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Preliminary Injunctive Relief under the Federal Water Pollution Control Act - Weinberger v. Romero-Borcelo

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In 1978, environmentalists applauded the United States Supreme Court's decision in *TVA v. Hill*\(^1\) to permanently enjoin the completion of an enormous federal dam in order to save an endangered species of fish. The decision was noteworthy because it illustrated the Supreme Court's willingness to use a permanent injunction, under the authority of an environmental statute, to preserve valuable ecological assets. Four years later, however, in *Weinberger v. Romero-Barcelo*,\(^2\) the Court retreated from its position on environmental protection and the availability of injunctive relief. Instead, the Court refused to issue a preliminary injunction even though there was a discharge of pollutants into national waters in violation of statutory requirements.

The *Romero-Barcelo* Court considered whether the enforcement provisions of the 1972 Federal Clean Water Amendments (FWPCA) pre-empted a federal district court's inherent equitable power to withhold a preliminary injunction.\(^3\) The Commonwealth of Puerto Rico had sought to enjoin the Navy from conducting bombing practice off the Puerto Rican coast.\(^4\) The district court denied the preliminary injunction because the plaintiffs had not made a sufficient demonstration of irreparable harm.\(^5\) The district court also found that national security and preservation of sea lanes made it imperative that the Navy continue its bombing maneuvers. Therefore, the district court allowed the bombing practice to continue prior to the issuance of a permit, as required by the FWPCA.\(^6\)

Without addressing the merits of the district court's decision, the

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3. *Id.* at 306-07.
5. *Id.* at 706-07.
6. *Id.* at 708.
Supreme Court affirmed the power of the district court to deny injunctive relief. The Court found that the Clean Water Act, unlike the Endangered Species Act considered in *TVA v. Hill*, did not displace a federal court's traditional equitable power to withhold preliminary injunctions. In reaching its conclusion, the Court relied on the Clean Water Act's legislative history and statutory interpretation, as well as previous Supreme Court decisions and policy.

The tension between judicial equitable authority and Congress' power to provide injunctive relief arises whenever the district courts must determine whether an ambiguous statutory remedy is permissive or mandatory. The need for a preliminary injunction in environmental litigation is particularly urgent because certain kinds of damage can be very dangerous. Nevertheless, in the context of equally important countervailing federal concerns, *Romero-Barcelo* reflects a trend to give government agencies more latitude to pollute when other national policies are at stake.

This comment will discuss how federal courts have handled injunctions under other federal statutes. The focus will then shift to the legislative history of the 1972 Clean Water Act amendments and the relevant case law. The analysis will show that the finding in *Romero-Barcelo* that the Clean Water Act has not totally pre-empted a trial court's equitable discretion does not depart from most previous decisions. Instead, the court may still consider policy and irreparable harm as well as legislative intent, when withholding statutory injunctive relief. Thus, *Romero-Barcelo* is a potentially useful precedent for the federal courts to deny preliminary injunctions in the wake of superseding national policies or in the absence of irreparable harm to the plaintiff. However, lower federal courts have been more willing to grant injunctive relief when it is provided for by statute, without the traditional showing of irreparable harm, in order to achieve the concerns expressed by the statute. It is likely these courts will limit *Romero-Barcelo* to its facts.

**BACKGROUND**

*Standards for the Grant or Denial of Injunctive Relief*

A trial judge may order injunctive relief if he finds there is immi-

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7. 456 U.S. at 320.
8. Id. at 311-320.
nent danger of irreparable injury. An appellate court may overturn the order if there is error or abuse of discretion. Because an injunction is an extraordinary remedy, however, four traditional requirements for injunctive relief retain practical significance: First, no permanent or interlocutory (preliminary) injunction is granted unless the legal remedy is clearly inadequate. Secondly, the court will not grant a preliminary injunction except to prevent irreparable harm. Evidence of this harm must be stronger than that needed to issue an injunction as a permanent remedy after the trial. Thirdly, the court will deny temporary relief except on a strong showing that the applicant will ultimately succeed on the merits. Finally, where hardships will result in loss to either party which are not compensable as damages, the court must balance the possibility of irretrievable loss to either side. Rule 65 of the Federal Rules of Civil Procedure has expressly incorporated the second of the above four considerations in its criteria for issuing temporary restraining orders. In addition, the three other traditional requirements for preliminary injunctive relief often appear in federal

10. D. Dobbs, Remedies 105, 111 (1973). An injunction is an equitable decree issued by a court which directs an individual to act, or prohibits him from acting in a certain manner. Id. at 105. It may be enforced by a court's contempt order so that a recalcitrant party can be imprisoned, fined, or deprived of the right to litigate his grievance. Id. Equitable jurisdiction should be distinguished from subject matter jurisdiction. Subject matter jurisdiction involves the power of the court to hear the case. Any decree a court issues without the requisite subject matter jurisdiction is always void. M. Green, Basic Civil Procedure 4 (2d ed. 1979). Equitable jurisdiction, however, is merely a designation for the kinds of cases which were historically heard by the English chancellor instead of the English common law courts. As a result, an equitable remedy is enforceable even if it is erroneously issued. Dobbs at 105.

Some injunctive orders are issued without a full hearing on the facts. Id. at 106. Some may be issued even before the defendant has an opportunity to appear and make a defense. Therefore, the form of the relief, the standards under which it is granted or denied, and procedural safeguards are very important.

A preliminary injunction is an order which is granted as an emergency measure before a full hearing can be held. Id. at 106. There must be notice to the defendant and a hearing on the motion. If the party against whom the preliminary injunction acts is sufficiently aggrieved, the trial judge may stay the order while the appropriateness of the preliminary injunction is reviewed. Id. at 107. In fact, some statutes even authorize a mandatory stay while the appellate court reviews the interlocutory order. Id.

11. Id. at 108. "Inadequate" means that the legal remedy, usually money damages, will not give the plaintiff the compensation he desires, or will not prevent further harm from occurring. Id. at 57-8.

12. Id. at 109.

13. Id.

14. Id.

15. Rule 65(b) reads in pertinent part:

A temporary restraining order may be granted without written or oral notice to the adverse party or to his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition.

cases, although these requirements are not expressly listed in the text of Rule 65.16

Unfortunately, the courts often do not distinguish in their opinions between the tests for permanent17 and preliminary18 injunctions but the line of demarcation seems to be the following: for a preliminary injunction the plaintiff always has to satisfy the four part test.19 For permanent injunctions the most important component is inadequacy of a legal remedy, coupled with irreparable harm to the plaintiff.20 As the decisions below indicate however, the courts which do mention these

16. See Webb v. Board of Educ., 223 F. Supp. 466 (N.D. Ill. 1963). The court denied the preliminary injunction because the plaintiffs did not demonstrate a high probability of success on the merits. There remained a substantial question of fact as to whether the school superintendent and the Board of Education of the City of Chicago had purposely maintained the schools in a segregated manner thus causing the harm which the plaintiffs alleged in the complaint.

See also Grier v. Bowker, 314 F. Supp. 624 (S.D.N.Y. 1970). This court denied a preliminary injunction to eliminate summer school fees at certain New York City colleges. The court upheld its denial saying that the plaintiffs had been unable to estimate the number of community college students who wished to attend summer school but could not because of the tuition. Since this showing was necessary for probable success on the merits, a prerequisite for the preliminary injunction, the issue of irreparable harm became moot.

As for whether the federal courts can issue a preliminary injunction under Rule 65 without a showing of irreparable harm, see Pharmaceutical Manufacturers v. Weinberger, 401 F. Supp. 444 (D.D.C. 1975). The pharmaceutical company requested a preliminary injunction to prevent the FDA from releasing information about its drugs without giving it notice. Judge Sirica denied the request, stating that the four-part test applied. Unfortunately for the plaintiffs, they had not demonstrated the likelihood of success on the merits or the likelihood of irreparable harm.

Another case decided under the Rule, Florida Medical Assoc. v. U.S. Dept. of Health, Educ. and Welfare, 601 F.2d 199 (5th Cir. 1979) held that the four-part test must be followed when granting preliminary injunctions in the federal courts. The court stated:

With few exceptions, the Federal Rules of Civil Procedure provide the procedures to be followed in the United States district courts . . . Neither the doctrine of ancillary jurisdiction nor the All Writs Act empower a district court to abandon the Rules whenever they prove procedurally inconvenient . . . A preliminary injunction, however, must be the product of reasoned application of the four factors held to be necessary prerequisites before a preliminary injunction may be obtained.

Id. at 202.

17. A permanent injunction is granted after trial if monetary damages will not compensate the plaintiff for his injury, or if the injury is likely to recur numerous times. See Dobbs supra note 10 at 106, 110.

18. A preliminary injunction is granted before trial under circumstances in which the status quo must be preserved until judgment on the merits. It is also granted when it is apparent that plaintiff will clearly prevail on the merits at the trial. Dobbs, supra note 10 at 106, 110.


20. Id. at 108-09. However, Professor Dobbs maintains that the concept of irreparable harm is not applied literally where permanent injunctions are involved. Id.
criteria may use them interchangably often relying on demonstrations of irreparable harm to the plaintiff.

**Pre-emption of Equitable Jurisdiction by Federal Statutes: Prior Case Law**

Previous Supreme Court decisions indicate that some federal statutes may not totally pre-empt equitable jurisdiction. For example, in *Hecht Co. v. Bowles*, the Supreme Court ignored statutory language which arguably made an injunction mandatory for any violation. In *Hecht*, a department store owner had inadvertently committed violations of the Emergency Price Control Act. The Court considered whether an injunction should automatically be granted if the defendant had made every effort to comply and an injunction was not necessary to insure future compliance with the Act. The Court held that the injunction was not mandatory. The Court seemed to say that equitable principles still applied "across the board" to any statute authorizing equitable relief. However, the Court went on to obscure its holding considerably by stating that proof of actual harm and lack of an adequate legal remedy are not always required when a statute provides for injunctive relief to protect public interests.

The conflict between Congress and the federal courts over who has

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22. *Id.* at 322. Section 205(a) of the Emergency Price Control Act of 1942 provides:
   "Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond."


23. *Id.* at 330-31. In *Hecht*, the petitioner operated a large department store in Washington, D.C. Government investigators discovered numerous violations in prices and records in several sections of the store. However, the district court found good faith effort by the petitioner, despite the difficulty in interpreting regulations and confusion on the part of the employees. *Id.* at 324-25.

The United States Supreme Court found the language of Section 205(a) of the Emergency Price Control Act permissive with respect to granting injunctive relief. *Id.* at 328-29.

24. *Id.* at 331 (dictum). The Supreme Court did not subsequently resolve this inconsistent dictum in United Steelworkers of America v. United States, 361 U.S. 39 (1959) (per curiam) or Rondeau v. Mosinee Paper Corp., 422 U.S 49 (1975). The Court in *Steelworkers* was consistent with the *Hecht* dictum and held that no traditional showing of irreparable harm was necessary because Congress passed the Labor Management Relations Act to promote national welfare and safety. In *Rondeau*, however, the Court found that a demonstration of irreparable harm was necessary for relief under the Williams Act. 422 U.S. at 55. It reasoned that because the *Rondeau* litigant (a corporation) was a private party asserting a private right of action more than a mere statutory violation was needed to trigger injunctive relief. Since the corporation conceded that it had suffered no irreparable harm, Chief Justice Burger, writing for the majority, held that a denial of injunctive relief was proper. *Id.* at 62-65.
the final authority to order injunctive relief also exists under several environmental statutes. One recent Supreme Court decision, *TVA v. Hill*\(^2^5\) illustrates how Congress has succeeded in modifying the courts' power by using the legislative intent behind the Endangered Species Act.\(^2^6\) Cases such as *Weinberger v. Catholic Action of Hawaii*,\(^2^7\) and *Aluli v. Brown*\(^2^8\) are important because they discuss environmental policy in the context of national security.\(^2^9\) Two National Environmental

26. See also *Vermont Yankee Nuclear Power Corp. v. NDRC*, 435 U.S. 519 (1978). In *Vermont Yankee*, the Supreme Court concluded that the Administrative Procedure Act completely pre-empts judicial equitable discretion in the area of administrative rulemaking procedures.

