

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CIVIL ACTION 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

MOTION OF NASHUA RIVER WATERSHED ASSOCIATION, INC.
MASSACHUSETTS AUDUBON SOCIETY, INC.
FRIENDS OF QUABBIN, INC.
WATER SUPPLY CITIZENS ADVISORY COMMITTEE AND
RUTHERFORD H. PLATT FOR LEAVE TO FILE A BRIEF AMICUS

The Amici listed above, by their counsel, hereby move the Court for leave to file the attached Brief Amicus in the above action.

Based on their experience in the subject water system, the Movants wish to inform the Court about the crucial importance of grass-roots support for watershed management on the local and state level in preference to reliance on filtration.

The Brief is necessary because the parties are likely to focus primarily on narrow legal issues concerning the District Court's discretion.

The matters asserted are relevant to disposition of the case because they will provide a broader context for the Court's review of the District Court's decision of May 5, 2000.

Respectfully submitted,
Nashua River Watershed Association, Inc.
Massachusetts Audubon Society, Inc.
Friends of Quabbin, Inc.,
Water Supply Citizens Advisory
Rutherford H. Platt

By their attorney

Alexandra D. Dawson (BBO No. 116680)

December 19, 2000

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

**BRIEF OF AMICI CURIAE
NASHUA RIVER WATERSHED ASSOCIATION, INC.
MASSACHUSETTS AUDUBON SOCIETY, INC.
FRIENDS OF QUABBIN, INC.
WATER SUPPLY CITIZENS ADVISORY COMMITTEE
RUTHERFORD H. PLATT**

**IN AFFIRMANCE OF THE DECISION OF THE DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS**

Alexandra D. Dawson (BBO No. 116680)
2 West Street
Hadley, MA 01035
(413) 586-5586
Dated December 19, 2000

CORPORATE DISCLOSURE

Three of the Amici - The Nashua River Watershed Association, Inc., The Massachusetts Audubon, Inc. and The Friends of Quabbin, Inc., are nonprofit corporations. However, none of these corporations has any parent corporations, and none has issued any stock.

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STATEMENT OF INTEREST

The Amici are non-profit organizations and environmental advocates providing a perspective which the parties will not sufficiently address. The Amici believe that protection of water quality through watershed management, properly implemented by the communities in the watershed, provides the soundest public health benefit to consumers in the long run. The District Court decision of May 5, 2000 affirms this belief.

The watershed program of the Massachusetts Water Resources Authority (MWRA) and Metropolitan District Commission Division of Watershed Management (MDC-DWM) recognizes to a unique degree the principle that the ongoing success of a protection and management program depends not just on state action, but on the understanding and cooperation of the people within the watershed: public support from the ground up. The managing agencies have elicited public awareness and acceptance of the principle that actions taken by anyone on watershed lands and tributary waters determine the quality of the reservoir water.

In spite of the array of state-level regulations relating to drinking water quality, regulation of overall land use is still principally implemented on the local level. Successful watershed management programs must include the active

cooperation of the communities in the watersheds, often themselves not direct consumers of the protected water resource.

The Amici share a common concern. The MWRA/MDC-DWM water system currently benefits from local cooperation in addition to state and federal oversight. If the MWRA system must build a filter plant, then the people living in the watershed will no longer perceive that their contribution is crucial to prevention of water quality degradation. The overall level of protection will be seriously diminished. State and federal Acommand and control≡ alone cannot substitute for cooperative self-control.

The Amici have become intimately involved with this system=s water protection efforts. Specific activities are listed below:

Nashua River Watershed Association, Inc.¹ is a member of the Massachusetts Watershed Coalition. The Association's Executive Director is appointed to the Watershed Initiative Steering Committee by the Commonwealth's Secretary of Environmental Affairs to provide advice on the Massachusetts Watershed Initiative. The Association provides technical assistance to the Watershed towns. The Association is a community partner in the Nashua River Watershed Team established by the Massachusetts Executive Office of Environmental Affairs. The Wachusett Reservoir was formed by damming the

Nashua River.

