWTR. This violation has neither been cured as in *Hecht*, nor did the district court order or the MWRA agree to cure the violation in the future as in *Gambell* and *Romero-Barcelo*. Since the law requires the MWRA to filter, there is no alternative means to compliance under the SWTR other than to install a treatment system combining filtration and disinfection.[1]/

---

[1]/ The MWRA also cites (MWRA Brief at 25) to *Friends of the Earth, Inc. v. Laidlaw Envt'l Services*, 120 S. Ct. 693, 710 (2000), to support the general proposition that district courts under the Clean Water Act have discretion to shape injunctions to "abate current violations and deter future ones." The district court cited to this case too as offering some possible support for its decision. *MWRA II,* Add. 11, n. 2. Yet, this case supports neither the MWRA's arguments nor the district court's decision in this case. In *Laidlaw*, the Supreme Court again states that violations of the law must be "abated," and notes that the district court had

The MWRA also cites three cases principally involving the National Environmental Policy Act ("NEPA"), *Conservation Law Foundation v. Busey*, 79 F.3d 1250 (1st Cir. 1996), *Town of Huntington v. Marsh*, 884 F.2d 648, 649-51 (2d Cir. 1989), and *Essex County Preservation Association v. Campbell*, 536 F.2d 956 (1st Cir. 1976). The comparison between NEPA and the SDWA is not apt because, unlike the SDWA, NEPA is a procedural statute imposing no substantive environmental requirements. *Robertson v. Methow Valley Citizens' Council*, 490 U.S. 332 (1989) ("NEPA[] reli[es] on procedural mechanisms--as opposed to substantive, result-based standards * * * .").

These cases have no application to a case such as this one where compliance with the substantive provisions of a public health protection statute can only be obtained through an injunction. This was not true in these cases because in each one the Government had already corrected or was in the process of correcting its NEPA violation by preparing Supplemental Environmental Impact Statements. *See Conservation Law Foundation*, 79 F.3d at 1254 (Air Force agreed to prepare supplemental EIS where initial EIS found to be deficient); *Essex County Preservation Association*, 536 F.2d at 962-63 (approval of plans and specifications for highway two months prior to approval of "Action Plan" in violation of federal

---

authority not to issue an injunction in the case because the defendant's violations had ceased by virtue of the closure of the violating plant.

highway statute did not require injunction to halt construction where EIS addressed all environmental impacts from construction of the highway); and *Town of Huntington*, 884 F.2d at 649-51 (injunction did not have to issue for violation of Ocean Dumping Act and NEPA where a new EIS was soon to issue that would cure the violation.). Thus, in each of these cases, there was no refusal by the Government to conduct subsequent remedial NEPA work.

In contrast, the MWRA is making no attempts to comply with the filtration requirement of the SWTR, nor are there alternative means for it to comply with the Rule. Accordingly, the Supreme Court case that is on point is *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). As discussed in the United States' opening brief (pp. 39-43), in *Hill*, the Supreme Court concluded that the only way the statute could be complied with was to enjoin construction of the dam, and thus an injunction was required. Similarly, the only way for the MWRA to comply with the SWTR and SDWA is to install filtration equipment as required by the Rule. Thus, *Hill* controls this case and mandates that the MWRA be ordered to filter its water.

Moreover, by not ordering the MWRA to install filtration, the district court usurped to role of Congress and EPA, to whom Congress had delegated the responsibility of determining when filtration should be required. As the Sixth Circuit stated in *United States v. City of Painesville, Ohio*, 644 F.2d 1186, 1192-

93 (6th Cir.), *cert. denied,* 454 U.S. 894 (1981):

> By enacting the Clean Air Act, Congress established a high priority for 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 the 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.

B. The MWRA Is in Permanent Violation of a Substantive Requirement of the SDWA.

Understandably uncomfortable with having to justify its permanent noncompliance with the SWTR, the MWRA asserts that its failure to provide filtration despite failing at least one of the avoidance criteria is not a substantive violation of the Rule or the Act, but rather only a procedural violation of the SWTR's deadlines. MWRA Brief at 31- 33. Under this interpretation, the MWRA argues that an injunction requiring filtration is not "necessary to give force to the policies the Act furthers * * *." MWRA Brief at 32. The MWRA argues that the substantive requirement of the SWTR is the need to satisfy the avoidance criteria at any time in the future.