The Atomic Energy Commission (AEC) and the Atomic Safety and Licensing Board had originally held hearings on the license for a nuclear reactor. The subsequent rulemaking proceedings on environmental effects associated with the uranium fuel cycle culminated in an AEC ruling on the issue, and the approval of the rulemaking procedures.

About the same time, the Council on Environmental Quality (CEQ) revised its criteria for environmental impact statements so that discussion of energy conservation as an alternative to a proposed project became necessary. The AEC would not reopen the proceedings at the agency level to reconsider the sufficiency of the original rulemaking procedures or the granting of the license. The Court of Appeals, however, held in a companion case, *Aeschliman v. United States Nuclear Reg. Com'n*, 547 F.2d 622 (D.C. Cir. 1976), that the environmental impact statement must be rewritten according to the new CEQ criteria. It reasoned that the original report was not sufficiently informative to the public. It also found the AEC rulemaking procedures inadequate, although they conformed to the minimum requirements of the Administrative Procedure Act. Consequently, the appellate court overturned the AEC's determination on the license and its ruling. Both were remanded to the agency for further proceedings. *Id.* at 627-32.

The Supreme Court summarily reversed the mandatory ACRS report decree. It found that the Court of Appeals had invaded the executive power of the agency and had intruded on Congress' power to formulate nuclear power policy. 435 U.S. at 555. Justice Rehnquist addressed the Administrative Procedure Act at greater length and observed that its legislative history did not indicate that the Act could be augmented by the courts, *Id.* at 545-46. Instead, the statute provided all the necessary administrative requirements for rulemaking procedures. *Id.* at 548.

The *Vermont Yankee* appellate court was very aggressive in its conception of the scope of its judicial power. Perhaps its orders to refashion the rulemaking process before the AEC could be construed as an affirmative mandatory injunction, as opposed to a negative prohibitory injunction. However, characterization of what the appellate court did was irrelevant according to the Supreme Court because the Administrative Procedure Act foreclosed any judicial modification of the agency decision making processes. The problem in *Romero-Barcelo* was different because a government agency was arguably not in compliance with the statutory language of the Clean Water Act in the first instance.

27. 454 U.S. 139 (1982).
29. See also *Adams v. Vance*, 570 F.2d 950 (D.C. Cir. 1978). In *Adams*, the United States was a participant in an international treaty whereby Eskimos were allowed to hunt bowhead whales. The United States Secretary of State failed to object when the International Committee took this privilege away in the interest of preserving a threatened species. The Eskimos subsequently requested a preliminary injunction ordering the Secretary to abide by his original promise to allow the hunting. However, the circuit court held that when injunctive relief "deeply intrudes" into the core concerns of the executive branch, the court should not apply orthodox criteria for injunctive relief. *Id.* at 954.

*Adams* is an excellent example of a case in which the federal courts did not apply the traditional four-part test for preliminary injunctive relief against the government because of foreign policy.
Protection Act (NEPA) cases\textsuperscript{30} illustrate that private plaintiffs or state governments may need more evidence of irreparable harm for injunctive relief when the defendant is the federal government.

**Legislative intent**

In *TVA v. Hill*,\textsuperscript{31} the Supreme Court concluded that the legislative intent behind the Endangered Species Act of 1973 prevented the completion of a dam which threatened the existence of the snail darter.\textsuperscript{32} The Court relied on the intent expressed in the congressional reports and held that all federal agencies must "'insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence' of an endangered species or 'result in the destruction or modification of habitat of such species.'"\textsuperscript{33} Furthermore, the *TVA* Court rejected the traditional balancing of equities approach. It found no power to balance hardship if Congress had made no exemption for federal agencies from the remedial provision of the Act. Since Congress had the expert knowledge, the Court had no authority to fashion its own remedies. Therefore, the Court upheld the order for a permanent injunction.\textsuperscript{34} However, the *TVA* decision did not expressly state that the traditional four-part test for preliminary injunctive relief is abolished under the Endangered Species Act.

**National security**

*TVA v. Hill* demonstrates how the Supreme Court deferred to congressional intent behind a federal environmental statute, in this case the Endangered Species Act. However, when national security considerations are present, then such congressional intent may be superseded by another statute, executive order or prudential considerations. Two recent cases illustrate why the district court and the Supreme Court in the *Romero-Barcelo* litigation found national security very relevant in


\textsuperscript{33} Id. at 173, quoting 16 U.S.C. § 1536 (1976). In *TVA*, the federal government had begun construction on a huge dam (Tellico Dam). Shortly after the passage of the Act, a small species of perch known as the snail darter was registered as an endangered species. Consequently, the Secretary of Interior declared the area originally designated for the reservoir as the critical habitat of the snail darter. Respondents brought the original action in a district court to enjoin completion of the dam and impoundment of the reservoir. They claimed that completion of the dam would violate the Act by causing the snail darter's extinction. *Id.* at 158-65. Furthermore, according to the Act, all federal agencies were to give preservation of species the utmost priority. *Id.* at 173.

\textsuperscript{34} *Id.* at 193-94.
the decision to deny preliminary injunctive relief. In \textit{Weinberger v. Catholic Action of Hawaii},\textsuperscript{35} the Navy allegedly violated the National Environmental Protection Act by refusing to publically disclose an environmental impact statement revealing the location of a potential arsenal of nuclear weapons. The Supreme Court held that specific statutory protection of Navy environmental impact statements prevented the public from obtaining such information.\textsuperscript{36} Instead, such disclosure is governed by the Freedom of Information Act (FOIA) which exempts matters which are "specifically authorized . . . by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order."\textsuperscript{37} Since the Navy had an executive exemption under that statute, the district court could not order disclosure under NEPA.

The requested remedy in \textit{Catholic Action of Hawaii} was not a preliminary injunction but a mandatory decree to disclose information on future nuclear weapon storage. The case is instructive however, because Congress, pursuant to the FOIA, had exempted the Navy from NEPA requirements in the interest of national security. As a result, the superseding policy behind another statute foreclosed the plaintiffs' request for equitable relief. In contrast, the district court in \textit{Aluli v. Brown}\textsuperscript{38} faced no conflicting statute, but on its own initiative, recognized a significant national security problem. In that case, the plaintiffs requested a preliminary injunction when the Navy held bombing maneuvers in Hawaiian coastal waters. In its decision denying the request, the court discussed its concerns over the Navy's contention that the military readiness of the Thid Fleet would be reduced 30 to 40 percent if the injunction was granted.\textsuperscript{39} In considering the potential loss of


\textsuperscript{36} 454 U.S. at 144-45.

\textsuperscript{37} \textit{Id.} at 144.


\textsuperscript{39} \textit{Id.}
military preparedness, the court found that the balance of hardships tipped in favor of the Navy.\textsuperscript{40}

_Catholic Action_ and _Aluli_ demonstrate how the Navy can prevail over environmental policy. Although these cases were originally brought pursuant to NEPA,\textsuperscript{41} a similar situation surfaces as the conflict between Clean Water Act policy and military preparedness in _Romero-Barcelo_.\textsuperscript{42} The _Romero-Barcelo_ Court appears to have relied on prudential concerns similar to those in _Aluli_, presumably because the facts and requested remedy were remarkably alike.

_The federal government as defendant_

One _Romero-Barcelo_ plaintiff was a political entity (Puerto Rico) suing the federal government. Consequently, two NEPA cases\textsuperscript{43} are noteworthy in the context of injunctive relief when the defendant is a federal agency, but the plaintiff is a private organization or a state agency. In _Klepp v. Sierra Club_\textsuperscript{44} a private organization sued the Federal Department of Interior because of the alleged insufficiency of an environmental impact statement concerning a coal mining operation. The Supreme Court reversed the Court of Appeals' decision to grant a permanent injunction against the department.\textsuperscript{45} It reasoned that neither the statute nor its legislative history allowed a court to substitute its own judgment for that of the agency. The court found an additional reason for its conclusion: even if the court had the authority to

\textsuperscript{40} Id.

\textsuperscript{41} _Aluli_ was litigated under the National Environmental Policy Act (NEPA). _Catholic Action_ was litigated under the NEPA and the FOIA with its accompanying executive orders and regulations.


\textsuperscript{43} Section 102(2)(C) of NEPA reads in pertinent part:

_The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter and (2) all agencies of the Federal Government shall— (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on— (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented._

\textsuperscript{44} 42 U.S.C. § 4332 (1976).

\textsuperscript{45} Id. at 407-08.
substitute its own judgment, then the plaintiffs must establish irreparable injury in order to obtain an injunction.\textsuperscript{46} Under the \textit{Kleppe} facts, there was no such harm because the existing environmental impact statement adequately described the proposed mining plans.\textsuperscript{47}

\textit{Kleppe} illustrates that when the defendant is the federal government, the Supreme Court is wary of conflict with the executive and legislative branches. As a result, policy and legislative intent become more crucial when the defendant is not a private party. However, at least one court has found the reasoning of the \textit{Kleppe} Court unpersuasive on the facts presented before it. In \textit{California v. Bergland},\textsuperscript{48} California sued the National Forest Service alleging that the necessary NEPA environmental impact statement had been inadequate. As a result, roadless wilderness areas in the state were slated for development without appropriate regard for environmental consequences. The plaintiffs disputed the nonwilderness designation of forty-seven areas prior to circulation of the environmental impact statement in compliance with NEPA requirements.\textsuperscript{49} The district court found that its role in enforcing NEPA was limited and precise—to make the National Forest Service follow the statute. Therefore, a permanent injunction was appropriate until the agency submitted an environmental impact statement, completed according to NEPA requirements.\textsuperscript{50} \textit{Bergland}

\textsuperscript{46} \textit{Id.} at 407.

\textsuperscript{47} \textit{Id.} The reason that the Court found no harm in \textit{Kleppe} was because the plaintiffs did not demonstrate a need for a greater regional implementation plan. \textit{Id.} at 14. The Court therefore deferred to the "expert agency" (Department of the Interior) statement that the potential problems of the coal-related projects could be handled without one comprehensive impact statement. \textit{Id.}

\textit{See also} \textit{Alaska v. Andrus}, 580 F.2d 465 (D.C. Cir. 1978), in which an appellate court denied a preliminary injunction against the NEPA defendant using a similar rationale. In \textit{Alaska}, the Federal Department of the Interior had offered for bid over one million acres of oil and gas leases in the Gulf of Alaska Outer Continental Shelf. Originally the plaintiffs litigated to enjoin the sale of the leases. They alleged that the environmental impact statement prepared prior to the sale did not satisfy the requirements of the Environmental Policy Act. They further alleged that the Secretary of the Interior proceeded with the sale without adequate information, which was in itself a violation of the Act. The plaintiffs did not prevail in this original suit for injunctive relief. However, they subsequently filed another suit to enjoin exploratory drilling in the Gulf of Alaska. \textit{Id.} at 466-67.