Massachusetts Audubon Society, Inc.¹ has statutory representation on three committees formed to advise the MDC-DWM on all aspects of management within the system's watersheds: Quabbin Watershed Advisory Committee (QWAC), established under 1984 Mass. Acts 372, s. 42; codified at M.G.L. c. 92, s. 114.; the Wachusett-Sudbury Advisory Committee, established under 1984 Mass. Acts 372, s. 42 codified at M.G.L. c. 92 s. 115.; and the Ware River Advisory Committee established under 1995 Mass. Acts 242. The Massachusetts Audubon Society also fills a legislated position for an environmental organization on the MWRA Advisory Board 1984 Mass. Acts 372, s. 23 (a)(ii)(4). The Advisory Board has principal budgetary oversight to the MWRA. The Society is also represented on the Quabbin Science and Technical Advisory Committee.

Friends of Quabbin, Inc.¹ has a statutory position on the Quabbin Watershed Advisory Committee (QWAC) established under the 1984 Mass. Acts 372, s. 42, codified at M.G.L. c. 92 s. 114. The Friends' representative currently

¹The Nashua River Watershed Association, Inc.; The Massachusetts Audubon Society, Inc.; and The Friends of Quabbin, Inc. are non-profit organizations incorporated under M.G. L. c. 180 and qualified under s. 501(c)(3) of the Internal Revenue Code.

chairs the QWAC Forestry and Wildlife Subcommittee. Friends of Quabbin, Inc. operates the Visitors Center at the Quabbin Reservoir and conducts educational and technical support programs and projects jointly with MDC-DWM's operating and interpretive services staff.

Water Supply Citizens Advisory Committee (WSCAC) was officially appointed by the Massachusetts Secretary of Environmental Affairs in 1978 to advise the Metropolitan District Commission on all aspects of its water supply program, and has since served the same advisory function to the MWRA. WSCAC staff and volunteer members actively participate in a variety of committees addressing state-wide water policy development, and have participated in coalitions working on Federal laws such as amendments to the Safe Drinking Water Act (SDWA).

Rutherford H. Platt is a professor of geography and planning law at the University of Massachusetts Amherst, specializing in policy issues of land and water resources management. He served as a member of the recent National Research Council Committee reviewing the New York City Watershed Management Strategy developed by the City to qualify for a waiver of the filtration requirement under the SDWA.

SUMMARY

The MWRA's and the MDC-DWM's comprehensive programs of pollution prevention, in-reservoir management, ozone disinfection, and infrastructure improvements are preferable to building a filtration plant in order to meet water quality standards. No single treatment stratagem, such as filtration, can so effectively protect consumer health and build upon the unique strengths of this water supply system. Millions of dollars and years of expert studies failed to demonstrate the need for a filter plant, although other water system improvements were clearly indicated.

Under the SDWA amendments of 1986, unfiltered water systems may meet the requirements of the Act by one of two options: build filtration and provide disinfection, or implement a program of watershed management and provide disinfection. 42 U.S.C. 300g-1(b)(7)(iii); 40 C.F.R. 141.71-141.73. Treatment of contamination provides less protection to the consumer than preventing pollution in the first place. For this reason the Amici prefer the watershed management option.

The addition of filtration will result in the watershed communities perceiving that their efforts are not critical to source protection. As a result, their support for state agency watershed protection and management programs will diminish. The result will be degradation of water entering the reservoirs.

The federal Environmental Protection Agency (EPA) regulations and programs increasingly recognize the importance of watershed management. 42 U.S.C. 300f et seq; 40 C.F.R. Part 141. The Amici believe that the cooperation of all of the citizens involved is essential to watershed management and is necessary to sustain such regulatory efforts.