The MWRA never quotes any language from the SWTR in support of this argument for the simple reason that there is none. By exalting the avoidance criteria over the requirement to provide filtration, the MWRA's argument turns the SWTR upside down; as the Rule makes clear, failure to meet an avoidance

criterion is a trigger for the filtration requirement, which is the substantive requirement of the Rule. Under the unambiguous provisions of the Rule, once a system fails any avoidance criterion any time after December 1991, that system no longer qualifies for filtration avoidance status and must install filtration in order to comply with the SDWA. Congress, after all, directed EPA to determine when filtration would be required, and EPA did this in the SWTR, which as a legislative regulation has the force of law. *Batterton v. Francis*, 432 U.S. 416, 425 n. 9 (1977).

As reflected in the rulemaking record, EPA found that it is impossible to consistently and accurately determine if and in what amount the contaminants of concern (microbiological pathogens) are present in drinking water, a conclusion that was supported by the evidence presented at trial**,** *see* A. 1654, and confirmed by the district court. *MWRA II*, Add. 16-17 & n. 24. Because of the risks posed to public health by pathogens in water supplies, and the infeasibility of accurately detecting their presence or of accurately detecting rates of waterborne illnesses, *see* A. 1654, 1625; *MWRA II*, Add. at 15 & n. 17, EPA decided in the SWTR to adopt a policy of "institutionalized caution." *TVA v. Hill*, 437 U.S. at 194. Accordingly, pursuant to 42 U.S.C. 300g-1(b)(7)(A), EPA promulgated a treatment technique with criteria that, if not met, trigger an irrevocable obligation to install filtration.

A failure to meet the avoidance criteria is not itself a violation of the SWTR. Thus, if a public water system subject to the SWTR were to fail to meet any avoidance criterion, but installed filtration within 18 months after the failure, the United States would have no cause of action against such a system under the SWTR because the system would have complied with the SWTR. Thus, it is the requirement to provide filtration, and not the need to meet the avoidance criteria, that "give[s] force to the policies the Act furthers * * *."

C. EPA's Exercise of Enforcement Discretion Does Not Alter the Meaning of the SWTR.

The MWRA claims that EPA's June 1992 "Guidance on Enforcement of the Requirements of the Surface Water Treatment Rule" (A. 390) supports its position by purportedly allowing systems that fail the avoidance criteria to comply with the Rule by later meeting the avoidance criteria instead of installing filtration. The MWRA's reliance is misplaced. The Guidance merely stated that EPA Regions and states might decide, as a matter of enforcement discretion and provided that certain conditions were met, not to bring enforcement actions against systems that missed the December 30, 1991, deadline for meeting the avoidance criteria to avoid filtration. A. at 398. The MWRA also claims that EPA has allowed some systems to avoid the filtration requirement by meeting the avoidance criteria after the deadlines contained in the Rule. According to the MWRA, those cases support

the MWRA's interpretation of the SWTR as allowing systems that fail to meet an avoidance criterion to nevertheless avoid filtration. MWRA Brief at 36-37.

The MWRA's reliance on the Guidance is unavailing for two reasons. First, the Guidance was not an interpretation of the SWTR. Rather, as the Director of EPA's Water Enforcement Division testified, this Guidance and its implementation were an exercise of enforcement discretion. Exhibit 25 (Maas Deposition, volume 1, p. 154) to the Third Declaration of Mark Stein, filed with the United States' Reply Memorandum in Support of Its Motion for Partial Summary Judgment, Docket No. 66. Thus, the Guidance does not change the legal requirements and deadlines, or even purport to do so. A. at 390, 408. Second, even if the Guidance were an interpretation of the SWTR, an interpretation of a regulation in a guidance document cannot change the meaning of an unambiguous regulation. *Clean Ocean Action v. York*, 57 F.3d 328, 333 (3rd. Cir. 1995) (where plain language of regulation and terms of agency guidance document differ, the regulation controls.).