The circuit court's decision on the appropriateness of this injunctive relief was the subject of the most recent case, \textit{Alaska}. The court held that while there is, in cases of NEPA non-compliance, a "presumption" in favor of injunctive relief, such relief does not automatically flow from every statutory violation. \textit{Id.} at 485. Therefore, although the continued operation could cause environmental harm while the Secretary conducted an evaluation, the risk was simply too small and speculative to justify an injunction as long as the Secretary proceeded reasonably and expeditiously. \textit{Id.} at 486.

\textsuperscript{48} 483 F. Supp. 465 (E.D. Cal. 1980).

\textsuperscript{49} \textit{Id.} at 499.

\textsuperscript{50} \textit{Id.} Judge Karlton recognized that other courts in the Ninth Circuit still applied a balancing of the equities test in NEPA cases, although there appeared to be a presumption in favor of injunctive relief. However, there seemed to be, even in these cases, the opinion that absent unu-
did not address whether NEPA requires a preliminary injunction under all circumstances, although the court did find that a permanent injunction was appropriate when there would be widespread destruction of wilderness areas.\textsuperscript{51}

\textit{Kleppe} and \textit{Bergland}, although decided under NEPA, are relevant because they resolved environmental litigation against federal government defendants; as noted previously, the \textit{Romero-Barcelo} defendant was the United States Navy. However, for a total understanding of \textit{Romero-Barcelo}, a brief discussion of another water pollution statute, the River and Harbors Act of 1899, is necessary because the Act is a direct legislative predecessor to the 1972 Clean Water Act Amendments. Consequently, the Supreme Court relied on Rivers and Harbors case law to arrive at its conclusions under the Clean Water Act.\textsuperscript{52} The Clean Air Act of 1970\textsuperscript{53} is also crucial to understanding the Supreme Court decisions because that statute was also a direct, albeit younger legislative precursor of the Amendments. More importantly, as a result of the sparsity of appropriate Clean Water Act decisions it is necessary to analyze analogous Clean Air Act cases in order to fully understand \textit{Romero-Barcelo}.

\textit{The Rivers and Harbors Act of 1899 and the Clean Air Act of 1970}

The Rivers and Harbors Act of 1899\textsuperscript{54} was originally intended to keep navigable channels clear of debris so that they would be safe for commerce.\textsuperscript{55} Congress included injunctive relief as an important rem-
edy for obstruction to navigation. During the 1960s and early 1970s, federal courts expanded the use of this remedy to actions against private real estate developers who dumped fill materials into national waterways. The Supreme Court decision in *Wyandotte Transportation Company v. United States* supported this expansive interpretation.

Congress passed the Clean Air Act in 1955 for the purpose of preserving public health. The 1970 amendments provided for civil penalties as well as injunctive relief. Since the 1970 amendments, at


57. It is interesting that some cases involving injunctive relief which arose under the Refuse Act during the 1970s were decided under provisions which do not mention injunctions in either permissive or mandatory language. Apparently the need for such an expansive spirit of enforcement was no longer needed after the passage of the 1972 amendments to the Federal Water Pollution Control Act.


58. 389 U.S. 191 (1967). In *Wyandotte*, the United States Supreme Court held that the criminal penalties provided in Section 406 of the Refuse Act do not exclude the district courts from granting appropriate civil remedies. The Court stated:

> Our decisions have established, too, the general rule that the United States may sue to protect its [own] interests. . . . The rule is not necessarily inapplicable when the particular governmental interest sought to be protected is expressed in a statute carrying criminal penalties for its violation. . . .

> The inadequacy of the criminal penalties explicitly provided by section 16 of the Rivers and Harbors Act is beyond dispute. . . .

*Id.* at 201-02. The Court ultimately concluded that government prosecutors were entitled to any civil "remedy that ensures the full effectiveness of the Act." *Id.* at 204. See also United States v. Joseph G. Moretti, Inc. 331 F. Supp. 151 (S.D. Fla. 1971), vacated in part and remanded, 478 F.2d 418 (5th Cir. 1973), on remand, 387 F. Supp. 1404 (S.D. Fla. 1974). In *Moretti*, the court enjoined the defendants from conducting dredge and fill work in the Florida Keys. The court held that the filling of a bay constituted creation of a structure within the meaning of the statute. Therefore, the removal of the fill was enforceable by an injunction.


60. *Id.* See also Section 113 of the 1970 Act which reads in pertinent part:

(b) The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction. . . .

(c) Any person who knowingly—

(A) violates any requirement . . . shall be punished by a fine. . . .

42 U.S.C. § 1857C-8 (1970). The section now reads:

(Violations by owners or operators of major stationary sources)

(b) The Administrator shall, in the case of any person which is the owner or operator of
NOTES AND COMMENTS

least two federal courts have granted permanent or preliminary injunctive relief when the federal government requested it. In *United States v. West Penn Power Company*, the government's complaint alleged that the defendant company was emitting sulfur dioxide in violation of the Clean Air Act. The court granted the government's request for preliminary injunctive relief because of the likelihood of success on the merits and because there was irreparable injury. However, in dicta the court said that when a statutory injunction is available, irreparable injury need not be shown because Congress had established the priority of public health. The Sixth Circuit court followed this approach in *U.S. v. City of Painesville* and issued an injunction ordering compliance with a Clean Air Act sulfur dioxide standard.

However, in two other recent cases, courts did not grant injunctions when the plaintiff was a private citizen's group or a state agency. In *Alabama Air Pollution Control Commission v. Republic Steel Corporation*, the circuit court agreed that the defendant was making a good

a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day of violation, or both, whenever such person—

(1) violates or fails or refuses to comply with any order issued under subsection (a) . . . ; or

(2) violates any requirement of an applicable implementation plan. . . .


The Clean Air Act Amendments do not expressly limit the traditional power of the courts to frame equitable decrees. However, with respect to the emergency provisions, the Report of the Committee on Interstate and Foreign Commerce said: "... This section also authorized issuance of emergency orders where the public health cannot be adequately protected solely by initiating a suit for injunctive relief." The language from both the reports and the statute indicate that injunctions should be readily available, especially when public health is at stake.


62. The court had been embroiled in the same litigation for over four and a half years. Previous attempts by West Penn to avoid compliance included: Penn v. Train, 378 F. Supp. 941 (W.D.Pa. 1974), aff'd 522 F.2d 302 (3d Cir.); cert. denied, 426 U.S. 947 (1975), and West Penn Power Co. v. Train, 538 F.2d 1020 (3d Cir. 1975). West Penn also had a proceeding pending before a state agency during the litigation discussed in the text. 460 F. Supp. at 1313-14.

faith effort to update its pollution control equipment; furthermore, there would be an undue hardship if the entire factory closed down. 66

Similarly, in *Citizens Association of Georgetown v. Washington*, 67 a private citizen's group requested a preliminary injunction to prohibit a local business from building a shopping center and garage in their community. The plaintiffs contended that the Clean Air Act emission standards would be violated by automobile and bus fumes after construction. Nevertheless, the court allowed the construction to proceed. The court found the harm too speculative and concluded that only the Environmental Protection Agency could make such a determination when the violation had not yet occurred. 68

These four recent lower court decisions indicate a split of authority on whether the Clean Air Act pre-empts the traditional equitable tests. However, as illustrated by *West Penn*, Congress' concern for the public health 69 is probably the strongest argument for modification of the traditional equitable tests under the Clean Air Act, at least when the plaintiff is the federal government suing a private or municipal pollutor.

*The Federal Water Pollution Control Act: History, Statutory Language, and Legislative Intent*

The original 1948 Clean Water Act had no viable enforcement provisions. 70 During the 1950s and 1960s, 71 Congress sporadically amended the Act but the new enforcement provisions failed for three reasons. First, to constitute a nuisance under the Act, a violation had to endanger the health or welfare of persons in a state other than "that in

66. *Id.* at 214-15. Curiously, this court did not explicitly consider any congressional priorities or legislative intent.
68. *Id.* at 1109.
69. "While the intended purpose of the committee bill include the above as well as others, the primary and overriding purpose of the bill remains the prevention of illness or death which is air pollution related and protection of the public health." Report of the Committee on Interstate and Foreign Commerce, No. 95, 95th Cong. 338 (1977).
70. See *Currie*, supra note 59. Currie points out that Congress may have overlooked a significant loophole. Section 110(h) of the present Act only prevents the states and the Administrator from granting extensions not authorized by statute. It does not limit the traditional power of the courts to consider relative hardship in framing equitable decrees. *Id.* at 588.
71. *See* H.R. REP. NO. 911, 92nd Cong., 2d Sess., 100 (1972) which reads in pertinent part: "The Committee has provided fast, effective, and straightforward enforcement procedures to replace enforcement conferences and 180-day notices in the Water Quality Act of 1965." *Id.* at 114.

*See also* Note, supra note 55, at 583. The author explains why the 180 day notice requirements and the mandatory conferences in the Water Quality Act of 1965 effectively precluded timely enforcement proceedings.
71. *See* Note, supra note 55, at 579-83.
which the discharge originates. . .”，72 thereby presenting the difficult
problem of proving an interstate effect. Secondly, effluent emissions
from each potential pollutor were not monitored. As a result, the gov-
ernment could never establish who was responsible for raising the level
of a pollutant above the maximum allowable level in a specific body of
water.73 Thirdly, the responsibility and enforcement was delegated to
the individual states which were casual about reporting violations.74

In 1972, Congress amended the Clean Water Act to conform sub-
stantially to the enforcement provisions in the Clean Air Act Amend-
ments of 1970 and the Refuse Act of 1899.75 Section 309(a) and (b)
authorized permanent and temporary injunctions by the EPA76 while
section 504 authorized restraining orders for immediate and substantial
health hazards.77 Congress amended the Act because of the docu-
mented effect of water pollution on the ecology and public health. The
amendments provided additional enforcement to combat these effects.
The House Committee Report emphasized that the EPA Administra-
tor's emergency powers under the amended Act were such that if the
Administrator brought suit “the appropriate district court could imme-
diately restrain any person causing or contributing to the alleged pollu-

73. The 1948 Act provided only stream standards for a body of water. The emissions from
each polluting source had no individual limitation. See Note, supra note 55, at 579.
74. Id. at 583.
75. See House Report, supra note 70, at 100-35 and S. REP. No. 414, 92d Cong., 1st Sess. 41
(1971).

The Senate Report reads in pertinent part: “The Committee believes that the no-discharge
declaration . . . in the 1899 Refuse Act is useful as an enforcement tool. . . ” Id. at 43. The
House Report indicates that the citizen suit enforcement provision of the 1972 amendments “fol-
lows the concepts utilized in Section 304 of the Clean Air Act. However, the legislation allows the
courts to impose civil penalties as well as injunctive relief.” Id. at 121.
76. The original section 309(b) reads in pertinent part:

(b) The Administrator is authorized to commence a civil action for appropriate relief,
including a permanent or temporary injunction, for any violation for which he is
authorized to issue a compliance order under subsection (a) of this section. Any
action under this subsection may be brought in the district court of the United
States for the district in which the defendant is located or resides or is doing busi-
ness, and such court shall have jurisdiction to restrain such violation and to require
compliance. Notice of the commencement of such action shall be given immedi-
ately to the appropriate State.
77. Section 504 of the 1972 amendments reads:

Notwithstanding any other provision of this chapter, the Administrator upon receipt
of evidence that a pollution source or combination of sources is presenting an imminent
and substantial endangerment to the health of persons or to the welfare of persons where
such endangerment is to the livelihood of such persons . . . may bring suit on behalf of
the United States in the appropriate district court to immediately restrain any person
causing or contributing to the alleged pollution to stop the discharge of pollutants caus-
ing or contributing to such pollution or to take such other action as may be necessary.
tion." Similarly, the Senate Report approved of the Refuse Act as a model because of its strong enforcement policy. The Report noted that the Refuse Act had succeeded because the courts had never constrained the government in its prosecutions of corporate pollutors under that statute. The Committee wanted to incorporate this attitude into the Clean Water Act Amendments.

