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Agency Power v. Court Discretion: Should Courts Have the Discretion to not Enforce Injunctive Relief Recommended by Statutes? United States v. Mass. Water Res. Auth.

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CASENOTE

AGENCY POWER V. COURT DISCRETION: SHOULD COURTS HAVE THE DISCRETION TO NOT ENFORCE INJUNCTIVE RELIEF RECOMMENDED BY STATUTES?

United States v. Mass. Water Res. Auth.[1]

I. INTRODUCTION

Congress enacted the Safe Drinking Water Act ("SDWA") in 1974 to ensure the purity of the nation's public drinking water supply.[2] In 1986, Congress amended the SDWA, adding in part that disinfection would be mandatory for all public water providers and, in some cases, filtration would be required.[3] The Environmental Protection Agency ("EPA") was to establish the criteria for which filtration would be required,[4] which resulted in the Safe Water Treatment Rule ("SWTR") of 1989.[5] Enforcement of the SDWA was allocated to the EPA.[6]

United States v. Mass. Water Res. Auth. presented the question of whether and to what extent courts have the discretion to enforce or not enforce injunctive relief suggested by a statute. The First Circuit's decision will provide future guidance for courts that will face similar situations in this relatively uncharted area of law.

II. FACTS AND HOLDING

Plaintiff United States, on behalf of the EPA, brought a SDWA action for injunctive relief in the United States District Court for the District of Massachusetts against defendants Massachusetts Water Resources Authority ("MWRA") and Metropolitan District Commission ("MDC").[7] Through the SDWA, the EPA has the authority to commence a civil action against a public water supplier who is in violation of the SDWA and has failed to comply with the regulations.[8] On February 12, 1998, the EPA commenced a lawsuit against the MWRA seeking an injunction ordering the MWRA to install a filtration system because of past failures to meet the avoidance criteria established by the SWTR,[9] and the MWRA's ongoing refusal to install the filtration system.[10]

In 1991, the MWRA realized it would be unable to meet all the avoidance criteria by the deadline of December 31, 1991, and in early 1992, the Massachusetts Department of Environmental Protection ("DEP")[11] informed the MWRA that they were now required to install a filtration system by June 30, 1993.[12] When it became clear in early 1993 that the MWRA would not be able to install the system by the deadline, the MWRA, the MDC, and the DEP began negotiations to establish an Administrative Consent Order ("ACO").[13] The ACO provided for a "dual-track" approach for the MWRA's compliance that allowed for the MWRA to avoid installing the system on a short-term basis.[14] Instead, the MWRA was to

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[1] 256 F.3d 36 (1st Cir. 2001).
[2] Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1660 (codified as amended at 42 U.S.C. §300f to §300j-8 (1991 & Supp. 2001)).
[3] 42 U.S.C. §300g-(b)(8) (1986) & 42 U.S.C. §300g-(b)(7)(C)(i) (1986).
[4] 42 U.S.C. §300g-(b)(7)(C)(i).
[5] 40 C.F.R. §141.70-.73 (1989).
[6] 42 U.S.C. §300g-3 (2001).
[7] *United States v. Mass. Water Res. Auth.*, 48 F.Supp.2d 65 (D. Mass. 1999) ("*MWRA I*") and 97 F.Supp.2d 155 (D. Mass. 2000) ("*MWRA II*"), *aff'd by United States v. Mass. Water Res. Auth.*, 256 F.3d 36, 37 (1st Cir. 2001) ("*MWRA*").
[8] 42 U.S.C. § 300g-3.
[9] There are eleven "avoidance criteria" for levels of certain waterborne contaminants that public water suppliers must satisfy in order to avoid installing filtration systems. 40 C.F.R. §§ 141.71(a)-(b). The particular violation in this case was relating to the standard dealing with fecal coliform concentrations. *MWRA*, 256 F.3d at 44. The fecal coliform bacteria problem was due to the seasonal roosting habits of gulls. *MWRA*, 256 F.3d at 42.
[10] *MWRA*, 256 F.3d at 44.
[11] 42 U.S.C. §300g-2 provides that the EPA may allocate the duty of primary enforcement to state environmental agencies if that state agency meets particular standards set out in 42 U.S.C. §300g-2(a). Although the DEP had not received this duty when this situation first started, it was granted the duty of primary enforcer on June 28, 1993. *MWRA*, 256 F.3d at 41.
[12] *MWRA*, 256 F.3d at 42.
[13] *Id.*
[14] *Id.*