In any event, the MWRA would not have qualified for any additional time to comply under the Guidance because that document imposed rigorous conditions on any exercise of enforcement discretion, which the MWRA did not meet. The Guidance stated:

If the system has submitted information to the State that enables the

> State to determine that it is likely the system will be able to meet the avoidance criteria and/or disinfection requirements in its system in a reasonable time, the State may issue an order (or file a civil action) requiring the system to complete the modifications to its system as expeditiously as possible. *The state should not allow the system any more than six months to one year for completion of these modifications.*

A. at 398 (emphasis added). The Guidance made clear that extensions would be granted "in very limited cases" and only where the drinking water system had submitted information showing that through specific modifications it could quickly meet the avoidance criteria. A. at 399. The MWRA did not meet the terms for an extension because, at that time, it had not sought a waiver of the filtration requirement, having initially conceded that it was required to install filtration. *MWRA I*, Add. at 5. It also could not show that it was able within 6 months to one year from December 1991 to make modifications to its system short of filtration that would ensure constant compliance with the avoidance criteria. Indeed, in May 1993, EPA informed the MWRA that it did not meet the conditions of the Guidance for possible enforcement discretion. *MWRA II*, Add. at 72-74.

The MWRA also argues that the exercise of enforcement discretion by EPA and the states is evidence that the Agency interprets the SWTR as allowing for second chances to comply with the avoidance criteria. The MWRA thus equates the exercise of enforcement discretion by EPA and the states with its notion that

district courts have unlimited discretion in ordering relief under the SWTR. MWRA Brief at 40. However, the MWRA provides no authority that links the Executive Branch's exercise of discretion in how it enforces the laws to an asserted discretion in the Judicial Branch to not apply the law.2 *See TVA v. Hill*, 437 U.S. at 194 ("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.").

The MWRA's argument is tantamount to asserting that if a drinking water system violated a regulatory standard (such as a maximum contaminant level for a particular contaminant, or as here, the failure to implement a treatment technique after a triggering event), but the EPA did not take enforcement action in each and every situation to enforce this requirement, then the standard becomes optional at the discretion of a district court. Such a position would erode the enforceability of EPA's drinking water regulations and would severely undermine the SDWA's goal of protecting public health.

In any event, the unequivocal language contained in the Rule is controlling,

---

2 To be sure, the executive branch has virtually unlimited discretion in deciding whether or not to prosecute violations of the laws. *Heckler v. Chaney*, 470 U.S. 821 (1985) (agency decision not to bring enforcement action not reviewable under the APA because it is committed to agency discretion); *United States v. Flemmi*, 225 F.3d 78, 86 (1st Cir. 2000) ("[A] United States Attorney's decision to prosecute (or, conversely, to forebear) is largely unreviewable by the courts.").

making it unnecessary to look to other sources to determine the Rule's meaning. *See Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 295 (1995) ("when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished.") (internal quotation marks and citations omitted).

The cases cited by the MWRA at pages 36-37 of its brief do not support a contrary conclusion; each involved either an agency's revocation of a past regulation or formally adopted policy (*Motor Vehicle Manufacturers Association v. State Farm*, 463 U.S. 29, 41-42 (1983) and *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 807-08 (1973)), or use of agency conduct to interpret an ambiguous regulation (*Martin v. Occupation Safety and Health Review Commission*, 499 U.S. 144, 155 n. 5 (1991) and *FDIC v. Philadelphia Gear Co.*, 476 U.S. 426, 438-39 (1986)). The rare instances in which EPA allowed a water system additional time to comply with the SWTR are clearly the exception, not the rule, and thus do not reflect settled agency policy.3 In fact, there have been relatively few instances where EPA or a state allowed a

---

3 The MWRA also cites to Justice Thomas's dissenting opinion in *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 524 n.3 (1994). Although that opinion does argue that agency conduct implementing a regulation can be used to interpret that regulation, it concerned an allegedly consistent practice over a decade that was inconsistent with a later interpretation by the agency. Of course, here there is no such consistent interpretation of the SWTR that is counter to that

drinking water system to avoid filtration despite not meeting all of the filtration avoidance criteria by December 30, 1991 -- about 32 systems nationwide. A. 237-240; 250-51. This is small (0.3%) compared to the 10,634 community public water systems nationwide that use surface water sources, the vast majority of which are filtering or being required to filter. Declaration of Brian J. Maas, ¶¶ 4-5, filed with the United States Memorandum in Support of Its Motion for Partial Summary Judgment, Docket No. 26 ("Maas Declaration").