Another enforcement section added to the Clean Water Act which had no previous counterpart was section 313: Federal Facilities Pollution Control. Congress added this provision because it was very critical of past federal agency efforts to control their own pollution. The Senate Committee was particularly unhappy with the Defense Department which, it alleged, had "failed in halting pollution and in requesting appropriations to develop control measures." As a result, under section 313, Congress provided that "federal facilities meet all control requirements as if they were private citizens." However, the Committee also noted "the impracticality of any effort to halt all pollution immediately." Therefore, Congress provided Presidential exemptions for federal agencies in the presence of a paramount national interest.

78. See H.R. REP. No. 911, 92nd Cong., 2d Sess. at 132. Section 504 of the 1972 Clean Water Act Amendments is modelled after the analogous Section 303 of the Clean Air Act of 1970. Section 303 provides for injunctive relief when there is imminent danger to public health. Id. at 132.
79. Senate Report, supra note 75, at 53.
80. The Committee also intended that, like the Clean Air Act and the Refuse Act, the enforcement powers of the federal government should be concurrent with the enforcement powers of the states. Id. at 64.
81. The original Section 313 reads in pertinent part:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any persons is subject to such requirements.

82. Senate Report, supra note 75, at 67.
83. Id. at 80.
84. Id. at 67.
85. Id. at 68.
86. The 313 exemption for executive agencies reads in pertinent part:

The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so;

The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption.

Cases arising after the 1972 amendments

Before discussion and analysis of *Romero-Barcelo*, it is necessary to first look at previous Clean Water Act decisions. The most significant case to define what degree of harm is necessary for preliminary injunctions is *Reserve Mining Co. v. Environmental Protection Agency*.\(^{87}\) In 1975, the United States and Minnesota sued an iron ore processing company to prevent the company from discharging asbestos debris into the air and Lake Superior. The plaintiffs relied in part on the pre-1972 Clean Water Act to support their prayer for injunctive relief.\(^{88}\) At trial, the plaintiffs could not establish that harm to public health had already occurred or that the danger was imminent.\(^{89}\) However, the court reasoned that “endangering” within the meaning of the Clean Water Act was used by Congress in a preventive sense. Therefore, a showing of potential harm rather than actual harm was sufficient to satisfy the requirement for injunctions.\(^{90}\) The court decided that a sufficient showing was made when the government proved that the discharge of asbestos called for precautionary measures rather than waiting until the local population became ill with cancer.\(^{91}\)

87. 514 F.2d 492 (8th Cir. 1975). The United States Supreme Court has recently had two opportunities to rule on the post-1972 Clean Water Act, but not in the context of preliminary injunctive relief. In *Middlesex Sewage Auth. v. National Sea Clammers*, 453 U.S. 1 (1981), the Court was concerned with statutory pre-emption of an implied action for money damages under the citizen suit provision. Plaintiff fishermen in *Sea Clammers* claimed that as private citizens, they had a right to relief outside the citizen’s suit provision (Section 505 of the 1972 Amendments). They reasoned that this section left open any remedy available under another statute or common law, because of the savings clause in the section. Id. at 9. However, the Supreme Court held that when remedial devices provided in the statute are sufficiently comprehensive, their presence may demonstrate an intent to preclude remedies at common law or under other statutes. Id. at 20.

In *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), the Supreme Court held that there was no federal common law basis for a court to impose additional sanctions to those mandated in the Clean Water Act. Id. at 319-24. Therefore, a common law claim of public nuisance in an area pre-empted by the 1972 permit scheme was no longer cognizable in the federal district courts.

88. Reserve Mining Co. v. EPA, 514 F.2d at 501, 520. But see id. at 501 n.7. The court stated that all references to the Clean Water Act are to that statute as it existed prior to the 1972 amendments unless otherwise noted. However, it could be argued that a similar interpretation would apply to the present emergency provision now codified at 33 U.S.C. § 1364 (1976). It certainly seems that statutory interpretation in 1975 would be influenced by the spirit under which Congress passed the 1972 amendments. See 514 F.2d at 528, n. 70, in which the court implicitly acknowledges the similar intent behind the 1972 and pre-1972 provisions.

89. 514 F.2d at 513, 519.

90. Id. at 528-29, n. 71.

91. Id. at 536. *Reserve Mining* partially dispenses with traditional criteria when Congress establishes that an injunction is appropriate when a health hazard exists. However, the *Reserve Mining* decision preserves inherent equitable power under certain circumstances. For example, it used discretion to resolve the quality of the injunction: Although it looked to legislative intent and the word “endangering” in the statute to decide whether it would issue an injunction, the traditional requirement of immediate irreparable harm governed both the timing and scope. Therefore, the court held that although there was a risk to public health, the defendant must be
Reserve Mining is still good law with respect to the appropriateness of injunctive relief for potential health hazards. However, federal district courts subsequently conflicted in their approach to injunctive relief in non-health contexts after the 1972 Amendments. The court in United States v. Board of Trustees of Florida Keys Community College held that the plaintiff must still meet the traditional tests for equitable remedies. In Florida Keys, the College had filled an open slough on its property without obtaining a dredge and fill permit from the Army Corps of Engineers. Both the Refuse Act and the Clean Water Act required this permit. The government subsequently requested an injunction in the form of a mandatory decree requiring the College to restore the slough to its original swampy condition. However, the court merely required the defendants to replant a small area with mangroves upstream from the original swampy area. The court's rationale was that, when assessing civil remedies under the Clean Water Act, the degree and kind of wrong, as well as the practicality of the remedy, is important. It also concluded that civil penalties sufficiently deterred future violations.

given sufficient time to comply with the pollution control order before the facilities could be closed down.
92. See infra notes 93, 98, 102.
94. Id. at 269.
95. Id. at 275.
96. See also U.S. v. Price, 523 F. Supp. 1055 (D.N.J. 1981), aff'd 688 F.2d 204 (3d Cir. 1982). Although this case was decided under the National Resource and Recovery Act and the Safe Drinking Water Act, it posed statutory interpretation problems similar to those arising under the Clean Water Act 1972 Amendments. In Price, the United States brought suit to remedy the hazard caused by chemical dumping at Price's landfill in Pleasantville, New Jersey during 1971 and 1972. The government requested that Price alleviate the leakage of chemical wastes from his property. It also requested that Price find another source of drinking water for the nearby community because his landfill had contaminated the well water.

The court relied on several arguments when it denied the government's requested remedies. First, the court noted that neither the Resource Conservation and Recovery Act nor the Safe Drinking Water Act explicitly deprive the court of its traditional power to balance equities. Therefore, the traditional four-part test for preliminary injunctions survived passage of both statutes. The court did concede that where a statute specifically authorized injunctive relief, a showing of irreparable harm may be unnecessary, but only if Congress had made the determination that the statutory violations be enjoined. However, relying on Hecht, the court did not believe "that the traditional equitable discretion of the court is entirely irrelevant whenever a statute specifically provides for injunctive relief." 523 F. Supp. at 1066. This was especially true, according to the Price court, if the court orders an affirmative, mandatory act, rather than negatively restraining an ongoing violation. Affirmative relief changes the status quo. Therefore, it is not appropriate as temporary relief before trial. This analysis, of course, does not mean that the same kind of affirmative relief would be inappropriate after the trial.

It is interesting that Congress passed the National Resource and Recovery Act in 1976 and the Safe Drinking Water Act in 1974, within a few years of the Clean Water Act Amendments. They were undoubtedly influenced to the same extent by the 1970 Clean Air Act Amendment debates, hearings and testimony.
97. 531 F. Supp. at 275. The Court held: "First, in contrast to the egregious violations docu-
On the other hand, at least two cases implicitly dispensed with the traditional requirements for requesting injunctions. In *United States v. Lee Wood Contracting, Inc.* the United States requested injunctive relief and civil penalties against the defendant corporation. The corporation had dumped fill material into an area immediately adjacent to navigable waters without obtaining a permit from the Army Corps of Engineers as required by the Clean Water Act. The judge held that since this company had been aware of its ongoing violation, a civil penalty was appropriate in addition to permanent injunctive relief. As to the property or scope of the injunction, however, the judge did not refer to statutory language, legislative intent, or his inherent equitable authority as chancellor. Instead, he simply issued an affirmative injunction to the defendant to immediately remove the sludge.

In *United States v. City of Detroit* the judge appointed a receiver to supervise sewage treatment facilities until the city remedied the Clean Water Act violations. The court found a broad range of equitable powers existed under the statute to effectuate its orders and judgments. However, while the court found that plenary equitable power existed under the statute, as in *Lee Wood*, there was no explicit discussion of traditional criteria, especially irreparable harm.

The district and circuit court decisions discussed above conflict or are silent on whether fulfillment of traditional equitable criteria is necessary for preliminary injunctive relief under the Clean Water Act Amendments. The United States Supreme Court addressed the question in *Romero-Barcelo* where the central question was whether a district court can deny preliminary injunctive relief despite a continuing Clean Water Act violation.

mented in *Moretti* . . . this court concludes the instant violations were negligent rather than willful.” *Id.*

99. *Id.* at 119.
100. *Id.* at 121-22.
101. *Id.* at 121.
103. *Id.* at 520.
104. *Id.*
105. *But see* U.S. v. Outboard Marine Corp., 549 F. Supp. 1036 (N.D. Ill. 1982) (memorandum opinion and order). The court held that a mandatory affirmative injunction to clean up past and ongoing PCB discharges into Lake Michigan was appropriate under Section 309 (a) and (b) of the Amendments. Judge Getzendanner’s arguments were purely statutory. She did not address whether equitable considerations enter into a decision of whether to grant preliminary injunctions under this provision.

The memorandum order in this four year old litigation between the United States and Outboard Marine came down several months after the *Romero-Barcelo* Supreme Court decision. However, it is still relevant for two reasons. First, it stands for the proposition that the traditional
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The District Court Decision: Barcelo v. Brown

Barcelo v. Brown began while the Navy was conducting bombing practice off the coast of the small Puerto Rican island of Vieques. Several years after the Navy activity had commenced, the residents complained of noise pollution, water pollution, and damage to the coral reef and endangered species of the island. The Commonwealth of Puerto Rico sued the Navy for violating several federal and commonwealth environmental statutes, including the Clean Water Act, for tortious Navy conduct and for the "taking of property without just compensation.”

The lower court dismissed the tortious damage claims because the plaintiffs had not fulfilled jurisdictional requirements by filing with the appropriate federal agency. It also dismissed the "taking of property" claim because the six-year statute of limitations period had run many years prior to filing of the suit. With respect to the Clean Water Act claims, the court found that the bombing of navigable waters was pollution within the meaning of 33 U.S.C. Section 1311(a) or 1323(a). Therefore, the Navy was required to have a permit in order to conduct bombing practice despite the fact that the EPA did not have a regulation providing a permit for the discharge of bombing refuse into the water.

The district court did not enjoin the Navy from bombing practice while it prepared its permit application for the Environmental Protection Agency. The court followed the reasoning in Hecht Co. v. Bowles, that the purpose of an injunction is to deter and not to punish. The Brown court also concluded that there were other reasons why preliminary injunctive relief was not appropriate. First, the discretion of the court is minimal under the facts of this case, e.g., ongoing violations with no significant effort to comply. In the alternative, since the litigation began years before the Romero-Barcelo decision it could be construed as previous case law allowing mandatory affirmative relief under 309(a) and (b) without the traditional showing of irreparable harm.