continue their present water treatment of disinfection, ozonation,[15] and covered water storage facilities, as well as initiate a watershed protection plan and a "gull-harassment" campaign to scare the gulls away from the supply reservoirs.[16] Along with this program, the MWRA could petition on or before August 3, 1998 to establish themselves as having met the avoidance criteria, thus making the MWRA eligible to avoid installing the filtration system.[17] However, the MWRA was still required to plan and design a filtration facility in the meantime in case it was unable to fulfill all the avoidance criteria.[18]

The EPA at this point began working closely with the MWRA to help the MWRA meet the criteria and also with the planning of the possible filtration facility.[19] However, by 1997, the EPA and the MWRA's relationship quickly deteriorated when the MWRA announced that it would again be unable to meet the deadline.[20] Then on October 1, 1997, the MWRA submitted its petition, almost a year early, requesting that it be absolved from the requirement to design and plan the filtration facility if it could show future compliance with the criteria.[21] The EPA responded critically to the petition and in December 1997 sent a letter to the MWRA, the MDC, and the DEP stating that the EPA had requested the United States Department of Justice to file suit.[22] Because of this, the DEP refused the MWRA's request to terminate the planning of the filtration facility, but did extend the deadline for meeting the avoidance criteria to October 31, 1998.[23] On October 30, 1998, the MWRA submitted its petition to continue using the disinfection techniques and to use the money saved from not installing the filtration system to replace pipelines, and the DEP approved the petition in November 1998.[24] However, the DEP claimed that the approval was only good as long as no avoidance criteria were violated; were any criteria to be violated, the approval would be revoked, and the filtration system would have to be installed.[25]

Meanwhile, the EPA had already commenced the action in the United States District Court for the District of Massachusetts against the MWRA on February 12, 1998, asking for an injunction ordering the MWRA to implement the filtration system plan.[26] The District Court stayed the case for almost a year awaiting the DEP's disposition of the MWRA's petition.[27] When the MWRA's petition was granted, the EPA filed a motion for summary judgment, citing "uncontradicted evidence of the MWRA's past failures to meet the avoidance criteria and its continued refusal to install a filtration system."[28] In January 1999, the fecal coliform concentration again was too high and violated that particular avoidance criteria.[29] Despite the violation, the DEP refused to revoke the filtration waiver.[30]

The District Court made its ruling on the motion for summary judgment on May 3, 1999.[31] Relying solely on the January 1999 violation, the Court held that the EPA was entitled to injunctive relief and civil penalties.[32] However, the District Court went on to hold that courts, except where legislation has provided otherwise, have discretion in deciding what equitable relief should be granted.[33] Therefore, the Court ordered a bench trial in order to determine 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 the EPA's insistence on filtration."[34] On May 5, 2000, the District Court issued its ruling that the MWRA would not have to install the filtration system based on its

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[15] Ozonation is a type of disinfection process where ozone bubbles are injected into the water supply. *Id.* Ozonation allegedly kills a wider range of pathogens than do other disinfection treatments and has an added benefit of enhancing the water's taste and coloration. *Id.*

[16] *Id.*

[17] *Id.* at 42-43.

[18] *Id.* at 43.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 44.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 45.

[31] *Id.*

[32] *Id.* (*citing MWRA I*, 48 F.Supp.2d at 70). 42 U.S.C. § 300g-3(b) allows for civil penalties to be accessed against a violator that can be as much as $25,000 for each day the violation occurs. *Id.*

[33] *MWRA*, 256 F.3d at 45.

