June 1983

Equitable Discretion under the Federal Water Pollution Control Act: Weinberger v. Romero-Barcelo

James Petruzzi

Michael Thomas

Follow this and additional works at: http://scholarship.law.berkeley.edu/elq

Recommended Citation
Available at: http://scholarship.law.berkeley.edu/elq/vol11/iss1/4

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38W534

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcerl@law.berkeley.edu.
Equitable Discretion Under the Federal Water Pollution Control Act: Weinberger v. Romero-Barcelo

James Petruzzi*
& Michael Thomas**

INTRODUCTION

In 1972, Congress substantially amended the Federal Water Pollution Control Act (FWPCA). The Amendments provided for a detailed permit system that established individual compliance schedules for effluent discharge sources. The goal of the law was to eliminate all discharges of pollutants into the nation's waters by 1985.

Since 1970, the United States Navy has conducted weapons training in the vicinity of an island near Puerto Rico. The training resulted in much material being discharged into the coastal waters surrounding the island. The Governor of Puerto Rico and others sued the Navy in federal district court, charging violations of the FWPCA and seeking to enjoin the Navy's use of the island. Despite finding the Navy in violation of the FWPCA by discharging ordnance without a permit, the district court held that there was no harm to water quality and issued an order directing the Navy to apply for a permit. On appeal, the

Copyright © 1983 by ECOLOGY LAW QUARTERLY.
* Member, third-year class, School of Law (Boalt Hall), University of California, Berkeley. B.S. 1981, University of Texas at Austin.
** Member, third-year class, School of Law (Boalt Hall), University of California, Berkeley. B.A. 1981, California State University at Fullerton.


2. See infra text accompanying notes 23-25.

3. See infra text accompanying notes 27-178.


6. Ordnance is a term of art used to designate the various types of ammunition discharged as pollutants in a military context. See infra note 49.

First Circuit held that the FWPCA embodied a "congressional ordering of priorities" that withdrew the district court’s discretion to withhold injunctive relief. Consequently, it instructed the district court to order the Navy to cease its discharges until it obtained a permit.

In *Weinberger v. Romero-Barcelo*, the Supreme Court was called upon to determine the scope of equitable discretion available to federal courts in remedying an ongoing violation of the FWPCA. The Supreme Court held that the FWPCA did not completely foreclose the district court’s equitable discretion, but that the Act instead permitted the court to order the relief it deemed necessary to secure compliance. The Court further found that the statutory scheme contemplates that federal courts will balance the equities and apply their traditional equitable powers to craft remedies other than injunctions.

This Note examines the Supreme Court’s decision in *Weinberger v. Romero-Barcelo* in light of the statutory background of the FWPCA and case law concerning federal court exercise of equitable discretion. This Note concludes that the text and legislative history of the Act require that a permit be obtained prior to the discharge of pollutants into navigable waters. In addition, previous Supreme Court decisions suggest that federal courts are without power to allow an ongoing violation of a statutory command. The *Romero-Barcelo* decision greatly alters the comprehensive regulatory program devised by Congress. Furthermore, it may have the unfortunate consequence of encouraging violators of the Act to wait until they are sued before applying for a permit. This Note concludes that the *Romero-Barcelo* decision was improvidently decided and will delay the clean-up of our nation’s waters.

I

THE FWPCA AND THE 1972 AMENDMENTS

Finding existing water pollution legislation "inadequate in every vital respect," Congress in 1972 enacted a series of amendments to the Federal Water Pollution Control Act. These amendments were designed to rectify the inadequacies of past water pollution control efforts under both the Rivers and Harbors Appropriation Act of 1889
(The Refuse Act)\textsuperscript{16} and the Water Quality Act of 1965.\textsuperscript{17} The Supreme Court stated in another case that the Amendments "were viewed by Congress as a 'total restructuring' and 'complete rewriting' of existing water legislation . . . ."\textsuperscript{18}

The Refuse Act was an ineffective measure for controlling water pollution in that it failed to provide standards for pollution discharges or effective enforcement mechanisms.\textsuperscript{19} Similarly, the Water Quality Act of 1965 contributed only minimally to national water clean-up efforts. The 1965 Act had contained a set of water quality standards which specified acceptable maximum levels of pollution in navigable waters.\textsuperscript{20} The States were charged with the task of translating these water quality goals into specific effluent limitations for individual dischargers. The several States failed to fulfill this task, however. Moreover, the Act was ineffective because of its unduly burdensome enforcement procedures.\textsuperscript{21}

The 1972 Amendments exemplified a conscious shift in congressional philosophy toward more rigorous and effective control of water pollution. The Amendments provided for application of specific effluent limitations to individual sources of pollution rather than generalized water quality standards.\textsuperscript{22} The National Pollutant Discharge Elimination System (NPDES) was created to develop standards for individual polluters and to provide for the issuance of NPDES permits.\textsuperscript{23} Under the Amendments, the discharge of pollutants from a "point source"\textsuperscript{24} without a permit is unlawful.\textsuperscript{25}

The permit system is coordinated by the Environmental Protection Agency (EPA) or by those States with EPA-approved permit programs.\textsuperscript{26} The specific effluent limitations established by the EPA are

---


\textsuperscript{19} See 2 Legislative History, supra note 14, at 1334.