The MWRA/MDC-DWM water quality monitoring and public health surveillance programs exceed federal requirements. The agencies have established an interactive program with the whole community of interested parties. Such cooperation ensures that whatever needs to be done, will be done promptly.

ARGUMENT

I. The Congress recognized and the Court found on the facts that prevention of pollution is a primary treatment technique for protecting public health in this water system.

A. The Amici believe that there are public health benefits to the

watershed communities and to the consumer at the tap if the MWRA system remains unfiltered. The MWRA/MDC-DWM's unfiltered system operates through programs that emphasize source protection, appropriate disinfection and infrastructure maintenance throughout the water delivery system.

A requirement to add filtration will persuade the watershed communities that their efforts on behalf of source protection are needless, and those efforts will consequently decline.

In its argument to the District Court in support of its motion for partial summary judgment, the EPA found this argument unpersuasive because it apparently thinks that adequate source protection can be mandated entirely from above. Reply Memorandum of the United States in Further Support of Motion for Partial Summary Judgment; January 29, 1999. Civil Action No. 98-10267-RGS, Docket Entry No. 66. The District Court, however, found the watershed protection argument "credible" because the Court understood that the program would not be sustainable without local public support. (Add pp. 187-188).

B. Unlike many others, the MWRA/MDC-DWM system begins with exceptionally high water quality. The water quality is enhanced by the two largest constructed reservoirs dedicated to drinking water supply in the United States, specifically designed and engineered for long detention times, sedimentation of

particulates and long exposure of the water to sunlight (ultraviolet radiation), further improving the water's purity. (Add pp. 160, 170).

Vast tracts of watershed lands are publicly owned. The watershed program is increasing land holdings by systematic purchase of targeted lands that contribute most directly to tributary water quality. The emphasis on pollution prevention through land management led to the unique relationship between the water purveyor and the watershed communities, reified by the Massachusetts legislature's Watershed Protection Act (WsPA) of 1992. 1992 Mass. Acts c. 36; codified at M.G.L. c. 92, ss. 104, 107A-108.

The watershed program developed from information gathered through formal scientific study reviewed by the EPA, the Massachusetts Department of Environmental Protection (DEP) the state agency with primary enforcement power 42 U.S.C. 300g(2). under the SDWA, and independent experts. The empirical findings direct programmatic management actions specific to the watershed and reservoir characteristics, and strategically focus remedial actions on any potential threats from pollution and pathogens.

C. The passage of the WsPA is clear evidence that the state endorses a prevention strategy. The Amici support prevention as a sound basis for public health protection for consumers and watershed residents.

WsPA was passed after five years of statewide debate. Although adopted specifically to protect the three watersheds comprising the MWRA/MDC-DWM system, the law codified watershed management and protection practices, Mass. Acts c. 36; codified at M.G.L. c. 92, ss. 104, 107A-108, that would support the source-protection provisions of the DEP's water-quality assurance program for all surface drinking-water sources throughout the state. 1992 Mass. Acts c. 36, s. 14.

The WsPA provides a focused problem-solving management and land acquisition program that creates set-backs from tributary streams, connected wetlands and reservoirs; requires minimum acreage for lots with septic systems in watershed areas (or supports, where appropriate, expansion of sewers); and prohibits land disturbance in special resource boundary locations. It forms a basis for technical assistance to watershed communities in the MWRA/MDC-DWM system with funds and staff from state and federal agencies including the EPA and the Division of Natural Resources Conservation Services within the United States Department of Agriculture.

Pursuant to the WsPA, the watershed communities responded to state technical support by instituting many improvements, including amended zoning bylaws and subdivision regulations, mining controls, annual household hazardous waste collections, and stream clean-up events. When the WsPA was adopted in 1992, some watershed communities lacked functioning Boards of Health required

by other state law. Now, all communities have Health Boards, and they participate in a formal Board of Health Coalition. All cooperate in coordinating local Board data with the MDC-DWM watershed division data-base to better regulate local septic systems and to site private wells properly.