[34] *MWRA I*, 48 F.Supp.2d at 72 *quoting* H.R.Rep. No. 93-1185 (1974). reprinted in. 1974 U.S.C.C.A.N. 6454. 6476.

finding of facts that at the time of trial there was no actual health issue due to the MWRA's compliance to the avoidance criteria.[35] Also, the cost of the filtration system would critically threaten the MWRA's other projects,[36] such as the pipeline replacement plan.[37] Thus the District Court denied any injunctive relief to the EPA at the present time, but did retain jurisdiction in the event that there were future violations.[38]

The United States appealed this case to the First Circuit Court of Appeals. The First Circuit heard the case on May 7, 2001, and issued its holding on July 16, 2001, affirming the District Court's rulings.[39]

III. LEGAL BACKGROUND

A. Overview of the SDWA

The focus of the Court's decision in *United States v. Mass. Water Res. Auth.* was whether the Court had discretion under the SDWA to fashion remedies as the Court saw fit rather than impose the remedy the EPA argued was the statutorily required remedy. In 1974, Congress enacted the SDWA requiring the EPA to insure the purity of the nation's public water supply.[40] Under the SDWA, the EPA is to establish and enforce maximum contaminant levels ("MCLs")[41] and treatment techniques.[42]

In 1986, Congress added amendments to the SDWA due to the EPA's idleness in establishing MCLs and enforcing the SDWA.[43] With these new amendments, Congress specified particular treatment techniques.[44] The first of these was the requirement that all public water suppliers use disinfection as a treatment method.[45] Filtration was the second specified treatment technique, but unlike disinfection, it is not mandatory.[46] However, Congress did specify that the EPA "shall propose and promulgate ... criteria under which filtration...is required as a treatment technique for public water systems supplied by surface water sources."[47]

In 1989, in compliance with the new amendments, the EPA created the SWTR, which established eleven avoidance criteria that public water supplies must meet to avoid filtration.[48] These eleven criteria deal with the quality of the system's source water, the minimum levels of disinfection, and the quality of the watershed protection and systems operation.[49]

When there has been a violation by a public water supplier, the SDWA covers the enforcement of drinking water regulations.[50] Upon the occurrence of a violation, the EPA "shall so notify the State and such public water system and provide such advice and technical assistance ... as may be appropriate to bring the system into compliance ...."[51] The SDWA goes on to say that the EPA "may bring a civil action," and the court "may enter ... such judgment as public health may require, taking into consideration the time necessary to comply and the availability of alternative water supplies ...."[52]

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[35] There had been no avoidance criteria violations since the violation in January 1999. *MWRA*, 256 F.3d at 45.
[36] The estimated cost of the filtration system was $180 million. *Id.* The MWRA had already budgeted about $1.7 billion for a new water supply tunnel, a covered-storage facility for treated water, a new disinfection facility, and the pipeline replacement plan. *Id.* at 46, n. 12. Furthermore, the court noted that the pipeline replacement would have to take place whether or not the MWRA had to install the filtration system. *Id.*
[37] *Id.*
[38] *Id.* at 47.
[39] *Id.* at 37.
[40] *Id.* at 38.
[41] MCLs are "numerical standards that represent the agency's expert determination as to 'the level at which no known or anticipated adverse effects on the health of person occur and which allows an adequate margin of safety.'" *Id. quoting* 42 U.S.C. §300g-1(b)(4)(A) (2001).
[42] *MWRA*, 256 F.3d at 38.
[43] *Id.* at 39.
[44] *Id.*
[45] 42 U.S.C. §300g-(b)(8) (2001).
[46] 42 U.S.C. §300g-(b)(7)(C)(i) (2001).
[47] *Id.*
[48] 40 C.F.R. §140.171(a)-(b) (2001).
[49] *Id.*
[50] 42 U.S.C. §300g-3 (2001).
[51] 42 U.S.C. §300g-3(a)(1)(A) (2001).
[52] 42 U.S.C. §300g-3(b) (2001).