\textsuperscript{21} The Act placed the responsibility for establishment and enforcement of water quality standards upon the states. States were required to formulate water quality standards and obtain approval from the Secretary of Interior. A lawsuit could be commenced only if (1) the governor of the state involved consented to the suit, (2) a formal notice of intent to sue preceded the action by at least 180 days, and (3) the pollution had an interstate impact.


\textsuperscript{24} Section 502(14), 33 U.S.C. § 1362(14) defines a point source as "any discernible, confined discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container rolling stock, concentrated animal feeding operation, or vessel or other floating craft from which pollutants are or may be discharged . . . ."


incorporated as conditions of the permit. The permit serves to “trans-
form generally applicable effluent limitations . . . into the obligations . . . of the individual discharger . . . .”27 For enforcement purposes, compliance with the terms and conditions of an NPDES permit is
deemed to be compliance with the FWPCA.

Both the EPA and private citizens have authority to sue under the
FWPCA. The EPA Administrator is authorized to respond to viola-
tions of the Act with compliance orders28 and civil suits.29 The Admin-
istrator may seek a civil penalty of up to $10,000 per day,30 and
criminal penalties are also available.31 Citizen-suit provisions author-
ize private persons to seek injunctions to enforce the statute.32 In addition,
“any interested person” may seek judicial review in the U.S.
courts of appeal of actions taken by the Administrator, including estab-
lishment of effluent standards and issuance of permits for pollution
discharge.33

There are two limited derogations from the pervasive statutory
scheme of the FWPCA: the phased compliance schedule, and exemp-
tions from the permit requirement.34 “Recogniz[ing] the impracticality
of any effort to halt all pollution immediately,”35 Congress provided
for a scheme of phased compliance. Section 301(b) of the Act36 estab-
ishes two stages of point source effluent limitations. By July 1, 1977,
the effluent limitations for point sources were to be achieved through
application of the “best practicable control technology [BPT] currently
available.”37 The second set of limitations, to be achieved by July 1,

when the Administrator finds a violation of the permit requirement “he shall issue an order
requiring such person to comply with such section . . . .”
29. FWPCA § 309(b), 33 U.S.C. § 1319(b) (1976) authorizes the Administrator “to
commence a civil action for appropriate relief, including a permanent or temporary injunc-
tion, for any violation for which he is authorized to issue a compliance order under subsec-
tion (a) of this section.”
31. Id. § 309(c), 33 U.S.C. § 1319(c) (1976).
32. Id. § 505(a), 33 U.S.C. § 1365(a) (1976).
33. Id. § 509(b), 33 U.S.C. § 1342(b) (1976).
34. See infra text accompanying notes 39 & 40.
out the factors that the EPA is to look to in setting specific BPT limitations:
Factors relating to the assessment of best practicable control technology currently
available . . . shall include consideration of the total cost of application of technol-
yogy in relation to the effluent reduction benefits to be achieved from such applica-
tion, and shall also take into account the age of equipment and facilities involved,
the process employed, the engineering aspects of the application of various types of
control techniques, process changes, non-water quality environmental impact (in-
cluding energy requirements), and such other factors as the Administrator deems
appropriate.
1983, requires "application of the best available technology [BAT] economically achievable . . . which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants."38

Although the FWPCA generally prohibits discharges without a permit, there are two exemptions from this requirement. First, the President is authorized to "exempt . . . any department in the executive branch from compliance with [the permit requirement] if he determines it to be in the paramount interest of the United States to do so . . ."39 Congress also provided exemptions for industrial dischargers who can prove economic and technological justifications for a variance from the compliance deadlines.40 These exemptions, however, must be viewed in light of Congress' objective in enacting the FWPCA: "to restore and maintain the chemical, physical, and biological integrity of the nation's waters."41 The Amendments were intended to "establish a comprehensive long-range policy for the elimination of water pollution."42 According to Senator Randolph, Chairman of the committee that drafted the Senate version of the Amendments, "[this Act] is perhaps the most comprehensive legislation that the Congress of the United States has ever developed in this particular field of the environment."43 Thus, the exemptions noted above should be read narrowly, as they represent Congress' intent to limit the opportunities for non-compliance with the Act.