The accomplishments of the watershed management program continue to exceed the DEP's "Measures of Success" guidance, 1996 Massachusetts Department of Environmental Protection Measures of Success Guidance, which was approved by the EPA. This guidance defines criteria by which DEP assesses whether the watershed protection efforts conducted by public surface water suppliers qualify their water system to obtain, and/or maintain, a waiver from filtration requirements.

II. Since the 1986 SDWA amendments, watershed protection has been incorporated into national policy.

In that regard, EPA regulation has made a transition to a multi-faceted approach for public health protection: source protection and individually tailored treatment strategies for consumer protection.

Neither the SDWA amendments of 1986 and 1996 nor the implementing regulations precludes the option of a water supply system remaining unfiltered.

Both sets of amendments provide two methods for compliance: (1) disinfection for all surface drinking water sources and (2) a choice of whether or not to add filtration. 42 U.S.C. 300g-1(b)(7)(C)(iii); 40 C.F.R. 141.71-141.73; (Add pp. 165-167). Choosing to remain unfiltered requires the implementation of a watershed protection program.

In the 1996 SDWA amendments, Congress explicitly recognized the significance of source protection. 42 U.S.C. 300j-13. Congress also confirmed the need for EPA to continue gathering information to determine the actual performance of water systems and existing treatments so as to delineate more clearly what actions are most cost-effective for consumer protection and what new rules might be needed in the future. 42 U.S.C. 300g-1(b)(2)(C); 40 C.F.R. 141.140-142.

EPA was directed under the 1996 amendments to establish Rules incorporating information not available when the earlier microbial and disinfection standards were set. This program requires large water systems to monitor and provide data on the occurrence of pathogens and disinfection by-products. The information included data gathered from the full array of accepted treatment practices, including data from unfiltered disinfected systems. EPA agreed to be guided by the site-specific or technology-specific demonstrations of performance in considering its future requirements for finished water quality.

The 1996 amendments made EPA's approach to drinking water protection more comprehensive, emphasizing the need for basic watershed characterizations and management of pollution hot-spots. The approach consequently reduced the EPA's singular dependence on filtration. It also permitted the use of the federal/state revolving loan fund for protective land acquisition. 42 U.S.C. 300j-12(i).

Before the new approach was adopted, the EPA learned that filter plants were not fully providing the protection anticipated, unless impeccably maintained and operated. Congress responded in the 1996 SDWA amendments by including requirements that EPA promulgate a Rule to govern recycling of filter-plant backwash water, 42 U.S.C. 300g-1(b)(14), and consider standards for filtration upgrades to control microbial contaminants in low-quality sources. 42 U.S.C. 300g-1(b)(2)(C). Congress recognized that watershed management programs (often ignored in systems with filtration) could improve water quality; and that unfiltered systems should remain an acknowledged category under the SDWA and subsequent rule setting procedures. 42 U.S.C. 300g-1(b)(7)(C)(i); 40 C.F.R. Part 141.

Since its inception, the SDWA has mandated absolute limits, known as maximum contaminant levels, for some pollutants in drinking water (metals and organics for example), and the use of treatment techniques which provide

fractional reductions for identified microbial pollutants, such as viruses and *giardia lamblia*. 42 U.S.C. 300g-1(b)(7). The concentrations of these pathogens are difficult to measure. The fractional reduction of pathogens is expressed in the regulations as log reductions: Viruses must be reduced by 4-logs and *giardia lamblia* by 3-logs. 40 C.F.R. 141.70(a).

The public might find this arithmetic obscure. However, everyone can appreciate that percentage removals do not eliminate consumer risk. For example, if a water system with 10,000 pathogens per 100 liters of source water is processed to meet the standards, it still serves the consumer water with 10 pathogens per 100 liters after a 3-log reduction; whereas, water starting out with only 10 pathogens per 100 liters would expose the consumer to fewer than one/one-hundredth pathogen in 100 liters after a 3-log reduction --- a much safer product.