To focus on these 32 systems is to ignore EPA and the States' consistent record of enforcing the filtration requirements of the SWTR. In fact, as the Agency stated in its Response to MWRA's First Set of Interrogatories, as of July 22, 1998, the federal data base showed over 4,900 enforcement actions of various types (e.g., notices of violation, administrative orders, penalty actions, civil referrals) for violations of the June 29, 1993 deadline for installing filtration. A. 501, 548. Indeed, the MWRA system is currently the *only* public water system in the United States serving more than 100,000 people that, having been required to filter, is not providing filtration or is not on an enforceable schedule to do so. Maas Declaration at ¶ 6. Thus, the Agency's enforcement history does not support the MWRA's argument that the Agency is interpreting the SWTR in a manner contrary to the plain meaning of its words.

---

advanced by the United States in this case.

D. The Judicial Enforcement Provision of the SDWA Does Not Authorize the District Court to Permit the MWRA to Violate the SWTR.

The MWRA claims at great length that 42 U.S.C. 300g-3(b), which authorizes enforcement by the United States of the terms of the SDWA and its regulations, gives the district court the discretion to permit the MWRA not to comply with the SWTR. MWRA Brief at 40-50. This argument fails for two reasons. First, as *TVA v. Hill* shows, whether Congress, or an agency acting by regulation pursuant to Congressional direction, can constrain the equitable powers of a court is based on the substantive provisions of the statute and not the provision authorizing the Government to seek an injunction. Second, while 42 U.S.C. 300g-3(b) does allow a court discretion in certain matters, it ultimately requires that the court ensure compliance with the Act.

First, the provision of the Endangered Species Act (ESA) authorizing the citizens' suit brought in *TVA v. Hill* is less clear than 42 U.S.C. 300g-3(b) that a court has to require compliance with the statute. The ESA provision stated only 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." 16 U.S.C. 1540(g)(1) (1976 ed.). Writing in dissent, Justice Rehnquist 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. 437 U.S. at 211. The majority, however, looked to the substantive provisions of the ESA, which barred federal agencies from taking action that would result in destruction of the habitat of an endangered species. 16 U.S.C. 1536 (1976 ed.). Because it was not disputed that construction of the Tellico Dam would lead to the destruction and modification of the habitat of endangered species, the Court held that an injunction had to issue. 437 U.S. at 194. Any other result would have been flatly inconsistent with a substantive provision of the statute. Similarly, the substantive provisions of the SWTR require that a drinking water system that fails to meet an avoidance criterion must install filtration. That requirement can only be satisfied by issuance of an injunction.

Second, the language of 42 U.S.C. 300g-3(b) authorizes the United States to file a civil action in district court "to require *compliance* with any applicable requirement [under the SDWA]," and 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 * * *." (emphasis added). The repeated use of the words "compliance" and "comply" shows that it was not intended to allow a violator of the Act to continue its violations indefinitely. It is worth repeating the conclusion of the Second Circuit

when faced with the same argument that 42 U.S.C. 300g-3(b) gave a district court the discretion to not order filtration when it was required by the SWTR:

> 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 [42 U.S.C. 300g-3(b)] on which appellants rely focuses almost entirely on compliance issues. * * *.

United States v. City of New York, 198 F.3d 360, 366 (2d Cir. 1999).

The district court believed and the MWRA argues that the phrase "such judgment as protection of public health may require * * *," gives the district court discretion not to enforce the terms of SWTR. Reading this phrase out of context ignores the repeated references to compliance in 42 U.S.C. 300g-3(b). Read in context, and with the benefit of the legislative history, this phrase means to allow courts discretion to permit noncomplying water systems time to come into *compliance* so that consumers will not be deprived of water in the interim, and to impose necessary safety measures on a noncomplying system so that the water received by the consumers is safe pending compliance. 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.

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

Representative Staggers, a sponsor of the SDWA, further explained this provision:

> Several erroneous statements have been made about the bill. One is that a water supply could just be closed down and an area would be left without any source of water to drink. This is not true. According to the language in the bill if an enforcement action is brought, 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.
>
> From some of the earlier debate, it was said that EPA could come in and just close down the water supply and the area would have no water.
>
> Now, this is not true. The court may only order a system to close down if adequate, safe alternative water supplies are available.