II
CASE HISTORY
A. Introduction

Vieques is a small island approximately six miles off the southeastern coast of Puerto Rico.44 The island and its surrounding waters constitute an unusual coastal ecosystem that includes coral reefs and seagrasses, mangroves, bays populated with bioluminescent plankton and several endangered species of animals.45

40. Id. §§ 301(c), 301(g), 302(b)(2), 33 U.S.C. 1311(c), 1311(g), 1312(b)(2) (1976).
41. Id. § 101(a), 33 U.S.C. §1251(a) (1976).
42. S. REP. No, 414, 92d Cong., 1st Sess. 95. See 2 Legislative History, supra note 14, at 95.
43. See 2 Legislative History, supra note 14, at 1269 (Statement of Sen. Randolph). Other legislators made similar statements. See, e.g., 1 Legislative History, supra note 14, at 343 (Rep. Young); id. at 350 (Rep. Blatnik); id. at 380 (Rep. Roberts); id. at 467 (Rep. Dingell); 2 Legislative History, supra note 14, at 1302 (Sen. Cooper); id. at 1408 (Sen. Hart).
44. Romero-Barcelo v. Weinberger, 643 F.2d 835, 837 (1st Cir. 1980).
45. Id. at 837-38. Of the seven bioluminescent bays (containing living matter that gives off light from internal oxidation) known to exist in the world, three are located along the
The Navy uses part of Vieques as a range for naval weapons training. Vieques was used principally for small-scale artillery training until 1971, when the Navy began to increase its shelling and bombing. Between 1974 and 1977, the Navy increased the number of bombs dropped on and around Vieques by over 900 percent. The Navy’s activities have resulted in the discharge of munitions and other materials into the coastal waters.

On March 1, 1978, the Governor of Puerto Rico, Carlos Romero-Barcelo, and others initiated a suit to enjoin further Navy weapons training. Plaintiffs charged the Navy with, among other things, violation of the FWPCA.

B. The District Court Opinion

The district court ruled that the Navy had violated the FWPCA by discharging munitions into navigable waters without first obtaining an NPDES permit from the EPA. According to the court, the “unambiguous language” of the Act specifically includes munitions in the definition of “pollutant.” The court ordered the Navy to apply for an NPDES permit but refused to enjoin Navy operations pending EPA consideration of the permit application. The district court found that injunctive relief was not necessary to ensure the Navy’s prompt compliance with the Act. The court emphasized the broad discretion traditionally available to a court of equity in deciding appropriate relief:

Perhaps the most significant single component in the judicial decision whether to exercise equity jurisdiction and grant permanent injunctive relief, is the court’s discretion. Being an extraordinary remedy, it is not

---

46. 643 F.2d at 839-40.
48. Id. The Respondents also noted that “[i]n 1977 alone, the Navy dropped approximately 5 million pounds of ordnance on and around Vieques.” Id.
49. Id. “Items discovered in the waters of Vieques near the reefs include exploded and unexploded bombs and shells, practice ordnance, parachute cables, flares, flare casings, barges and other military vessels, machine gun rounds, bazooka rockets and many unidentifiable ordnance fragments.” [citing Supreme Court Joint Appendix at 76-91].
51. Id. The suit also charged the Navy with violations of almost every piece of major environmental legislation enacted by Congress over the past decade. Id.
52. 478 F. Supp. at 664.
54. 478 F. Supp. at 707.
55. Id. at 708.
56. Id. at 706-08.
The Court explained that “there is no irreparable damage to coral reefs in Vieques” and that “the evidence is at best inconclusive that these activities have a substantial negative ecological impact on these beaches.” The court further found that “injunctive relief . . . would cause grievous and perhaps irreparable harm, not only to defendant Navy, but to the general welfare of this nation.”

C. The Court of Appeals Opinion

The court of appeals for the first circuit concluded that the district court had erred in undertaking a traditional balancing of the equities. The court vacated the district court’s decision and instructed that court to order the Navy to cease bombing until it obtained an NPDES permit.

The court of appeals relied heavily on the case of *TVA v. Hill* in reaching its decision. In *Hill*, the Secretary of the Interior sought to prevent completion of the Tellico Dam on the grounds that operation of the dam would have resulted in the elimination of the known population of snail darters, an endangered species, and destruction of the species’ critical habitat. Section 7 of the Endangered Species Act requires federal agencies to “insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of [any] endangered species . . . or result in the destruction or modification of habitat of such species which is determined . . . to be critical.” The Supreme Court found that in the Endangered Species Act, Congress has made it “abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities.” The Court concluded that a federal court was powerless to strike a different balance between competing interests, and that an injunction must issue.

---

57. *Id.* at 706 (citing Hecht Co. v. Bowles, 321 U.S. 321, (1944)).
58. *Id.*
59. *Id.*
61. *Id.* at 863.
63. 643 F.2d at 861.
64. The snail darter is a species of perch. 437 U.S. at 158 n. 7.
65. *Id.* at 173.
68. 437 U.S. at 194.
69. *Id.* at 195. In reaching its decision, the Court did not weigh the economic hardship that an injunction would create for the Tennessee Valley Authority, which had already spent over $100 million on the project. 437 U.S. at 172.
The court of appeals in *Romero-Barcelo* found *Hill* to be controlling and stated that Congress has prohibited "the discharge of any pollutant," 33 U.S.C. § 1311(a), which includes the Navy's dropping of ordnance into the coastal waters, unless a NPDES permit has been secured pursuant to 33 U.S.C. § 1342. Whether or not the Navy's activities in fact harm the coastal waters, it has an absolute statutory obligation to stop any discharge of pollutants until the permit procedure has been followed and the Administrator of the Environmental Protection Agency, upon review of the evidence, has granted a permit.\(^7\)