107. Id. at 651.
108. Id. at 662-63.
109. Id. at 662.
110. Id. at 663.
111. Id. at 663-64.
112. Id. at 664.
113. Id. at 707.
115. 478 F. Supp. at 707.
Navy's activities were not causing appreciable harm to the ecology, and second, the equitable defense of laches was available to the Navy because citizens of Vieques had waited several years prior to filing their complaint. However, the most important reason that the court did not grant the preliminary injunction was its great concern about jeopardizing economic and military interests if naval operations were shut down. It concluded that grievous and irreparable harm might come to the national welfare if the operation were to cease immediately.

**The First Circuit Decision on preliminary injunctive relief:**
Romero-Barcelo v. Brown

In the subsequent appeal by Puerto Rico to the First Circuit, the court considered whether the Navy should be enjoined from bombing while the EPA reviewed the permit application. The Court of Appeals held that the district court had erred in balancing Puerto Rico's and the Navy's competing equities. Citing *TVA v. Hill*, the court held that "[whether 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." Therefore, the circuit court ordered the district court to enjoin the Navy's bombing pending EPA action on the permit.

**The Supreme Court Decision:** Weinberger v. Romero-Barcelo

The issue before the United States Supreme Court was whether the Clean Water Act requires the granting of an immediate preliminary injunction against all illegal discharges. Justice White, writing for the majority, began the opinion with a lengthy essay stressing that an injunction was an extraordinary remedy and that the Court had repeat-

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116. *Id.* at 706.
117. *Id.* at 707.
118. *Id.*
119. *Id.* at 708.
120. 643 F.2d 835 (1st Cir. 1981).
121. *Id.* at 861. The Navy required a national pollution discharge elimination system permit. (NPDES) On appeal, there remained eight unresolved issues. *Id.* at 840. One such issue, the NEPA environmental impact statement, became moot when the Navy submitted the NPDES application pursuant to the district court's order.
122. *Id.* at 861.
123. *Id.*
124. *Id.* at 862.
126. White's opinion was joined by Justices Burger, Brennan, Marshall, Blackmun, Rehnquist and O'Connor.
edly held that the basis for injunctive relief in the federal courts had always been irreparable injury and the inadequacy of legal remedies.\textsuperscript{127} Justice White stated that Congress was "assuredly well aware" of these practices and that it would require a clear congressional intent before the Court would depart from this practice.\textsuperscript{128} In the \textit{TVA} case the Court would have been "hard pressed to find a statutory provision whose terms were any plainer."\textsuperscript{129}

More important to the Court's reasoning, however, was that the only way to achieve compliance in \textit{TVA} was by an injunction. In the case before the Court, fines or criminal penalties could insure compliance. Ordering the Navy to apply for a permit had enough to achieve the objectives of the Act, the integrity of the nation's waters.\textsuperscript{130} The permit itself was not the purpose of the FWPLA.

The Court found that because the statutory scheme recognized that it could be achieved only through phased compliance, Congress did not thereby intend to deny courts their traditional equitable discretion.\textsuperscript{131}

The Court's final consideration was the effect of an FWPLA provision which allows the President to exempt federal facilities from compliance with permit requirements.\textsuperscript{132} The Court maintained that the Court of Appeals found that this provision indicated a congressional intent to limit the court's discretion and that only paramount national interests would justify failure to comply, a determination of which should be made only by the President.\textsuperscript{133} The Court held this reading would be too broad. A court's purpose in exercising equitable discretion was to achieve compliance with the act. The exemption served a different purpose—allowing noncompliance in extraordinary circumstances.\textsuperscript{134} Thus, the Court decided the proper standard for appellate review was whether the district court had abused its discretion in denying an injunction while the Navy applied for a permit and reversed and remanded the case to the court of appeals.\textsuperscript{135}

\begin{thebibliography}{9}
\bibitem{127} 456 U.S. at 311-12.
\bibitem{128} \textit{Id.} at 313.
\bibitem{130} 456 U.S. at 314.
\bibitem{131} \textit{Id.} at 316-17.
\bibitem{132} 33 U.S.C. § 1323(a).
\bibitem{133} 456 U.S. at 318.
\bibitem{134} \textit{Id.}
\bibitem{135} \textit{Id.} at 320. Justice Powell concurred. In his opinion, the case should have been remanded to the appellate court with orders to affirm the district court decision. Justice Powell believed the record clearly established that the district court had not abused its discretion by refusing to enjoin the immediate cessation of all discharges. \textit{Id.} at 321.
\end{thebibliography}
Justice Stevens was the lone dissenter. In his opinion, the navy's violation was blatant and not merely technical. He felt that such a predicament was foreseen by Congress and like *TVA*, the only way to insure compliance was through an injunction.

**ANALYSIS OF THE ROMERO-BARCELO DECISION**

The Supreme Court's decision covers issues of statutory interpretation, legislative intent, national security, and irreparable harm. The Court considered these issues when it decided whether the Clean Water Act required the district court to issue a preliminary injunction before the Navy obtained its permit to continue bombing maneuvers. This point is important because if equitable discretion survives the 1972 amendments, courts may abuse their discretion if they withhold injunctions when the statutory policy should prevail because of congressional concern for health or environment. The Court's view is that the 1972 Clean Water Act modifies judicial power, but it does not totally preempt equitable jurisdiction. The following discussion analyzes the factors on which the Supreme Court relied to determine how the 1972 amendments alter equity. The Court's discussion of statutory language, legislative history, and previous case law indicate that public health, national security, or irreparable harm affect the courts' jurisdiction.

However, the "bottom line" of the Supreme Court decision remains that a statutory violation without more will not automatically

136. *Id.* at 324. (Stevens, J., dissenting).

137. *Id.* Stevens felt that the language and legislative intent of the statute necessarily restricted the Court's authority to decide when a request for injunctive relief is appropriate. *Id.* at 321. Because of public interest considerations and the ordering of priorities by Congress in the statute, there were circumstances which compelled preliminary injunctive relief. *Id.* at 326-28. Such circumstances were present in this case because the Navy, by the very nature of the violation—discharging ordnance into the water without a permit—had to be restrained. Consequently, Justice Stevens felt the only way to insure the Navy's compliance with the Clean Water Act was to issue an injunction. His analysis is closer to that found in *TVA v. Hill* in which the policy behind the Endangered Species Act severely diminished the court's equitable discretion. In *TVA v. Hill*, the only way to save the snail darter was to issue an injunction. In *Romero-Barcelo*, the only way in which to keep bomb refuse out of the water was to enjoin the Navy until it received a permit. *Id.* at 326-28. Such circumstances were present in this case because the Navy, by the very nature of the violation—discharging ordnance into the water without a permit—had to be restrained. Consequently, Justice Stevens felt the only way to insure the Navy's compliance with the Clean Water Act was to issue an injunction. His analysis is closer to that found in *TVA v. Hill* in which the policy behind the Endangered Species Act severely diminished the court's equitable discretion. In *TVA v. Hill*, the only way to save the snail darter was to issue an injunction. In *Romero-Barcelo*, the only way in which to keep bomb refuse out of the water was to enjoin the Navy until it received a permit. *Id.* at 326-28.

Stevens distinguished between cases which involve private interest and those which implicate a public interest. Stevens believed that when Congress legislates to protect public interests, the Court's discretion is always curtailed. *Id.* at 327. This is not to say, however, that all equitable jurisdiction is gone forever. It only means that in a situation like *Romero-Barcelo*, the Court has no room to maneuver when there is a blatant statutory violation. *Id.* at 324.

Stevens also believed that the distinction the majority found between the legislative intent behind the statute in *TVA* and the Clean Water Act is largely illusory. Instead, the *TVA* court issued an injunction because it had "profound respect for the law and the proper allocation of lawmaking responsibilities in our Government." *Id.* at 334-35.

138. *See generally* the House and Senate Reports, *supra* notes 70 and 75.
trigger injunctive relief.  

Statutory Language and Legislative Intent

The language of the FWPCA enforcement amendments is of little assistance for determining whether an injunction is mandatory for every statutory violation. The language in Section 309(b) ony indicates that the Environmental Protection Agency Administrator may bring the appropriate action. Similarly, the citizens' suit provision permits a private individual to bring suit, but does not indicate whether an injunction must be granted for every violation. Instead, it only indicates that injunctive relief is a possible remedy.

Discovering the legislative intent behind the passage of such a complex and comprehensive scheme as the Clean Water Act and its numerous amendments is not easy task. Nevertheless, the legislative history of the 1972 enforcement amendments is not as equivocal as the majority opinion suggests. The Senate and House Reports on the bill indicate that the intent to halt pollution was as strong as the intent to preserve endangered species under the 1973 Endangered Species Act in


141. See supra note 76.


143. As in § 309, this same problem exists with the original sections 504 (codified at 33 U.S.C. § 1364 (1976)) and 313 (codified at 33 U.S.C. § 1323 (1976)): There is no mandatory language which authorizes injunctive relief. This ambiguity leaves open the possibility that a defendant will claim that an enforcement provision is merely jurisdictional and not substantive. If a court subsequently finds the provision jurisdictional only, it will provide a possible remedy for violations committed under other sections of the statute.

This problem continues to crop up under other environmental statutes. See U.S. v. Outboard Marine, 549 F. Supp. 1036 (N.D.Ill. 1982) (discussing whether the injunctive relief provisions of CERCLA are merely jurisdictional or are substantive and thus intrinsically create their own liability).

144. But see 33 U.S.C. § 1364 (1976) (formally Section 504 of the 1972 Amendments). This emergency provision could be construed as mandating injunctive relief if the Environmental Protection Agency files a suit in the appropriate district court. In any event, the argument would be strongest under this section that the only effective remedy for an immediate health hazard is an injunction.

145. See Greenhouse, Supreme Court: Probing Congressional Intent, The N. Y. Times, Oct. 22, 1982, col. 2 at A16. The article specifically discussed the federal tax status of Bob Jones University. The article's author points out, and probably with merit that: "The process of statutory construction is often criticized as providing an intellectually respectable cloak under which judges simply make their own policy choices. The rules of statutory construction do often sound more helpful than they really are, and are readily tailored to achieve a particular result." Id.
TVA v. Hill. Because both TVA v. Hill and Romero-Barcelo involved violations by federal entities it is important to compare legislative intent between the Endangered Species Act and the Clean Water Act Amendments to determine if and how requirements for government agencies differ under these laws. In Section Seven of the Endangered Species Act it is clear that enforcement against federal agencies should be swift and effective. The Senate Report on the 1972 Amendments to the Clean Water Act states that the government must comply with the Act since it has no more right to pollute than any private party. Addressing section 313 on federal facilities pollution control, the report reads in unequivocal language “This section would require every federal agency . . . to provide national leadership in the control of water pollution . . . This section requires that federal facilities meet all control requirements as if they were private citizens. . . .”

146. Congressman Dingell, Head of the Wildlife Committee, presented the original draft of the Endangered Species Act to the House of Representatives. The original draft read in part:

(c) It is further declared to be the policy of Congress that all Federal Departments and agencies shall seek to protect endangered species and threatened species and shall utilize their authorities in furtherance of the purpose of this Act.


The draft bill for the Endangered Species Act also provided for exceptions, just as did the 1972 Clean Water Act Amendments. Section 10 of the draft reads in pertinent part:

(a) The Secretary may permit . . . any act otherwise prohibited by Section 9 of this Act for scientific purposes or to enhance the propagation or survival of the affected species.