B. Courts' Discretion in Statutory Injunctive Relief Cases

The court plays a different role in statutory injunctive relief cases than it does in traditional equitable claims.[53] In traditional permanent injunctive relief cases, the court typically must find that: (1) the plaintiff has demonstrated actual success on the merits of its claim; (2) the plaintiff would be irreparably injured in the absence of injunctive relief; (3) the harm to the plaintiff from the defendant's conduct would exceed the harm to the defendant accruing from the issuance of an injunction; and (4) the public interest would not be adversely affected by an injunction.[54] However, when a statute provides for possible injunctive relief, "the court's freedom to make an independent assessment of the equities and the public interest is circumscribed to the extent that Congress has already made such assessments...."[55] Thus, courts generally must find a balance between their traditional role in equitable relief and the role Congress has given them by looking directly to the statute.[56]

The United States Supreme Court has held on several occasions that a court retains its discretion in issuing an injunction provided for by statute unless its discretion is overcome by a proper showing of clear Congressional intent.[57] "The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge...is not mechanically obligated to grant an injunction for every violation of law."[58] Although Congress can choose to guide, control, or even eliminate a court's discretion, the United States Supreme Court has held that they are "not lightly [to] assume that Congress has intended to depart from established principles."[59] Furthermore, "when Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of the statutory purposes."[60]

In *Weinberger v. Romero-Barcelo*, the United States Supreme Court reversed a First Circuit decision dealing with statutory injunctive relief.[61] The District Court in *Weinberger* had found that the Navy was in violation of the Federal Water Pollution Control Act ("FWPCA") by discharging ordnance into the sea without a permit.[62] Although the District Court ordered the Navy to apply for the necessary permit, it did not enjoin the Navy from continuing with its activities during the application process because the Navy's "technical violations " were not causing any "appreciable harm" to the water quality.[63] The First Circuit reversed the decision to allow the Navy to continue its activities stating "[w]hether or not the Navy's activities in fact harm the coastal waters, it has an absolute statutory obligation to stop any discharges of pollutants until the permit procedure has been followed," and a permit has been granted.[64] The Supreme Court reversed concluding that the purpose of the FWPCA was to restore and maintain the integrity of the Nation's water and allowing the Navy to continue its activities during the application process would not undermine this purpose.[65] The First Circuit had erroneously focused on the permit process rather than the integrity of the Nations' waters.[66]

The Court in *Romero-Barcelo* looked to legislative intent, history , and the exact wording of the FWPCA.[67] The Court noted that Congress' purpose was to "restore and maintain the chemical, physical, and biological integrity of the Nation's water."[68] The Court also pointed out that the exact wording of the FWPCA in some places directed the EPA to seek a permanent injunction when immediate discharges of pollutants present "an imminent and substantial endangerment

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[53] *Yakus v. United States*, 321 U.S. 414. 441 (1944).
[54] *A.W. Chesterton Co. v. Chesterton*, 128 F.3d 1. 5 (1st Cir. 1997).
[55] *MWRA*, 256 F.3d at 47, *citing Burlington N.R.R. v. Bair*, 957 F.2d 599. 601-02 (8th Cir. 1992).
[56] *MWRA*, 256 F.3d at 47-48.
[57] *See Weinberger v. Romero-Barcelo*, 456 U.S. 305. 313 (1982); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288. 291 (1960); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Hecht Co. v. Bowles*, 321 U.S. 321. 329 (1944).
[58] *Romero-Barcelo*, 456 U.S. at 313; *see also Id.* at 322. (Stevens. J. dissenting) ("Unless Congress specifically commands a particular form of relief, the question of remedy remains subject to a court's equitable discretion.").
[59] *Romero-Barcelo*, 456 U.S. at 313.
[60] *Mitchell*, 361 U.S. at 291-92.
[61] *Romero-Barcelo*, 456 U.S. at 311.
[62] *Id.* at 307-308.
[63] *Id.* at 309-310.
[64] *Id.* at 310-311.
[65] *Id.* at 314-315.
[66] *Id.* at 314.
[67] *Id.* at 314-318.
[68] *Id.*at 314, (*quoting* 33 U.S.C. §1251(a) (1976 ed. Supp. IV)).

to the health of persons or to the welfare of persons,"[69] or the EPA can commence a civil action for nonimminent threats to seek appropriate relief, which could include permanent or temporary injunction or any other appropriate means of relief.[70] Applying the legislative intent and the wording of the DWPCA, the Court found that Congress had left room for court discretion in determining what appropriate relief would be for violations of the FWPCA.[71]