The court reasoned that the statute contemplated that the EPA, not the court, was responsible for determining whether particular discharges caused harm to the environment.\(^7\) Therefore, according to the court, the trial court's finding that the Navy's discharge of munitions caused no significant harm to the environment was irrelevant.\(^7\) Furthermore, the appeals court stated that "[t]he EPA might find substantial harm even though the court had not . . . . [T]he permit process 'might reveal substantial environmental consequences,' [citations omitted] that would lead the Administrator to deny the application or grant only a limited permit."\(^7\)

The court further observed that the mere filing of an application for the permit would not put the Navy into compliance with the Act.\(^7\)

The court of appeals also rejected the district court's reliance upon national security considerations.\(^7\) The court indicated that if an injunction would interfere significantly with military preparedness, the Navy should "request the President to exempt it from the NPDES requirements in the interest of national security."\(^7\)

**D. Supreme Court Opinion**

In an 8 to 1 opinion, the Supreme Court reversed the court of appeals and remanded the case to the appeals court for a determination as

\(^{70}\) 643 F.2d at 861.

\(^{71}\) *Id.* A Senate Report on the FWPCA stated that "[e]nforcement of violations. . . should be based on relatively narrow fact situations requiring a minimum of discretionary decision making" and that "the issue before the courts would be a factual one of whether there had been compliance." S. REP. No. 92-414, 92d Cong., 1st Sess., 64, 80 (1971).

\(^{72}\) 643 F.2d at 861.

\(^{73}\) *Id.*

\(^{74}\) *Id.* at 862.

\(^{75}\) *Id.*

\(^{76}\) *Id.* 33 U.S.C. § 1323(a) (1976 & Supp. III 1979) provides:

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 . . . . Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for period not to exceed one year upon the President's making a new determination.
to whether an injunction should issue.\textsuperscript{77} The Court noted that the central issue was whether the FWPCA requires a district court immediately to enjoin all pollution discharges without NPDES permits or whether the district court has discretion to order other relief to achieve compliance.\textsuperscript{78}

The Court began by noting the equitable nature of an injunction and that it "is not a remedy which issues as of course."\textsuperscript{79} Equitable relief is afforded only where the injury is irreparable and legal remedies are inadequate.\textsuperscript{80} The Court concluded that "the essence of equity has been the power of the chancellor . . . to mold each decree to the necessities of the particular case"\textsuperscript{81} by balancing the competing interests involved.

The courts should pay particular attention to the public consequences flowing from the "extraordinary remedy of injunction."\textsuperscript{82} From this sole premise, the Court reasoned that the grant of jurisdiction to enforce a statute by injunction does not create an absolute duty to do so. Federal judges are "not mechanically obligated to grant an injunction for every violation of law."\textsuperscript{83} Congress may control the courts' exercise of discretion but such restriction will not be assumed absent a "clear and valid legislative command,"\textsuperscript{84} a command which the majority did not find in the FWPCA.

The Court relied on three aspects of the FWPCA to find that Congress did not intend to remove the courts' equitable discretion. The first was that an injunction is only one of several means of ensuring compliance with the FWPCA.\textsuperscript{85} The purpose of the act is to protect the nation's waters, not the permit process. This purpose, which the Court suggested resembles nuisance relief,\textsuperscript{86} could be achieved by allowing the Navy to continue its discharges temporarily while applying for a permit.\textsuperscript{87} Second, the Court found that the statutory scheme of phased compliance indicated that "Congress envisioned, rather than curtailed, the exercise of discretion."\textsuperscript{88} Finally, the Court reviewed EPA enforce-

\textsuperscript{77} Romero-Barcelo, 102 S.Ct. 1798 (1982).
\textsuperscript{78} Id. at 1804-05.
\textsuperscript{79} Id. at 1802 (citing Harrisonville v. U.S. Dickey Clay Mfg. Co., 289 U.S. 334, 338 (1933)).
\textsuperscript{80} Id. at 1803.
\textsuperscript{81} Id. (citing Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944)).
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id. (quoting Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946)).
\textsuperscript{85} Id. at 1804. The FWPCA provides for fines and criminal penalties, 33 U.S.C. § 1319(c) and (d).
\textsuperscript{86} Id. The Court explained in a footnote: "The objective of this statute is in some respects similar to that sought in nuisance suits, where courts have fully exercised their equitable discretion and ingenuity in ordering remedies." [citations omitted] Id., n. 7.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 1805.
ment practices and found that immediate cessation of discharges is limited to situations "presenting an imminent and substantial endangerment of the health of persons. . . ." Because the EPA Administrator is directed to seek an injunction only in this limited circumstance, the Court reasoned that the statute "contemplates equitable discretion."90

The Court concluded that a major departure from traditional equity practice should not be lightly implied and construed the FWPCA as permitting a district court to order the relief it considers necessary conditioned only by "the necessities of the public interest which Congress has sought to protect."91 The Court remanded the case to the court of appeals to determine whether the trial court had abused its discretion in denying an injunction. The Court implied if it becomes clear that no permit will be issued, the court should reconsider the balance it has struck.92