(b)(1) If any person enters into a contract . . . (prior to the listing of a species as endangered) . . . and the subsequent listing of that species will cause undue economic hardship to that person . . . the Secretary . . . may exempt such person from the application of Section 9(a) of the Act . . .


It is not clear whether 10(b) is applicable to federal agencies.

With respect to Section 309 of the Clean Water Act, the Senate Report reads:

The Committee believes that if the timetables established throughout the Act are to be met, the threat of sanction must be real, and enforcement provisions must be swift and direct. Abatement orders, penalty provisions, and rapid access to the Federal District Court should accomplish the objective of compliance.

Senate Report, supra note 75, at 65.

Discussion of Section 504 of the Clean Water Act in the House Report is brief. However, it makes clear that the Administrator can, without regard to any other provision in the act, bring an immediate restraining order in a federal district court if there is an imminent and substantial endangerment to public health. House Report, supra note 70, at 132.

In addition to the above discussion in the reports, it is informative to compare the old Clean Water Act with the 1972 amendments. There are no comparable provisions in the original act with respect to direct federal enforcement, federal facility pollution control, or emergency powers of the Administrator. Id. at 287-91.

147. The Congressional Record reads in part:

... (all federal agencies must) insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of an endangered species or result in the destruction or modification or habitats of such species. . . .


Section 313 provides for government compliance, presumably courts could apply the same enforcement provisions in the amended act to government as well as private defendants. However, the Senate Committee recognized that on occasion a federal agency may need to operate in the national interest notwithstanding the Act's requirements. The law provides for this contingency in an exemption provision which requires the President's permission. The Senate Report is clear that this provision should be used only in extraordinary situations.  

The Committee Report's criticism of federal agencies in general and the military in particular further demonstrates congressional intent that all federal agencies comply with the Clean Water Act. Unfortunately, the *Romero-Barcelo* majority decision mistakenly found stronger environmental concerns behind the Endangered Species Act than it did with the amended Clean Water Act. Instead, the Supreme Court should have recognized that analysis of legislative intent is not crucial to arriving at a different result in *Romero-Barcelo* than in *TVA* because both legislative histories indicate the priority of environmental goals for federal agencies. The provision for presidential exemptions in the Clean Water Act only emphasizes that Congress wanted the enforcement provisions to apply in most situations.  

149. *Id.* at 68. The Senate Report reads: "The Committee recognizes . . . that it may be in the paramount interest of the United States that a plant or facility not achieve full water pollution control within the time required. Therefore, the bill would provide case by case exemptions on the basis of determinations by the President. . . ." *Id.*

150. The House Report, *supra* note 70, reads: "The Committee, after hearing of numerous examples of flagrant violation of pollution controls is determined that the Federal facilities shall be a model for the Nation, and that unless exempted by the President, they shall be required to meet all requirements as if they were private citizens." *Id.* at 118-19.

The Senate Report, *supra* note 75, reads in similar language with respect to why Section 313 was added:

Evidence received in hearings disclosed many incidents of flagrant violations of air and water pollution requirements by federal facilities and activities. Lack of Federal leadership has been detrimental to the water pollution control effort. The federal government cannot expect private industry to abate pollution if the federal government continues to pollute. *Id.* at 67.

Similarly, on Section 505 (Citizen's suit provision) the Senate Report reads:

[A]s recognized under Section 313 of the bill, federal facilities generate considerable water pollution. Since some federal agencies such as the Department of Defense, have failed in abating pollution and in requesting appropriations to develop control measures, it is important to provide that citizens can seek, through the courts, to expedite the government performance specifically directed under Section 313. *Id.* at 80.

151. 456 U.S. at 314.

152. *See id.* at 324 (Stevens, J., dissenting).
Notes and Comments

Pre-emption of equitable jurisdiction: Romero-Barcelo and its relationship to previous case law

The Supreme Court erred when it distinguished intent behind the Endangered Species Act from that of the Clean Water Act Amendments. However, it was correct in its determination that equitable authority is not eliminated by the 1972 Clean Water Act Amendments. Although "Romero-Barcelo" and "TVA" reached different results, both cases support this conclusion since "TVA" never expressly held that the Endangered Species Act takes away all equitable authority in every instance. There are two other reasons for the difference in outcome between these two Supreme Court decisions. First, given the possibility of irreversible harm to the snail darter in "TVA" and the policy behind the Endangered Species Act, the Court had no choice but to enjoin the completion of the federal dam. On the other hand, in "Romero-Barcelo," the district court did not find the Navy's bombing irreversibly harmed the water and according to the majority opinion, there was no direct clash with the statutory policy. Therefore, the plaintiffs in "Romero-Barcelo" had two extra hurdles which were not present in "TVA": no factual basis for alleging irreparable harm and no demonstration of

153. 437 U.S. 153 (1978). The majority decision reads in pertinent part:

Having determined that there is an irreconcilable conflict between operation of the Tellico Dam and the explicit provisions of Section 7 of the Endangered Species Act, we must now consider what remedy, if any, is appropriate. It is correct, of course, that a federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of the law. This Court made plain in "Hecht v. Bowles" . . . that [a] grant of jurisdiction (emphasis added in the original) to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances.' Id. at 193.

The "Romero-Barcelo" Court noted that: "Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles." 456 U.S. at 313, relying on "Hecht v. Bowles," 321 U.S. at 329. Apparently, the big "ideological" difference between "Romero-Barcelo" and "TVA" may lie in specifying to what extent Congress can modify the courts' discretion. According to the "Romero-Barcelo" majority, Congress' authority is limited unless there is either mandatory language or when there is a violation which completely conflicts with the purpose of the statute. Id. at 313, 320.

154. The "TVA v. Hill" majority opinion reads in pertinent part:

[N]either the Endangered Species Act nor Art. III of the Constitution provides federal courts with authority to make . . . fine utilitarian calculations. On the contrary, the plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as incalculable.

437 U.S. at 187. Furthermore:

Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'

Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute.

Id. at 194.

155. 456 U.S. at 320.
a direct confrontation with the Clean Water Act policy. Furthermore, the injunction in *TVA* was a permanent one and it did not require the traditional four-part test for preliminary injunctive relief.

*United States v. Reserve Mining Co.* is more difficult to analogize to *Romero-Barcelo* on whether equitable authority survives the 1972 amendments for two reasons. First, *Reserve Mining* relied on the pre-1972 Water Quality Act. Secondly, the case addressed health and not ecological damages. Nevertheless, *Reserve Mining* is instructive because it used traditional equitable principles to define the scope of a remedy for a statutory violation. Therefore, the court refused to close down the factory immediately. It did not find an imminent health hazard, although it found that discharge of asbestos into the air and water constituted pollution which endangered health within the meaning of the Act. *Reserve Mining* stands for the proposition that the court can still balance the equities and refuse to grant injunctive relief when health rather than ecological damages are involved.

Ironically, the plaintiffs could not establish a violation when the Navy was in the process of complying by waiting for its permit from the EPA. The court explained its policy in this area by stating:

> Congress has generally geared its national environmental policy to allow polluting industries a reasonable period of time to make adjustments in their efforts to conform to federal standards. . . . In the absence of an imminent hazard to health or welfare, any other program for abatement of pollution would be inherently unreasonable and invite great economic and social disruption.

Instead the court wanted to balance the equities: "We believe that on this record the district court abused its discretion by immediately closing this major industrial plant. . . . A remedy should be fashioned which will serve the ultimate public weal by insuring clean air, clean water, and continued jobs in an industry vital to the nation's welfare." *Id.* at 537.

Earlier in the opinion, the court addressed the appropriate remedy: "In fashioning relief in a case such as this involving a possibility of future harm, a court should strike a proper balance between the benefits conferred and the hazards created by Reserve's facility." *Id.* at 535. However, the court also pointed out that a case in which public health was at stake presented a higher degree of urgency than that of ecological damage alone. *Id.* at 538.

It is not entirely clear from the opinion exactly how the court feels about injunctive relief generally under either the Clean Water Act or the Refuse Act. Equally confusing is the fact that although the court claims that it is using the pre-1972 Clean Water statute (because this is when the original harm occurred and the action was instigated) it seems to rely on the emergency provision of the 1972 amendments. *Id.* at 528 n.70. What is clear is that the court found, after extensive expert testimony, that the water pollution was less pervasive or harmful than the air pollution. Consequently, although the injunctive relief was issued under all three Acts (Clean Air, Refuse, and Clean Water) the injunction for air pollution was more stringent than the injunction for water pollution. *Id.* at 529-30 n. 72.

As to whether a health hazard under the common law of nuisance automatically triggers injunctive relief the court said: "We are not here concerned with standards applied to abatement of a nuisance under non-statutory common law doctrines. In most common law nuisance cases involving alleged harmful health effects some present harm or at least an immediate threat of harm must be established." *Id.* at 529 n.71. Such language suggests that although the court
tions despite a statute which provides for such a remedy. *Romero-Barcelo* is consistent with this approach in its assertion that inherent equitable power still exists. The difference is that *Reserve Mining* used that power to alter the timing and scope of an injunction whereas *Romero-Barcelo* used it to deny a preliminary injunction in the first instance.163

District court decisions prior to *Romero-Barcelo* which were decided under the 1972 amendments do not explicitly hold that a court can refuse an injunction after a statutory violation. On the contrary, these cases imply that immediate equitable relief is appropriate, although how much and what kind is the court's ultimate decision. For example, in *United States v. Lee Wood Contracting, Inc.*,164 the court simply enjoined a dumping and dredging violation and ordered the filled area returned to its original condition. There is no explanation why injunctive relief was appropriate. Instead, the court merely entered the order as soon as it made the requisite factual finding that the statutory violation had occurred.165 In *United States v. Board of Trustees of Florida Keys Community Colleges*166, the court did not issue a mandatory injunction to restore a slough to its original condition. It did, however, impose a mandatory decree to replant another comparable area on the campus.167 The court fashioned this modified injunctive relief with the policies of the Clean Water Act and Refuse Act in mind. This injunction, in turn, was modified by the facts of the case and the willfulness of the defendant.168

Unlike the *Romero-Barcelo* approach, however, the *Florida Keys* court, although claiming to temper the Clean Water Act with a "touch of equity", limited its discretion to the type of injunctive relief and not to whether there should be any injunction whatsoever. The same logic appeared in *United States v. City of Detroit*.169 Although *City of Detroit* did not squarely address the scope of traditional equitable authority retains discretion, in the presence of a statutory provision, there is no need to demonstrate likelihood of success on the merits or immediate irreparable harm.

163. 456 U.S. at 320.
165. *Id.* at 121. *See also* *U.S. v. Outboard Marine*, 549 F. Supp. 1036 (N.D. Ill. 1982). Judge Getzendanner seems to assume that an ongoing statutory violation of the Clean Water Act automatically merits some form of injunction under § 309(b).

For other cases ordering mandatory injunctive relief under the Clean Water Act, apparently under Section 309(b) see United States v. Weisman, 489 F. Supp. 1331 (M.D. Fla. 1980) and Parkview Corp. v. Department of the Army, 490 F. Supp. 1278 (E.D. Wis. 1980).
167. *Id.* at 276.
168. *Id.* at 275.
under the Act, the court implied that it survives in full force. In fact, the judge stated that a receivership was appropriate because “[t]he exercise of such authority is founded in the broad range of equitable powers available to this court to enforce and effectuate its orders and judgments.”\textsuperscript{170} In this respect, \textit{City of Detroit} is consistent with \textit{Romero-Barcelo}, but only in the context that once the statutory violation has occurred, the type of injunctive relief is within the court’s discretion. Because \textit{City of Detroit} involved a permanent injunction which became an equitable receivership, it is difficult to reconcile its discussion of the inherent equitable power of the court with mandatory injunctive relief.\textsuperscript{171} Apparently, the court relied on the statutory violation to initially justify some sort of equitable remedy.\textsuperscript{172}

Based on the above decisions, the \textit{Romero-Barcelo} Court followed precedent when it held that equitable jurisdiction remains after the

\textsuperscript{170} Id. at 520.