Id. at 36368.

As these statements make clear, the "as protection of public health may require" phrase does not authorize a district court to excuse a violator of the Act from complying with statutory and regulatory requirements.

E. The MWRA's Pre-1999 Failures to Meet Avoidance Criteria Are Relevant to Its Obligation to Install Filtration.

As pointed out in the United States' opening brief, the district court erred by not finding that the MWRA's prior failures to meet avoidance criteria even before the January 1999 fecal coliform exceedance also triggered the requirements

to provide filtration. U.S. Opening Brief at 33-34.4 Significantly, the MWRA does not dispute that it failed avoidance criteria prior to 1999 as identified in the United States' opening brief. However, the MWRA argues that its failure to meet avoidance criteria prior to 1999 is irrelevant, because in December 1998 the Massachusetts DEP purportedly determined for the Commonwealth that the MWRA did not have to install filtration, and in the MWRA's view wiped the slate clean. The United States has shown that this claim is wrong for two reasons: (1) both the SWTR and the DEP's own rules do not allow for a for a second chance to correct past failures to meet avoidance criteria, and (2) the United States' suit seeking to compel the MWRA to install filtration was filed more than thirty days before the DEP's purported determination that the MWRA did not have to install filtration, making the Commonwealth's settlement ineffective under 42 U.S.C. 300g-3(a) to bar to the United States' suit for the past failures to meet avoidance criteria. *See* U.S. Brief at 35-36. Accordingly, the consequence of the MWRA's failure to meet the avoidance criteria at any time after December 30, 1991, was the obligation to install filtration.5

---

4 While the MWRA claims that the Government waived this argument, the violations were identified at pages 21-22, and argument is made at pages 33-37.

5 The MWRA has not disputed in this appeal the district court's finding that the MWRA failed to meet the source water fecal coliform avoidance criterion in January 1999. *MWRA I*, Add. at 6-7. Accordingly, even if the Court were to find persuasive the MWRA's claims concerning its pre-1999 failures to meet

1. Correction of Past Avoidance Criteria Failures Does Not Avoid the Requirement of an Injunction.

The MWRA first asserts that "[i]njunctions should be narrowly tailored to prevent harm that presently exists or harm that is currently threatened and not to address problems which may have existed in the past." MWRA's Brief at 51. While that reasoning may apply in other circumstances, it is inapplicable here because the past failure to meet an avoidance criterion triggers the obligation to install filtration. Attempts to prevent future failures to meet avoidance criteria do not remedy the ongoing violation of the SWTR, namely the failure to install filtration. Thus, these past failures to meet avoidance criteria remain relevant today because they triggered the filtration remedy imposed by the SWTR. In contrast, the cases on which the MWRA relies (MWRA Brief at 51) for the proposition that past, corrected violations of a statute do not have to be considered in determining whether to issue an injunction, are irrelevant. In this case, there is an ongoing violation that, if not corrected, will continue indefinitely into the future -- the failure to provide filtration.

2. Estoppel or Unclean Hands Does Not Bar this Action for an Injunction.

The MWRA next asserts that had the district court considered the pre-1999

---

avoidance criteria, filtration would still be required on the basis of the January 1999 failure.

failures, it also would have had to determine whether the United States was estopped or had unclean hands because some EPA personnel had made statements suggesting that, provided certain conditions were met, it might be possible for the MWRA to avoid its obligation to install filtration. MWRA Brief at 52-54. The MWRA relies on EPA's decision not to take enforcement action when the MWRA entered into an Administrative Consent Order in 1993 with the Commonwealth ("1993 ACO"), providing for the "dual track approach," that held out the possibility that the MWRA might be able to avoid filtration. EPA was not a party to the 1993 ACO, and subsequent statements by EPA Region I officials that the Agency might at some point acquiesce in the MWRA not installing filtration cannot estop the Government in these circumstances.

Even if the Government is subject to estoppel, and there is some question that it is,6 there must have been detrimental reliance on "affirmative misconduct" by a Government official. *INS v. Miranda*, 459 U.S. 14, 19 (1982) (*per curiam*).7 The undisputed facts of this case show that there was no affirmative

---

6 The Supreme Court has stated that it is uncertain "whether an estoppel claim could ever succeed against the government." *Office of Personnel Management v. Richmond*, 496 U.S. 414, 423 (1990).