E. The Dissent

Justice Stevens authored the lone dissent in Romero-Barcelo.93 He conceded that the FWPCA does not require federal courts to issue an injunction for every violation of the Act. Nevertheless, he was convinced that by enacting the 1972 Amendments, "Congress had circumscribed the district courts' discretion on the question of remedy so narrowly that a general rule of immediate cessation must be applied in all but a narrow category of cases."94 Justice Stevens believed that the present case did not justify a departure from the general rule.95

Justice Stevens also argued that the district court's opinion was premised on two determinations that Congress did not commit to judicial discretion. The first was the court's finding that the Navy's operations had not harmed the quality of the coastal waters.96 The second was that compliance with the Act may adversely affect national security.97 Justice Stevens, agreeing with the court of appeals opinion, noted "that the first consideration is the business of the EPA and the second is

89. Id.
90. Id. at 1806.
91. Id. at 1807.
92. Id.
93. Id.
94. Id. at 1808.
95. Id. Justice Stevens pointed out that the FWPCA . . . expressly subjects federal agencies to all laws 'respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity.' 33 U.S.C. § 1323(a).
96. Id. at n. 3.
97. Id. at 1809.
the business of the President."\(^9\)

In his dissent, Stevens took exception to the majority's reading of the court of appeals opinion. Stevens did not agree that the appeals court held a district court is always without discretion to formulate remedies for statutory violations.\(^9\) According to Justice Stevens, the court of appeals "merely conclude[d] that the district court erred in undertaking a traditional balancing of the parties' competing interest" in the context of this particular legislation. 'According to Stevens, the district court in this instance "was not free to disregard . . . the integrity of the . . . process mandated by Congress."\(^10^0\) Justice Stevens felt that the majority's analysis proceeded upon a mischaracterization of the issue, which, "overlook[ed] the limitations on equitable discretion that apply in cases in which public interests are implicated and the defendant's violation of the law is ongoing."\(^10^1\)

Justice Stevens strongly criticized the Court's suggestion that Congress intended the FWPCA to be "little more than a codification of the common law of nuisance."\(^10^2\) He found this implication especially disturbing in light of the Court's discussion of the Act in *City of Milwaukee v. Illinois*\(^10^3\) where the FWCPA was examined:

The statutory scheme established by Congress provides a forum for the pursuit of such claims before expert agencies by means of the permit-granting process. It would be quite inconsistent with this scheme if federal courts were in effect to 'write their own ticket' under the guise of federal common law. . . .\(^10^4\)

Justice Stevens also found little merit in the Court's attempt to distinguish the case from *TVA v. Hill* on the grounds that the Endangered Species Act contained a "flat ban" on the destruction of critical habitats and that the FWPCA did not similarly ban permitless discharges.\(^10^5\) According to Justice Stevens, "[the FWPCA] also contains a flat ban against discharges of pollutants into coastal waters without a permit."\(^10^6\) He contended that "[t]o assume that Congress has placed a greater value on the protection of vanishing forms of animal life than on the protection of our water resources is to ignore the text, the legislative history, and the previously consistent interpretations of [the FWPCA] . . . ."\(^10^7\)

---

98. Id.
99. Id. at 1808.
100. Id.
101. Id.
102. Id. at 1812. See supra note 86.
104. Id. at 326.
105. 102 S.Ct. at 1812.
106. Id.
107. Id. at 1813.
The dissent concluded that the Court’s opinion “grants an open-ended license to federal judges to carve gaping holes in a reticulated statutory scheme designed by Congress . . . .”\(^{108}\) Justice Stevens chastised this result as “especially dangerous in the environmental area, where the temptations to delay compliance are already substantial.”\(^{109}\)

III

**EQUITABLE DISCRETION IN THE CONTEXT OF A STATUTORY VIOLATION**

By misapprehending the court of appeals’ holding, the Supreme Court obscured the limitations on equitable discretion that apply in cases where public interests are implicated.\(^{110}\) The majority opinion characterized the court of appeals’ holding as one requiring an injunction “under any and all circumstances.”\(^{111}\) Based on this reading the Court went on to conclude that the FWPCA does not foreclose completely the exercise of district court discretion.\(^{112}\) In fact however, the court of appeals did not decide that the FWPCA withdrew all district court discretion, but rather only held that the district court erred in “undertaking a traditional balancing of the parties’ competing interests.”\(^{113}\)

The majority opinion noted that “[t]he essence of equity has been the power of the chancellor to do equity and to mold each decree to the necessities of the particular case.”\(^{114}\) The equity courts balance the comparative inconveniences to the competing parties.\(^{115}\) Courts may exercise broad discretion in striking that balance including the discretion to deny an injunction.\(^{116}\) Yet, the Supreme Court has also recognized that actions to enjoin violations of federal statutory law should be