\textsuperscript{171} The court appointed the Mayor of Detroit to be the Administrator of the wastewater treatment plant for purposes of carrying out the obligations of Detroit under the consent judgement entered by the court on September 14, 1977. This order comprised the equitable receivership portion of his order. 476 F. Supp. at 515.


\textsuperscript{172} 476 F. Supp. at 520-21. In another recent decision under the 1972 amendments, a federal district court denied a preliminary injunction under Section 504 of the Act. United States v. Vertac Chemical Corp., 489 F. Supp. 870 (E.D. Ark. 1980). The court in Vertac found an imminent health hazard when dioxin, a powerful poison, leaked from a chemical factory in Arkansas. Notwithstanding this serious hazard, the court relied on the Reserve Mining balancing of equities approach to minimize economic hardship as well as the health risk. Id. at 886. As in Reserve Mining, the balancing went to the scope and nature of the injunction rather than whether or not to issue one. However, contrary to Reserve Mining in which the court denied immediate abatement, the Vertac court ordered the defendant to immediately remove leakage from past and present dioxin contamination.

In an analogous line of cases under a different statute, the Resource Conservation and Recovery Act of 1976, two federal district courts granted preliminary injunctions to the federal government. In United States v. Midwest Solvent Recovery, Inc., 484 F. Supp. 138 (N.D.Ind. 1980) the court held: “In determining whether the government should be afforded the preliminary injunctive relief it requests, the Court is guided by common law principles and by Rule 65 of the Federal Rules of Civil Procedure.” Id. at 143. Although the government-plaintiff argued that the Act made the statutory remedies substantive and not merely jurisdictional, the court disagreed. Instead, it held that if the statutory ‘endangerment’ existed without the showing of irreparable harm needed under the traditional four-part test, then it would not order a preliminary injunction. Fortunately for the government, the court found that contamination of the local drinking water by the defendant’s toxic waste runoff fulfilled the irreparable injury test. Therefore, the government obtained a preliminary affirmative injunction directed to Price to clean up his property.

Similarly, in United States v. Solvents Recovery Service, 496 F. Supp. 1127 (D.Conn. 1980), the court held that Section 7003 of the Resource Conservation and Recovery Act of 1976 authorizing injunctive relief when there is an “imminent and substantial endangerment to health or the environment” is only jurisdictional. Id. at 1131. Therefore, it does not provide any standards for when an injunction must issue. The judge in Solvents Recovery Service relied on the Act’s authorization of injunctive relief under the traditional judicial standards and the federal common law of nuisance. Resort to the federal common law of nuisance, however, is now foreclosed by the 1981 decision of City of Milwaukee v. Illinois, 451 U.S. 304 (1981).
1972 Clean Water Act Amendments. However, the question remains as to what other policy considerations affect the type of equitable relief, whether there must be an injunction in the first instance, or both.

**Policies Which Alter the Scope of Equitable Jurisdiction in the Federal District Courts**

As noted above, the legislative history of the Clean Water Act amendments does not clearly indicate whether Congress intended to totally pre-empt traditional equitable discretion.\(^7\) If equitable discretion does survive the Act, however, then a Committee Report is one useful method for suggesting other policies which modify the scope of such discretion. Public health,\(^7\) discussed in previous sections, is an important priority.\(^7\) Irreparable ecological harm also deserves special attention as was implied in the *Barcelo v. Brown* district court decision.\(^7\) Furthermore, *Romero-Barcelo*, as well as other case law,\(^7\) suggests that extensive environmental damage may influence a court to grant a preliminary or permanent injunction, particularly if a natural resource may be irreparably destroyed before a trial on the merits. Nevertheless, if the courts find that environmental policy threatens national security, they will deny injunctions in favor of that policy. Therefore, if the defendant in the litigation is the military, the defendant will undoubtedly prevail.

**Irreparable Injury to the Environment**

The *Romero-Barcelo* majority would not grant injunctive relief if: (a) it is merely available in the enforcement provisions as a possible remedy, and, (b) there is another remedy in the statute which will insure compliance. If compliance is possible without the destruction of a precious natural resource, then the court should use a less drastic alternative to a preliminary injunction. The district court found that no species would disappear and that the bombing did not damage the coral reefs.\(^7\) This factual finding is in sharp contrast to the facts in

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174. The Senate Report, *supra* note 75 reads in pertinent part: "This emergency authority provides for immediate, effective action whenever the discharge of water pollutants reach levels of concentration that present an imminent or substantial endangerment of the health or welfare of person." *Id.* at 78.
175. See also 456 U.S. at 327 (public interest) (Stevens, J., dissenting).
176. 478 F. Supp. at 707-08. See also 456 U.S. at 311-12.
In *TVA v. Hill* in which civil penalties or criminal sanctions would not bring the snail darter back to life. According to traditional criteria, then, the *Romero-Barcelo* district court did not abuse its discretion because the occasional bombing did not cause irreparable ecological injury.

In *Romero-Barcelo* typifies the trend in environmental law, then the appropriateness of preliminary or permanent injunctions will always depend on the circumstances of each case. Previous decisions under the Clean Water Act and statutes such as NEPA have already followed this reasoning. In the recent NEPA case, *California v. Bergland*, the court found an injunction necessary to protect undeveloped wilderness areas from development while the federal agency prepared the environmental impact statement. The *Bergland* court's stated rationale was that an injunction should follow every NEPA violation. However, an argument could be made that the underlying rationale was that the magnitude and irreversibility of the harm could only be alleviated by immediate cessation. In two other NEPA cases, *Kleppe v. Sierra Club*, and *State of Alaska v. Andrus*, the courts held that injunctions were unnecessary while agencies prepared environmental impact statements. The underlying rationale in these cases probably was that the harm done while waiting for the statements was neither irreparable nor sufficiently grievous.

Analogous distinctions appear in the Clean Water Act decisions. In *United States v. Lee Wood Contracting, Inc.*, the court issued an injunction to prevent the loss of a Michigan wetland which was irreplaceable if the defendant filled it with sludge. However, in *United States v. Board of Trustees of Florida Keys Community College*, the court found that the defendants could replant the small affected area elsewhere. Therefore, a mandatory injunction requiring restoration of the original location was unnecessary.

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180. Id. at 498.
181. Id.
184. Id. at 486; see also 427 U.S. at 407-08.
187. The cases which involved public health reveal the same tendency. In *Reserve Mining* and *Vertac Chemical*, both cases purported to balance equities before granting immediate injunctions. However, there were different results. *Vertac* granted an immediate affirmative cleanup order while *Reserve Mining* did not grant an immediate injunction to close down the factory. The *Vertac* court found immediate irreparable harm because of toxic waste runoff into the waterways.
Military preparedness was a primary concern of the district court when it decided not to grant a preliminary injunction.\footnote{188} The Supreme Court found that the Presidential exemption allowing for noncompliance with the permit requirement under Section 313 of the Act was inapplicable. The court found the equitable power of the court was to order \textit{compliance}.\footnote{189} The exemption was concerned only with noncompliance. Only if the Navy did not receive the permit, would the exemption become applicable.\footnote{190}

Consequently, the Supreme Court's conclusion was faulty because of its characterization of statutory violations and executive exemptions. The original Senate Committee Report specifically states that any pollution by the federal government is unlawful.\footnote{191} If a statutory violation, such as an unauthorized discharge is unlawful, then there cannot simultaneously be compliance. Furthermore, of all the federal "agencies" the Navy is in the best position to obtain an executive exemption.\footnote{192} \textit{Weinberger v. Catholic Action of Hawaii}\footnote{193} is an excellent example of a recent decision in which the Supreme Court relied on a similar statutory exemption. In \textit{Catholic Action}, the defendant-Navy prevailed because it had a statutory exemption under NEPA and the Freedom of Information Act (FOIA).\footnote{194} Under FOIA, if the information is exempted by an executive order, then the government may keep it from the public in the interest of national security. There was a properly classified executive order for the requested environmental impact statement in \textit{Catholic Action}. The Supreme Court concluded that the Navy could withhold the environmental impact statement from the public, a finding which would conflict with the policy of NEPA but for

\textit{The Reserve Mining} court did not consider the asbestos a sufficiently immediate irreparable harm to public health to close down the plant.

The above two cases addressed health, but as in \textit{Florida Keys}, presence of irreparable harm influenced the scope and timing of the injunction. This survey of the environmental and health cases demonstrates two ways in which courts factor in a showing of irreparable harm: the scope of the remedy, or whether there will be an injunction in the first instance. In the first type, the statutory policy prevails, but the courts discretion takes over as to scope and immediacy. In this context, the \textit{Romero-Barcelo} court did not follow either alternative because there was no showing of irreparable harm whatsoever to take into consideration.

\footnote{188} 478 F. Supp. at 707-08. The district court was concerned with the maintenance of the United States' sea lanes.
\footnote{189} 456 U.S. at 318 (emphasis in original).
\footnote{190} \textit{Id.}
\footnote{191} \textit{See supra} note 75, at 67.
\footnote{192} 456 U.S. at 326 n.7 (Stevens, J., dissenting).
\footnote{193} 454 U.S. 139 (1981).
\footnote{194} Currently codified at 5 U.S.C. § 552(b)(1) (1976). Section 102(c) of NEPA (1978) provides for disclosure of environmental impact statements to the public, subject to the FOIA.
the statutory exemption.\textsuperscript{195}

The facts in \textit{Romero-Barcelo} are not directly analogous to the situation in \textit{Catholic Action} for two reasons. First, there is no secrecy issue because everyone knew where and how long the Navy had conducted bombing near Puerto Rico. Secondly, in \textit{Catholic Action}, a very specific executive order already existed for exactly the kind of classified information which was at issue.\textsuperscript{196} The most confusing issue is that in \textit{Catholic Action}, the Court relied on this executive order to support the Navy's position, whereas in \textit{Romero-Barcelo} the Court totally ignored the executive exemption opportunity.\textsuperscript{197} The reason why the Court rejected such recent reliance on the statutory exemption argument is never adequately explained by Justice White's analysis in the \textit{Romero-Barcelo} majority opinion. The Court's rationale, as stated earlier, is that the exemption only extends to permanent noncompliance and that in \textit{Romero-Barcelo}, there was temporary noncompliance with no showing of irreparable injury to the water.\textsuperscript{198} Unfortunately, as Justice Stevens points out in his dissenting opinion, this is a blatant disregard for the clear language of section 313, which provides that even federal entities must obey the law.\textsuperscript{199}

Even without presidential exemptions, national security is a powerful policy argument.\textsuperscript{200} In the absence of express statutory language, it may tip the balance of hardships in favor of the Navy. In \textit{Aluli v. brown},\textsuperscript{201} the facts were similar to those in \textit{Romero-Barcelo}. The plaintiffs requested a preliminary injunction while the Navy was in the process of complying with NEPA and the National Historic Preservation

\textsuperscript{195} 454 U.S. at 146.
\textsuperscript{197} The Court in \textit{Catholic Action} said that: "Since the public disclosure requirements of NEPA are governed by FOIA, it is clear that Congress intended that the public's interest in ensuring that federal agencies comply with NEPA must give way to the Government's need to preserve military secrets." 454 U.S. at 145.
\textsuperscript{198} 456 U.S. at 318-19.
\textsuperscript{199} \textit{Id.} at 323 n.3 (Stevens, J., dissenting).
\textsuperscript{200} \textit{See} Totten v. United States, 92 U.S. 105 (1875), on which the Court relied in \textit{Weinberger v. Catholic Action of Hawaii} for the proposition that military secrets are immune from judicial review.
\textsuperscript{201} 437 F. Supp. 602 (D. Hawaii 1977).
The district court denied the preliminary injunction when the Navy presented testimony that the readiness of the fleet would be reduced by 30 to 40 per cent: "[a]lthough no measurement standards were cited in arriving at these figures, the court finds that the reduction would nevertheless be substantial." Even when alternative sites were considered and then rejected by the Navy, the Aluli district court still found the Navy's objections reasonable.