7 Estoppel is particularly inappropriate where application of it would frustrate a Government policy to protect human health. *Cf. Akbarin v. Immigration & Naturalization Service*, 669 F.2d 839, 844 (1st Cir. 1982) (estoppel is not appropriate where the result is an intrusion "on the executive's ability to promote

misconduct by EPA. EPA *never* promised the MWRA that if all of the conditions of the 1993 ACO were met, the MWRA's obligation to install filtration could be avoided. In a June 3, 1993, letter from EPA to the MWRA, EPA stated that it was not a party to the 1993 ACO and expressly reserved it rights to take federal enforcement action at a later date. A. at 75-76. Similarly, Jeff Fowley, an EPA attorney and the author of the June 1993 letter from EPA to the MWRA, testified in his deposition that he told the MWRA and Massachusetts DEP that EPA Headquarters believed the "dual track" consent order was inconsistent with the law. A. at 423-30; *see also* A. at 72-74; 423-30. Further, EPA letters also stated that if the Commonwealth decided to excuse the MWRA from filtering its water, EPA would decide how to react based on the facts and the law applicable at the time. A. at 431-38 and 98. In any event, the MWRA failed to meet the key requirements of the 1993 ACO. *See MWRA I* at Add. 5-6.

---

important federal policies by enforcing law.").

Accordingly, the MWRA cannot claim that it was misled by EPA; rather, the MWRA always knew the requirements of the SWTR and that it faced the possibility that, regardless of what improvements it instituted in its system, EPA might seek installation of filtration.8 The absence of any affirmative misconduct by the United States means that there is no basis for a claim of estoppel or unclean hands, and no need for a remand to address these claims.

II. Having Found a Failure of the Avoidance Criteria, the District Court Should Not Have Held a Trial to Determine Whether to Order the MWRA to Comply with the SWTR.

A. The District Court Disregarded Congress' Decision to Delegate to EPA the Responsibility to Determine the Conditions Under Which Filtration Would Be Required.

Contrary to the MWRA's claims, the district court did not conclude that the MWRA's non-filtration program would better protect public health than the filtration alternative. In fact, the district court found that filtration would provide greater protection against regrowth, a minimum of a 2-log improvement in inactivation of *Cryptosporidium*, and better water aesthetics. *MWRA II*, 97 F. Supp. at 188. Indeed, several MWRA officials and a Massachusetts state health

---

8 Moreover, because the meaning of the Rule is clear, there could be no reasonable reliance by the MWRA even if the statements by EPA officials had been less clear that EPA was reserving its rights to seek filtration. *Heckler v. Community Health Services*, 467 U.S. 51, 63 (1984).

official have stated that filtration needs to be installed to protect public health. A. 1331-33, 1359-67, 1370-71, 1376-79, 1405,1892-99, and Trial Exhibit 246.9 The reason that the district court declined to order the MWRA to install filtration was its belief that filtration was not justified by the court's own cost-benefit analysis. In reaching this conclusion, however, the district court usurped the role that Congress directed EPA to play when it required the Agency to issue regulations that would determine when filtration is required. In complying with this mandate by promulgating the SWTR, EPA considered many of the factors (risk, benefit to the public, etc.) that the district court addressed in its decision on the trial. The district court erred in second guessing the Agency on these issues.

EPA's judgments concerning these matters as reflected in the Rule could have been challenged under 42 U.S.C. 300j-7(a), which provides for judicial

---

9 The MWRA also seeks to downplay any risk posed by its refusal to provide filtration by citing to the testimony of EPA employee Kevin Reilly. Specifically, the MWRA asserts that EPA employee Kevin Reilly conceded that the MWRA had met the avoidance criteria between its last failure in January 1999 and when he testified in January 2000, and that as a result the MWRA "was adequately protecting the public health * * *." MWRA Brief at 16. What the MWRA omits, however, is that Mr. Reilly also testified that he believed, and continues to believe, that the MWRA should filter its water supply to ensure adequate public health protection. Reilly, XVIII: 114-16,122-24. Mr. Reilly stated that he believed that the MWRA neither presently met the watershed protection control avoidance criterion, 40 C.F.R. 141.71(b)(2), nor did it have the capacity to do so in the future because it could not control all human activities that might have an impact on the microbiological quality of the source water. Reilly, XX: 36; Reilly, XXI:60. Finally, Mr. Reilly testified that given its past failures of the avoidance criteria, he did not believe that the MWRA could meet the avoidance criteria in the future. Reilly, XX:77-78.