---

108. *Id.* at 1808.
109. *Id.* at 1809.
110. Running throughout the Supreme Court’s discussion of equitable discretion are three distinct mischaracterizations. First, the Court misstates the court of appeals decision by characterizing its holding as a complete denial of district court discretion. Second, it speaks of the permit requirement as if it is nothing more than a technical aspect of the FWPCA. Finally, the Court indicates that the Navy’s bombing activities are the type of public interest mentioned in cases balancing equities in the context of a statutory violation. All three of these flaw the Court’s analysis.
111. 102 S.Ct. at 1803.
112. *Id.* at 1807.
113. 643 F.2d 835, 861. Justice Stevens pointed out in dissent that “[t]he only ‘absolute duty’ (intimated by the court of appeals) was the Navy’s duty to obtain a permit before discharging pollutants . . . the Navy, like anyone else, must obey the law.” 102 S.Ct. at 1808 (Stevens, J., dissenting).
measured against a more limited standard of discretion. When Congress itself has struck the balance, has defined the weight to be given the competing interests, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion.\footnote{117. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 609-10 (1952) (Frankfurter, J., concurring).} The Romero-Barcelo Court simply ignored this distinction and invoked traditional maxims of equitable power.\footnote{118. 102 S.Ct. at 1802-03.}

A consistent line of Supreme Court decisions has delineated two principles dealing with equitable remedies when public interests are implicated. First, the interests of individual parties are accorded reduced weight. Second, where there is no danger that a future violation will occur, an injunction may be unnecessary. The principles established in these cases preclude the balancing approach approved by the Romero-Barcelo Court.\footnote{119. Id.}

Cases involving the appropriate remedy for an ongoing violation of federal law exhibit a much more restrained analysis than that applied by the Romero-Barcelo Court. In United States v. City and County of San Francisco,\footnote{120. 310 U.S. 16 (1940).} for example, the U.S. government had sought to enforce a federal statute prohibiting municipalities from reselling water rights obtained by federal grant.\footnote{121. 38 Stat. 242 et seq., 245, §§ 1 & 6. The United States brought suit charging San Francisco with disposing of power through a private utility in violation of Section 6 of the granting Act.} Once a violation of the Act had been proven, the Court observed that "there remain[ed] only the determinations whether the prohibitions of [the Act were] constitutional and [could] be enforced in equity."\footnote{122. 310 U.S. at 28. The Court found Section 6 to be constitutional, citing Article 4, Section 3, cl. 2 of the Constitution (the Property Clause).} The Court noted that "this case does not call for a balancing of equities or for the invocation of the generalities of judicial maxims in order to determine whether an injunction should have issued."\footnote{123. Id. at 30.} The balancing present in a suit to enforce purely private rights was altered by Congress to account for the public interest institutionally represented in Congress's enactments. The Court concluded that injunctive relief was "both appropriate and necessary" to prohibit a continuing violation of the Act.\footnote{124. Id. at 28.}

This approach suggests that the courts, when molding a decree, should pay particular attention to the public interest embodied in the Act. The Romero-Barcelo majority, however, turned this proposition

\footnote{125. Id.}
on its head when it cited this passage from *Yakus v. United States*:\(126\)

where an injunction is asked which will adversely affect a public interest . . . the court may in the public interest withhold relief until a final determination of the rights of the parties, though postponement may be burdensome to the plaintiff.\(127\)

The public interest at stake in *Romero-Barcelo* was the continuing efforts to clean up the nation's water, not the Navy's activities.\(128\) *Yakus* does not support the use of traditional nuisance-type balancing when violations of a federal statute are at stake.\(129\) On the contrary, the *Yakus* Court stated that "courts of equity may, and frequently do, go much further both . . . to give . . . and withhold . . . relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."\(130\) Simply put, a federal court's equitable discretion is constrained in the context of statutory violations affecting a congressionally-defined public interest.

The Court further expounded on the *Yakus* holding in a case involving the authority of the executive branch to prevent crippling steel strikes. In *Youngstown Sheet & Tube Co. v. Sawyer*,\(131\) the Court reviewed President Truman's order seizing all U.S. steel mills to assure continued production of steel for the Korean War. The government argued that in considering the granting of an injunction against the seizure the Court should balance the President's action against the compelling military necessities.\(132\) The Court rejected this argument and held that the constitution placed the power to regulate labor disputes in the hands of the nation's lawmakers, not its military authorities.\(133\)

Seven years later the Court again addressed the issue of equitable discretion in *United Steelworkers of America v. United States*.\(134\) The case grew out of a district court back-to-work order ending an industry-wide steel strike. Justice Frankfurter framed the issue as "whether the district court was to exercise the conventional discretionary function of equity in balancing conveniences as a preliminary to issuing an injunction."\(135\) His conclusion was that "under [this Act] it is not for judges