The Supreme Court in *Romero-Barcelo* confirmed the policy in *Aluli* five years after that district court decision. In both cases, the courts denied preliminary prohibitory injunctions against pollution but issued orders which required the Navy to submit environmental impact statements or permit applications. Apparently, when the Navy is the defendant, a mandatory decree directed towards securing permanent compliance within a reasonable time is an adequate remedy, while temporarily closing down an entire military operation is not appropriate.

**Significance of the Case**

*TVA v. Hill* and *Hecht v. Bowles* established the general proposition that equitable discretion can coexist with a statute providing for injunctions. However, they did not delineate the scope and timing of this discretion as a function of a specific statute, other federal policies, and Rule 65 of the Federal Rules of Civil Procedure. *Romero-Barcelo* fills in several of these gaps under the 1972 Clean Water Act Amendments. First, the Court resolved that the Amendments do not totally

202. *Id.* at 610.
203. *Id.* at 611.
204. *Id.*
205. In *Aluli v. Brown*, the court found as fact that the Navy violated both NEPA and the National Historic Preservation Act. However, when balancing the equities it found the tipping of hardships going to the Navy with respect to shutting down the Navy's operation while it complied with the first part of the court order. 437 F. Supp. at 611.

With respect to injunctions the court said:

> Injunctive relief should be granted either where the plaintiff can establish a probability of success on the merits and the showing of irreparable injury... Under the alternate test adopted by the Ninth Circuit, injunctive relief may be granted if there are sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

*Id.* at 610-11.

206. Hecht v. Bowles, 321 U.S. at 329-30; *TVA v. Hill*, 437 U.S. at 193-94. In *Hecht v. Bowles* the Supreme Court remanded the case to the appellate court to determine if there had been an abuse of discretion by the district court when it dismissed the request for injunctive relief. 321 U.S. at 331. *Hecht*, although not environmental law, is important because although the applicable statute authorized an injunction for statutory violations, the court still denied one because of the facts. The Court's rationale in *Hecht* was that an injunction would not deter inadvertent future violations by the defendant. *Id.*
pre-empt the court's power to withhold or order equitable relief. In prior decisions the courts were not always clear as to whether they ordered an injunction because the plaintiff surmounted the traditional tests as well as the statutory standard. After *Romero-Barcelo*, courts will not have to regard every statutory violation under sections 309 or 313 as irreparable injury *per se*. It follows from the above discussion that at least in the context of purely ecological issues, the plaintiff must demonstrate harm in fact which is immediate and irreparable under the traditional test. As to whether there is a lesser showing required for a health hazard under section 504, *Romero-Barcelo* is silent. However, the majority opinion acknowledges a rule in the FWPLA of immediate cessation for statutory violations "presenting an 'imminent and substantial endangerment of the health of persons or to the welfare of persons.'" This language implies that traditional requirements for either a preliminary or permanent injunction may not be required in the area of public health.

Secondly, *Romero-Barcelo* expands the kind of factual situations litigated under the 1972 Clean Water Act Amendments. Prior to this case there was no Supreme Court decision in which plaintiffs requested a preliminary injunction against a federal defendant under the amended Act. *Romero-Barcelo* reinforces previous trends seen in cases under several environmental statutes with respect to who the parties to the litigation are and their ultimate chance for success on the merits. For example, under most environmental statutes, a private party suing any defendant will have difficulty. Furthermore, in NEPA cases in which private citizens sue non-military government agencies, the plaintiffs have to make an even stronger showing of irreparable injury. When the federal government sues a private party, however, it is likely to prevail. Congress drafted the original Water Quality Act to have the litigation brought solely by the government. As for a *state* suing a private defendant under federal law, this attempt failed in at least one

207. 456 U.S. at 320.
209. 456 U.S. at 320.
210. *Id.* at 314 n.7.
211. *Id.* at 317.
214. *See* Note *supra* note 55, at 582-83.
Clean Air Act case.215

In the decisions discussed in this case comment, the private citizen against a military defendant is the worst possible combination for the plaintiff's success. One reason is that in general the private litigant cannot claim that he is an authority with respect to public policy: the courts do not believe that he has the standing and stature to make this kind of argument against an "expert" government agency in general216 or against the armed forces in particular.217 In Romero-Barcelo, this also holds true for a state or state-like entity such as Puerto Rico: its standing to bring the suit does not appear to be better than that of a private citizen.218 Unfortunately for this class of potential plaintiffs, the Romero-Barcelo situation is not unusual. Catholic Action of Hawaii and Aluli v. Brown are two other examples of cases in which a private litigant has unsuccessfully confronted the Navy.219

The federal government suing a non-military federal agency may prevail. TVA v. Hill is an example of the success of this type of action. However, the federal government suing the military is a special sub-class of federal suing federal.220 Presumably, an important innovation in the Clean Water Act Amendments is the section authorizing enforcement against federal polluters. However, the practical significance of this section is dubious because the federal government does not want to sue the military: in Catholic Action of Hawaii, and Aluli v. Brown, the plaintiffs were not the federal government. Similarly, Romero-Barcelo does not detract from the long followed case law tradition221 that courts will not intrude in areas which the executive and congressional branches also avoid.222

Romero-Barcelo does not address the propriety of preliminary affirmative injunctions as compared to negative preliminary injunctions. This omission probably occurred because the plaintiffs did not estab-

219. See supra text accompanying notes 35-41.
220. The author did not find a case where the federal government has sued the Armed Forces under the Clean Water Act.
221. See Totten v. United States, 92 U.S. 105 (1875).
222. See Laird v. Tatum, 408 U.S. 1 (1972). See also Weinberger v. Catholic Action of Hawaii, 454 U.S. 139 (1981). In dicta the Court said: "Ultimately, whether or not the Navy has complied with NEPA 'to the fullest extent possible' is beyond judicial scrutiny in this case." Id. at 146. This dictum implied that in matter of national security, judicial equitable discretion is minimal.
lish irreparable harm at the district court level. Since the Supreme Court had decided that a mere statutory violation is not sufficient to order an injunction, there was no need to decide what type of preliminary injunction would have been appropriate.

Although there are flaws in the *Romero-Barcelo* analysis, the Supreme Court did give needed definition to the Clean Water Act Amendments. The Refuse Act only applies to private polluters.\(^\text{223}\) Therefore, the scope of the Clean Water Act's control over federal defendants has to be tried and tested.\(^\text{224}\) Inevitably, there are questions left unanswered—after all, the amendments are only ten years old. One such unresolved area is that of reconciling the substantial statutory issues of remedies raised in *Romero-Barcelo* with procedural problems in the federal courts. For example, the Supreme Court in *Romero-Barcelo* did not discuss how Rule 65 of the Federal Rules of Civil Procedure is reconciled with the Clean Water Act scheme. In fact, lower federal court decisions did not seem very concerned about this problem either. Inevitably, these questions will be resolved by decisions which combine environmental issues with purported procedural violations, presumably at the district court level.

**Conclusion**

In *Romero-Barcelo*, the Supreme Court interpreted the spirit of the Clean Water Act very restrictively. Ironically, Congress drafted and passed the 1972 amendments during a period in which there was considerable concern over national health and environmental problems from pollution. Although Congress passed new laws in the late 1960s and early 1970s, the courts consistently resorted to the Refuse Act for injunctive relief. Congress drafted it under different circumstances and it is “accepted” in its role as a strict enforcement tool against private defendants. Although the report on the original Refuse Act bill is silent, it is likely that Congress passed it for commercial reasons, for example, to facilitate navigation. Therefore, unlike the Clean Water amendments, the Refuse Bill probably did not have to withstand a barrage of controversy. In addition, the Supreme Court in *Wyandotte Transportation Co. v. United States*,\(^\text{225}\) gave an expansive interpretation to the availability of injunctive relief under the Refuse Act. In sharp contrast, the *Romero-Barcelo* Court gave the 1972 amendments a re-


\(^{224}\) *Romero-Barcelo* is precedent for the proposition that judge made exemptions for national security are as available as statutory exemptions under the Clean Water Act.

\(^{225}\) 389 U.S. 191 (1967).
strictive gloss only a decade after their inception. If the Supreme Court continues the Romero-Barcelo trend, then government agencies will have more latitude to pollute when other national policies are involved. Furthermore, there is less likelihood that courts will enjoin government agencies if these agencies are in the process of complying with other requirements of the Act.

The issues in Romero-Barcelo are of statutory interpretation and policies. Except for a possible separation of powers problem at the federal level, there is no constitutional question. Therefore the state courts, as well as the federal courts, are not obligated to follow the Supreme Court when they interpret local ordinances or state environmental legislation. The effect of Romero-Barcelo on future case law decided under the Clean Water Act’s 1972 amendments is uncertain. Romero-Barcelo spoke of the Clean Water Act only with respect to preliminary injunctions when the defendant is the Navy. Some maverick district courts may continue to give injunctive relief without the traditional showing of irreparable injury. U.S. v. Outboard Marine is illustrative of this possibility. That decision relied on the Refuse Act and the Clean Water Act to order a mandatory cleanup of the Milwaukee Harbor. Although the decision came down after Romero-Barcelo, the district court relied on purely statutory arguments, as well as legislative intent. There was no mention of the necessity for the traditional tests.

As in U.S. v. Outboard Marine, some future district court decisions may also rely exclusively on legislative intent and statutory language and ignore Rule 65 or the traditional equitable prerequisites. Perhaps these district courts believe that when the Supreme Court’s inter-

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227. Examples include the permit requirement in Romero-Barcelo or the preparation of adequate environmental impact statements in NEPA cases.

228. 456 U.S. at 311, 334-35 (Stevens, J., dissenting).


230. 549 F. Supp. 1036 (N.D. Ill. 1982); see supra note 105.

231. In this respect the Refuse Act cases from the middle and southern federal district courts in Florida are interesting. The author has not found a similar clustering of cases under any other statute arising out of any other geographic section of the country. Apparently, from about 1970 to 1975, there was a local movement to preserve some commercially undeveloped areas in this region. See United States v. Underwood, 344 F. Supp. 486 (M.D.Fla. 1972); United States v. Joseph G. Moretti, Inc., 387 F. Supp. 1404 (S.D.Fla. 1974); United States v. Sexton Cove Estates, Inc., 389 F. Supp. 602 (S.D.Fla. 1975).
pretation of the law appears too restrictive, then it is up to the local government to accomplish its objectives environmentally. In any event, with a large selection of environmental statutes to choose from, a district court should have no difficulty finding an alternative manner to impose preliminary injunctive relief from water pollution.\textsuperscript{232}