Thus courts must look to the exact wording of the statute in order to determine whether Congress has specifically limited or completely eliminated the court's discretion.[72] Not only is the language, history, and structure of the statute important to the court's interpretation,[73] the underlying purpose of the statute will help guide the court in determining what is within its discretion and what is equitable in individual cases.[74] Thus, the Court in *United States v. Mass. Water Res. Auth.* looked to the language, history, and legislative intent of the SDWA.[75]

IV. INSTANT DECISION

In *United States v. Mass. Water Res. Auth.*, the First Circuit Court of Appeals affirmed the District Court for the District of Massachusetts' holding that courts have discretion in deciding what equitable remedy should be granted for a violation of the SDWA and SWTR.[76] On appeal, the EPA argued when it has been shown that a water supplier has violated the SDWA and SWTR, courts do not have discretion to deny the statutory remedy.[77] The Court based its decision on three aspects of the legislative intent behind the SDWA.[78] The first of these aspects is the traditional role of the court's discretion in equitable relief cases where there is a statutory injunctive relief specified.[79] Second, the court looked to the legislative intent and history of the SDWA.[80] Finally, the court pointed to the exact wording of the statute to bolster its decision.[81]

The First Circuit began by examining the traditional role of the court's discretion in equitable relief cases where there is injunctive relief provided by statute.[82] The Court concluded that although injunctive relief may be suggested in the statute, courts are not bound by the suggestion "unless Congress specifically commands a particular form of relief...."[83] Thus the Court looked to the SDWA to determine whether the legislative intent was to constrain the equitable discretion by courts, and furthermore, the Court concluded that it need not look at all to the SWTR because it was written and structured by the EPA, not Congress.[84] In traditional equitable remedy cases,[85] courts have wide discretion in choosing the appropriate equitable remedy.[86] Relying on *Romero-Barcelo,* the Court found that even when a statute is involved, and injunctive relief is suggested, the court is "not lightly [to] assume that Congress has intended to depart from established principles."[87]

Next, the court looked to the legislative intent and history of the SDWA.[88] The EPA argued that legislative history pointed to the conclusion that the court did not have discretion to withhold the injunctive relief sought.[89] The

[69] *Id.* at 317. (*quoting* 33 U.S.C. §1364(a) (1976 ed. Supp. IV)).
[70] *Id.* at 318. (*citing* 33 U.S.C. §1319(b) (1976 ed. Supp. IV)).
[71] *Id.* at 318.
[72] *Id.* at 312-13.
[73] *TVA v. Hill.* 437 U.S. 153, 174 (1978).
[74] *Amoco Prod. Co. v. Village of Gambell, AK.* 480 U.S. 531, 544 (1987).
[75] *MWRA.* 256 F.3d at 47-51.
[76] *MWRA.* 256 F.3d at 37.
[77] *Id.* at 47.
[78] *Id.* at 52.
[79] *Id.* at 47.
[80] *Id.* at 49.
[81] *Id.* at 51.
[82] *Id.* at 47.
[83] *Id.* (*quoting* (Stevens, J. dissenting) in *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 322 (1982)).
[84] *MWRA.* 256 F.3d at 48-49.
[85] Traditionally in equitable remedy cases the plaintiff must show that: (1) the plaintiff has demonstrated actual success on the merits of its claims; (2) the plaintiff would be irreparably injured in the absence of injunctive relief; (3) the harm to the plaintiff from the defendant's conduct would exceed the harm to the defendant accruing from the issuance of an injunction; and (4) the public interest would not be adversely affected by an injunction. *Id.* at 50 n. 15 (*citing A.W. Chesterton Co. v. Chesterton,* 128 F.3d 1, 5 (1st Cir. 1997)).
[86] *MWRA.* 256 F.3d at 47.
[87] *Id.* at 48.
[88] *Id.* at 49.