\(126\). 321 U.S. 414 (1944).
\(127\). *Id.* at 440.
\(128\). Both plaintiff and defendant can represent their claims as benefiting the public interest. National defense is in the public interest. However, Congress provided for the incorporation of the national defense interest by allowing for a Presidential exemption to the Act's requirements. *See infra* text accompanying notes 190-192.
\(129\). *See The Chancellor's Foot*, supra note 115, at 486.
\(130\). 321 U.S. at 441.
\(131\). 343 U.S. 579 (1952).
\(132\). *Id.* at 584.
\(133\). *Id.* at 587.
\(135\). *Id.* at 55.
to exercise conventional discretion . . . upon a balancing of conveniences."\textsuperscript{136} In \textit{Albermarle Paper Co. v. Moody},\textsuperscript{137} the Court again noted that an equitable remedy for the violation of a federal statute was neither automatic on the one hand,\textsuperscript{138} nor simply a matter of balancing the equities on the other.\textsuperscript{139} The choice of remedy, the Court states, "[was] not left to a court's 'inclination, but to its judgment . . . guided by sound legal principles.'"\textsuperscript{140} Thus, even though equity "eschews mechanical rules . . . [and] depends on flexibility, . . . when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not 'equity [which] varies like the Chancellor's foot.'"\textsuperscript{141}

The \textit{Romero-Barcelo} Court relied heavily upon \textit{Hecht v. Bowles} to support its finding of equitable discretion.\textsuperscript{142} The statute at issue in \textit{Hecht} was the Emergency Price Control Act of 1942. The Act was a wartime measure granting broad powers to the Office of Price Administration (OPA) to set maximum prices for goods and services. The Hecht Company sold consumer goods in excess of the OPA limits. The Administrator of the Act sought injunctive relief under a statutory provision directing that "upon a showing . . . that such person has engaged . . . in any such [prohibited] acts or practices, a temporary or permanent injunction, restraining order or other order is to be granted . . ."\textsuperscript{143} Although the Hecht Company admitted the violations had occurred, the trial court was convinced that the violations were not

\textsuperscript{136} \textit{Id.} at 56. "'Discretionary' jurisdiction is exercised when a given injunctive remedy is not commanded as a matter of policy by Congress, but is, as a presupposition of judge-made law, left to judicial discretion. Such is not the case under this statute. The purpose of Congress expressed by the scheme of this statute precludes ordinary equitable discretion.'" \textit{Id.}

\textsuperscript{137} 422 U.S. 405 (1975).

\textsuperscript{138} \textit{Id.} at 415-16. The trial court had refused to order backpay for minority employees who were systematically assigned to low-paying jobs in violation of Title VII of the 1964 Civil Rights Act. The trial court ruled that because there was no bad faith on the employer's part and because plaintiffs had waited an unreasonably long time before asserting their backpay claim, the equities favored the employer. \textit{Id.} at 422-24.

\textsuperscript{139} \textit{Id.} at 416 (quoting United States v. Burr, 25 F.Cas. 30, 35 (CC Va. 1807) (No. 14,692d) (Marshall, C.J.)).

\textsuperscript{140} \textit{Id.} at 417 (quoting Gee v. Pritchard, 36 Eng.Rep. 670, 674 (1818)). The \textit{Albermarle} Court was concerned with the frustration of important national goals by a "regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.'" [citations omitted]. Furthermore, the Court noted that "[i]f employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." \textit{Id.} The Court concluded that because "the power to award backpay was bestowed by Congress as a part of a complex legislative design directed at a historic evil of national proportions," the district court had abused its discretion by declining to award backpay. \textit{Id.}

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} 321 U.S. 321 (1944).

\textsuperscript{143} \textit{Id.} at 327.
likely to continue. Thus, the court refused to grant the cessation order sought.

The court of appeals reversed, finding the statute "require[d] the issuance of [such an] order as a matter of course, once violations were found." The Supreme Court reversed the court of appeals. The Hecht Court found the legislative history and statutory purpose of the Act gave no indication of any intent by Congress to require such a significant departure from the traditional practice of equity exercised by the courts.

The Hecht decision did not alter the importance of the public interest in enforcing federal statutes but only highlighted the need for showing future violations as a requisite for an injunction. The Hecht Court refused to require an injunction despite clear violations of the law because the record established that the past violations were inadvertent, that they had been promptly terminated, and that the defendant had taken vigorous and adequate steps to prevent any recurrence. This was supported by the district findings that "the issuance of an injunction would have 'no effect by way of insuring better compliance in the future . . .'. "

Justice Douglas' opinion in Hecht rightly noted that the "traditional practices" of equity courts must be "conditioned by the necessities of the public interest which Congress has sought to protect" by enacting the Price Control Act. In Hecht, therefore, "the standards of the public interest [as set forth by Congress] not the requirements of private litigation [the traditional balancing process] measure[d] the propriety and need for injunctive relief . . ." and found them lacking.

Rondeau v. Mosinee Paper Corp. provides another illustration of the Court's denial of an injunction where the violation of a federal statute was an isolated one. Rondeau, an investor, committed a technical violation of the securities law by purchasing the plaintiff company's stock without complying with disclosure requirements under the Williams Act. Because the violations were promptly corrected, and the defendant discontinued his plan to acquire a controlling interest in the company, the trial court found that an injunction was unnecessary. The Supreme Court noted that "[t]he usual basis for injunctive relief

---

144. Id. at 326.
145. Id. at 329-30.
147. Id. at 326.
148. Id. at 330.
149. Id. at 331. See The Chancellor's Foot, supra note 115.
150. 422 U.S. 49 (1975).
152. 422 U.S. at 55-56.
"that there exists some cognizable danger of recurrent violation, is not present here." As in *Hecht*, an injunction was not necessary to prevent a future violation of the Act. Both *Hecht* and *Rondeau* reflect situations where the public interest protected by the Acts in question was not adversely implicated. They are properly cited as authority for the principle that an injunction does not issue automatically for past statutory violations where there is no danger of a future violation, not that courts are free to ignore continuing violations of a federal statute.