In a system with high-quality source water, pollution prevention is superior to percentage reduction. Dirty water is still dirtier, after meeting the standards, than water that is clean from the start.

III. The MWRA water quality assurance program and the Court=s decision to allow the program to proceed, do not foreclose implementation of any future method determined to be necessary or appropriate to protect the public health.

A. The MWRA/MDC-DWM water quality monitoring and public health surveillance programs provide continuous feedback to the watershed and water service managers. The program exceeds the monitoring and Consumer Confidence reporting requirements of the SDWA regulations. 40 C.F.R. 141.151-155. In addition the MWRA voluntarily established, research and health surveillance programs with the state Department of Public Health. The programs involve members of health agencies from the MWRA user communities and the academic public-health community. Such broad-based coordination creates a dynamic iterative process that is unique in the nation.

B. The water quality improvement program implemented by the MWRA and the MDC-DWM, and the extensive monitoring and surveillance programs, supplement the requirements of the SDWA regulations. Contrary to the EPA=s argument in its brief on this appeal, Appellant United States Opening

Brief on Appeal from United States District Court for the District of Massachusetts (D. Mass. No. 98-10267-RGS) Docket No. 00-2028. the Judge clearly recognized that no present decision exculpates the MWRA from meeting the requirements of the SDWA and state water quality regulations by any means necessary, including present or new forms of filtration and disinfection, or emerging technology if and when it becomes necessary. (Add. pp. 31-32). Moreover, all new MWRA facilities are designed to accommodate any necessary engineering changes.

In an earlier decision in this case, the Court remarked “...there is an inherent danger in attempting to legislate today’s science as the foreordained solution for tomorrow’s problems.” United States v. Massachusetts Water Resources Authority, 48 F. Supp. 2d 65, 72 (D.Mass. 2000).

The MWRA/MDC-DWM’s flexible programs address water quality improvement from source to consumer. The program has broadened its base of public support by earning the affirmation of the watershed communities and environmental groups, and by willingly adding the scrutiny of the public health and academic community.

This kind of dialogue ensures the timely identification of problems and public support for the agencies= timely response.

CONCLUSION

The watershed management and land acquisition programs have state and local support. The Amici believe these programs constitute a model for protecting drinking water. These pioneer programs presage the "voluntary incentive-based partnership" approach included in the Safe Drinking Water Act 1996 amendments. 42 U.S.C. 300j-14. The surveillance programs and actions of many local boards, businesses, and individuals in the watershed support the level of treatment to which the MWRA is now committed. We believe that system-specific treatment, dedicated system maintenance and infrastructure improvements will continue to provide the highest public health protection to MWRA consumers and to the citizens of the regulated watershed areas.

The Amici believe that the District Court's decision is congruent with the values that the Amici support and that have been endorsed by Congress in the SDWA: environmental management and public health protection.

The Amici respectfully request that the Court of Appeals for the First Circuit affirm the decision of the federal District Court which recognized the effectiveness of the program discussed in this Brief Amicus.

Respectfully submitted,

Nashua River Watershed Association, Inc.
Massachusetts Audubon Society, Inc.
Friends of Quabbin, Inc.
Water Supply Citizens Advisory Committee
Rutherford H. Platt

By their attorney,

Alexandra D. Dawson (BBO #116680)

Dated: December 19, 2000

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CERTIFICATIONS

CERTIFICATION OF ASSENT

The undersigned certifies that the Defendants-Appellees, MWRA and MDC, have assented to this Motion, but the United States, Plaintiff-Appellant, has not assented.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with typeface and length limitation set forth in Rule 32 (a)(7)(c) of the Federal Rules of Civil Procedure. The Brief contains 14 point proportional spaced serif typeface, Times New Roman. The Brief contains 2963 words.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Motion and Brief were served upon the attorney of record for each party by hand delivery on December 19, 2000.

Alexandra D. Dawson (BBO No. 116680)