United States relied on a passage from a report from the House Interstate and Foreign Commerce Committee, which states:

> [T]he Committee intends that courts which are considering remedies in enforcement actions under [42 U.S.C. § 300g-3] are not to apply traditional balancing principles used by equity courts. Rather, they are directed to give utmost weight to the Committee's paramount objective of providing maximum feasible protection of the public health at the times specified in the bill.[90]

The Court agreed that this tended to provide evidence that Congress did not want courts to apply the traditional test for issuing injunctions; however, the Court gave more weight to the latter part of the quote, in that the court's duty according to this House Report was to find the remedy that is in the best interest of the public health.[91]

Finally, the Court found that the wording of the statute bolstered its decision because the SDWA states that a court "*may* enter ... such judgment as protection of public health may require ...."[92] The Court found that "when Congress uses the permissive 'may' in settings such as § 300g-3(b), it is 'eminently reasonable' to presume that the choice of verbiage is a deliberate one, and that, in the context of that statute, 'may' means may.'"[93] According to the Court, Congress's intentions were only made more clear when amendments to the SDWA in 1986 changed several of the "may" wording throughout the SDWA to "shall," leaving the "may" in § 300g-3(b) untouched.[94]

The EPA went on to pursue two other arguments in this case, the first being that the district court had exceeded its scope of discretion by allowing the MWRA to remain in violation of the SDWA indefinitely.[95] The Court disagreed, however, that the district court's order was permitting noncompliance, in that the order had been designed to provide that the SDWA's objective of having safe drinking water was met.[96] The Court concluded that the District Court was right in focusing on the SDWA's "substantive purposes rather than its technical requirements."[97]

The final argument made by the EPA, which the court found to be just a variation of the overall argument, was that Congress had delegated the duty of enforcement to the EPA, and that the District Court had usurped this power with its holding. The Court found that Congress had only given the EPA the power to decide what factors would lead to mandatory filtration, and that as a general matter, those requirements should not be second-guessed by the courts, while at the same time courts are still given equitable discretion to the "extent that Congress has preserved discretion in the statute."[98]

The Court concluded that "it should be a rare case in which a violation of regulatory standards does not lead to an injunction if the responsible enforcement agency requests one."[99] The Court found that this was indeed one of those rare cases, and that the district court's duty was to find an appropriate solution to ensure that the MWRA was providing safe drinking water and would do so in the future.[100] Thus, the district court had not usurped its power of equitable discretion in statutory injunctive relief cases.[101]

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[89] *Id.*
[90] *Id.* (*quoting* H.R. Rep. No 93-1185 (1974). (reprinted in 1974 U.S.C.C.A.N. 6454. 6476)).
[91] *MWRA*, 256 F.3d at 50.
[92] *Id.* at 51, *quoting* 42 U.S.C. §300g-3(b) (emphasis added).
[93] *MWRA*, 256 F.3d at 51 (*quoting McCreary v. Offner*, 172 F.3d 76, 83 (D.C. Cir. 1999)).
[94] *MWRA*, 256 F.3d at 51.
[95] *Id.* at 55.
[96] *Id.* at 56.
[97] *Id.* at 57.
[98] *Id.* at 57-58.
[99] *Id.* at 58.
[100] *Id.*
[101] *Id.*

V. COMMENT

In *United States v. Mass. Water Res. Auth.*, the First Circuit had to determine the court's role as allocated to them by Congress through the SDWA, and the effect this role plays in the EPA's ability to enforce the SDWA. The Court had to interpret the fine line between the court system's historic use of discretion in injunctive relief cases and its limited discretion when a statute recommends a particular relief.

The EPA's argument in this case was that under the SDWA, courts do not have discretion at all to refuse to grant a particular form of injunction if the statute in question specifically mentions relief.[102] The First Circuit, rightfully so, rejected this argument.