review of a SDWA primary drinking water regulations. No judicial review of the SWTR was sought, and under 42 U.S.C. 300j-7(a) further judicial review "in any civil or criminal proceeding for enforcement * * *" is prohibited. In conducting the trial, the district court ignored the congressional delegation to EPA and the statutory restrictions on subsequent challenges to SDWA regulations. 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." If not reversed, the district court's decision has the possibility of allowing any water system the opportunity to challenge the wisdom of the SWTR as applied to it. The district court's disregard for the clear requirements of the SWTR thus opens the door to litigation over every filtration determination, as well as violations of other regulations that trigger treatment technique requirements under specified conditions, and of those regulations that set specific standards for water quality. This would clearly frustrate the statutory and regulatory scheme of the SDWA.

B. The District Court Considered Irrelevant Factors at the Trial.

Finally, the MWRA and amicii argue that the cost of filtration would have limited the MWRA's ability to assist local community pipe replacement, and would decrease public support for watershed protection. MWRA Brief at 59. These issues are irrelevant under the provisions of the SWTR, where the only issue to be considered in determining whether a system must install filtration is whether the avoidance criteria have been met continuously. Furthermore, the record does not support the MWRA's and amicii's claims on which the district court relied. With regard to pipeline rehabilitation, various experts testified simply that old pipes present greater risk of "regrowth" which has the potential to harbor contaminants. In any event, pipeline rehabilitation will take many decades to accomplish, and there was no evidence that would permit the benefits of the proposed program to be quantified. A. 1792, 1789. With regard to watershed protection, the most that the court said about the MWRA's plan is that there might be less "public pressure to open restricted MDC lands to general recreational uses" if filtration is not installed. *MWRA II*, Add. 40-41. The brief filed by the amicii goes further and asserts that if filtration is installed, watershed protection will decline. Brief of Amici Curiae Nashua River Watershed Association, Inc. *et al.* at 7. Amicii provide no citation to the record to support this claim.

If the amicii's brief is meant to show that filtration is not supported by the public, this implication is refuted by the majority of those communities in the

MWRA service area that expressed an opinion on the issue, which stated that they preferred the filtration alternative. Trial Ex. 459, App. B Attachments; Trial Exhibit 430. In any event, the SWTR was not intended as a vehicle to promote wildlife habitat preservation and land use controls, but rather the quality of drinking water.

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 the MWRA to install filtration as part of its water treatment system.

Respectfully submitted,

DONALD K. STERN
United States Attorney

LOIS J. SCHIFFER
Assistant Attorney General
Environment & Natural Resources Division

GEORGE B. HENDERSON, II
Assistant United States Attorney
United States Courthouse
Suite 9200
Boston, MA 02210

GREER S. GOLDMAN
BRIAN DONOHOE
STEVE KELLER
SCOTT BAUER
ROBERT H. OAKLEY

Attorneys
U.S. Department of Justice
P.O. Box 23795
Washington, D.C. 20026
(202) 514-4081

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 6975 words.

___

Robert H. Oakley

CERTIFICATE OF SERVICE

I, Robert H. Oakley, hereby certify that on January 12, 2000, I served two copies of the foregoing Reply Brief of the United States, and one copy on computer diskette, on the following persons by Federal Express, Overnight Delivery:

Edward J. DeAngelo
Assistant Attorney General
Government Bureau
One Ashburton Place
Room 2019
Boston, MA 02108-1698

John M. Stevens, Esq.
Jonathan Ettinger, Esq.
Foley, Hoag, & Elliot
One Post Office Square
Boston, MA 02109

Nancy Kurtz
Massachusetts Water Resources Authority
Charlestown Navy Yard
100 First Avenue
Boston, MA 02129

Alexandra D. Dawson
2 West Street
Hadley, MA 01035

_____
Robert H. Oakley