A. A Literal Reading of the Statute's Language

The First Circuit was not bound by the SDWA to enforce filtration against the MWRA. One reason this is so can be found within the language of the statute itself. A literal reading of the statute's language indicates that Congress intended to retain court discretion in these matters. The court is granted its power to enforce drinking water regulations by 42 U.S.C. §300g-3(b). The exact language of this part of the SDWA provides that:

> The court *may* enter, in an action brought under this subsection, such judgment as protection of public health may require, taking into consideration the time necessary to comply and the availability of alternative water supplies....[103]

The use of the word 'may' conveys the idea that granting injunctive relief is permissive rather than mandatory. If Congress had intended for filtration to be mandatory, Congress could have easily construed the enforcement section of the SDWA in such a way as to clearly deny court discretion. In fact, Congress did so in other sections of the SDWA. For example, §300g-1(b)(1)(B)(III) says the EPA's "decision whether or not to select an unregulated contaminant for a list under this clause *shall not be subject to judicial review*."[104]

Furthermore, within §300g-3, Congress choose to use 'shall' in certain instances, demonstrating what actions are mandatory under §300g-3. The statute provides that the EPA "shall issue an order" or "shall commence a civil action."[105] The First Circuit determined that this particular wording throughout §300g-3 demonstrates that Congress considered the prosecution of SDWA violations as mandatory while leaving injunctive relief to the court's discretion.[106]

Caselaw also supports the First Circuit's interpretation of the use of 'may' and 'shall.' "The word 'shall' is ordinarily 'the language of command.'"[107] "And when the same Rule uses both 'may' and 'shall,' the normal inference is that each is used in its usual sense – the one act being permissive, the other mandatory."[108] In Congress's use of the word 'may' it is "eminently reasonable" that in the context of the statute Congress acted deliberately in its choice of words and "'may' means may."[109]

Thus, when one looks to the literal meanings provided by caselaw, as well as everyday usage, of the words chosen by Congress for the SDWA, the First Circuit was correct in deciding that §300g-3 provides for court discretion in terms of enforcing the SDWA. When comparing the use of the word 'shall,' as well as complete denial of judicial review in §300g-1,[110] with the use of the word 'may' within the statute, it is logical and appropriate to realize that Congress was: (1) using its power to allocate enforcement powers differently to two separate entities and (2) specifically granting complete discretion to the EPA in some instances while retaining judicial discretion in other instances.

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[102] *Id.* at 47.
[103] 42 U.S.C. § 300g-3(b) (2001) (emphasis added).
[104] 42 U.S.C. § 300g-1(b)(1)(B)(III) (2001) (emphasis added).
[105] 42 U.S.C. § 300g-3(a)(1)(B) (2001).
[106] *MWRA*, 256 F.3d at 51.
[107] *Alabama v. Bozeman*, 533 U.S. 146, 121 S.Ct. 2079, 2085 (2001) (*quoting Anderson v. Yungkau*, 329 U.S. 482, 485 (1947)).
[108] *Id.*
[109] *McCreary v. Offner*, 172 F.3d 76, 83 (D.C. Cir. 1999).
[110] 42 U.S.C. § 300g-1(b)(1)(B)(III) (2001).

B. Legislative Intent and Purpose of the Statute

From a literalist's perspective, the word 'may' alone could be all one needs to determine that the court had discretion to order or not order the filtration. However, the Supreme Court has said that although 'may' usually implies discretion, "[t]his common sense principle of statutory construction is by no means invariable ... and can be defeated by indication of legislative intent to the contrary or by obvious inferences from the structure and purposes of the statute."[111]

Congress's intent and purpose behind the 1974 enactment of the SDWA was to protect the nation's public water supply.[112] In *Romero-Barcelo* and *Village of Gambell*, the Supreme Court held that in determining whether or not to grant injunctive relief, the focus should be on the "underlying substantive policy the process was designed to effect..." not the statutory procedure.[113] Here the policy is to provide safe water by the best means possible. Thus, it should be left to the fact finder to determine what is the best means of providing safe water after a full fact finding inquiry and after determining the pros and cons of each alternative. This should be done on a case-by-case basis.

In the present case, the consequences of mandating filtration outweigh the consequences of allowing the MWRA to keep using disinfection, ozonation, and implementation of its other plans like pipe replacement. The court justifiably determined that Congress's objective was to provide "maximum feasible protection of the public health."[114] Therefore, courts should determine which alternative is both safe and feasible.

The first inquiry a court should make in determining whether to enforce filtration or not is whether alternative means being employed by the water system are working effectively. The only avoidance criteria of the eleven that the EPA considers to be a problem for the MWRA is the fecal coliform concentration. However, fecal coliform itself is not necessarily a risk to human health.[115] The problem is that most pathogens enter a water supply via fecal deposits, and one such pathogen that is of great concern is *cryptosporidium parvum*.[116] Although the scientific community has used fecal coliform counts as a predicator for pathogenic risk, according to scientists there seems to be no statistical correlation between fecal coliform present in water and pathogens such as *cryptosporidium* also being present in water.[117]

Therefore the MWRA's violation of the fecal coliform criteria is not actually indicative of the water's purity. In fact, of the sixty-seven cases of *cryptosporidiosis*, which is caused by *cryptosporidium*, in Massachusetts in 1998, none were traced back to contaminated water.[118] In 1996, there was an outbreak of *cryptosporidiosis* among guests at the Bay Tower Room in Boston, but the absence of subsequent outbreaks and the evidence at trial all pointed to unsanitary kitchen conditions rather than tap water.[119] Between 1984 and 1995, there were ten outbreaks of *cryptosporidiosis* in the United States, and the Centers for Disease Control reported that none were associated with unfiltered water systems.[120] Finally, it should be noted that filtration is not always foolproof. In 1993, in Milwaukee over 400,000 consumers were infected by *cryptosporidium* when there was a malfunction in the filtration plant.[121] Thus, the MWRA's one violation in 1999 of the fecal coliform count is not necessarily indicative of the water's safety.

Filtration also does not seem feasible for the MWRA. The estimated cost of filtration is $180 million.[122] The MWRA already had allocated $1.7 billion to replace pipes, which is necessary with or without filtration,[123] and also to build a new water supply tunnel, a covered-storage facility for already treated water,[124] and a new disinfection facility.[125] Furthermore, the MWRA started a grant program where its constituent cities and towns can receive part of the $25 million

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[111] *U.S. v. Rodgers*, 461 U.S. 677, 706 (1983).
[112] *MWRA*, 256 F.3d at 38.
[113] *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 544 (1987).
[114] H.R.Rep. No. 93-1185 (1974), reprinted in, 1974 U.S.C.C.A.N. 6454, 6476.
[115] *MWRA II*, 97 F. Supp.2d at 163.
[116] *Id.* at 162-63. *Cryptosporiduim parvum* is just one of the possible pathogens, but it is one of the greatest concerns in water systems and has been chosen here to be used for illustrative purposes in the text that follows.
[117] *Id.* at 163.
[118] *Id.* at 162, n.17. The number of cases reported, however, could be underrepresented due to underreporting or under diagnosis. *Id.*
[119] *MWRA II*, 97 F. Supp.2d at 164, n. 27.
[120] *Id.* at 162.
[121] *Id.*
[122] *MWRA*, 256 F.3d at 46.
[123] About 50% of the pipes are antiquated unlined cast iron. *MWRA II*, 97 F. Supp.2d at 169. Some of the pipes are over 150 years old while the average life of a pipe is only 100 years. *Id.* at 169, n. 40. Corrosion in the pipes can lead to contaminants leaking in through the pipes. *Id.* at 169.
[124] The $205 million allocated for this would result in the only two remaining uncovered reservoirs to be covered. *Id.*
[125] *MWRA*, 256 F.3d at 46, n. 12.

allocated annually to upgrade their pipelines.[126] The consequences of mandating filtration would result in the postponement or complete failure of these programs, all of which together make filtration unnecessary.

Therefore, the substantive underlying policy of the SDWA is to provide safe drinking water not to enforce filtration. If a public water system can show that other methods of purifying water are as effective as filtration and are more feasible, it is in the public's interest to avoid filtration.

VI. CONCLUSION

The First Circuit's decision will play an important role in future statutory injunctive relief cases since this area of law has not been addressed very much in past cases by courts. The main issue in this case was statutory interpretation, and it is better for the Court to fall on the side that allows for a check and balance upon agencies rather than to give agencies complete control. Finally, if Congress did not intend for the statute to be interpreted this way, then Congress is free to change the statute in such a way that makes it clear what Congress's intentions are.

LEECIA D. CARNES

[126] *Id.*