The holding in *TVA v. Hill*, that an injunction was required to vindicate the purposes of the Endangered Species Act, is consistent with previous rulings concerning appropriate relief for violations of federal statutes. The issue in *Hill* was whether an injunction should issue to halt a continuing violation of federal law even though it would prevent operation of a nearly completed dam, counter to several equitable considerations. After determining that TVA's action would violate the statutory requirements, the Supreme Court ruled that the district court should have issued an injunction.

The *Hill* Court recognized that a trial court was not "mechanically obligated to grant an injunction for every violation of law." Nevertheless, the *Hill* Court noted that "these principles take a court only so far." The Court stated that the judiciary must enforce the congressional ordering of priorities embodied in federal law when enforcement is sought:

> Once Congress . . . has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought . . . We have no . . . mandate from the people to strike a balance of equities . . . [when] Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck . . . Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee or review, nor are we vested with the power of veto."

153. *Id.* at 59 (quoting United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953)).
154. In both cases, the violations of statutory requirements were minor and quickly corrected. This is distinguishable from the Navy's failure to comply with the permit requirement - the very essence of the FWPCA - and its failure to correct the harm it may be creating.
156. *Id.* at 165-67.
157. *Id.* at 194-95.
158. *Id.* at 193.
159. *Id.* at 194. "Our system is, after all, a triparte one, with each branch having certain defined functions delegated to it by the constitution. While it is emphatically the province and duty of the judicial department to say what the law is, it is equally and emphatically the exclusive province of Congress not only to formulate legislative policies, mandate programs and projects, but also to establish their relative priority for the nation."
160. *Id.* at 194-95.
Previous decisions thus clearly indicate that courts' traditional equitable discretion is more constrained under federal statutory law than the majority in *Romero-Barcelo* recognized. First, the court must examine the statute and provide a remedy that vindicates the objectives of that statute, rather than the competing interests of the parties.\textsuperscript{161} As *Hecht* and *Rondeau* demonstrate, a court should assess the likelihood of a continuing violation in order to determine whether injunctive relief is necessary. No decision of the Supreme Court has held that a court has equitable discretion to permit an ongoing violation of a federal statute. Lower federal courts have applied these standards to enjoin a wide variety of statutory violations.\textsuperscript{162} For example, in *Commodity Futures Trading Commission v. Hunt*,\textsuperscript{163} the trial court found that defendants violated section 6(c) of the Commodity Exchange Act\textsuperscript{164} but nevertheless denied injunctive relief. The court of appeals reversed and concluded that the trial court had abused its discretion.\textsuperscript{165} The court of appeals stated that "actions for statutory injunctions need not meet the requirements for an injunction imposed by traditional equity jurisprudence. Once a violation is demonstrated, the moving party need show only that there is some reasonable likelihood of future violations."\textsuperscript{166}

In the case under consideration, the wide latitude traditionally allowed a district court in fashioning relief is circumscribed by the FWPCA's stated public purpose: the elimination of discharges into navigable waters. By allowing the district court to disregard the "congressional ordering of priorities"\textsuperscript{167} embodied in the FWPCA, the Court ignores a consistent line of precedent that grants a strong presumption in favor of injunctive relief in this case. In light of the Navy's ongoing violation, the trial court's exercise of unrestrained equitable discretion is without foundation in the case law. The public interest, reflected in the FWPCA and its permit requirement, militates strongly in favor of granting equitable relief. This "ongoing deliberate violation of a federal statute" should not be "treated like any garden-variety private nuisance action in which the chancellor [possesses] the widest pos-

\textsuperscript{161} See *supra* text accompanying notes 120-125.


\textsuperscript{163} 591 F.2d 1211 (7th Cir.), *cert. denied*, 442 U.S. 921 (1979).


\textsuperscript{165} 591 F.2d at 1220.

\textsuperscript{166} *Id.* When evaluating the likelihood of future violations, past conduct may be highly probative. This is true particularly "when a defendant persists in its illegal activities 'right up to the day of the hearing in the district court . . . .';" *Id.* (quoting *Commodity Futures Trading Comm'n v. British American Commodity Options Corp.*, 560 F.2d 135, 142 (2d Cir. 1977)).

\textsuperscript{167} 102 S.Ct. at 1808 (Stevens, J., dissenting).
sible discretion in fashioning relief.”

IV

THE CONGRESSIONAL INTENT EMBODIED IN THE FWPCA ENFORCEMENT PROVISIONS

The question for federal courts in enforcing federal statutes “is not what a court thinks is generally appropriate to the regulatory process, it is what Congress intended . . . .”169 The Supreme Court’s decision allowing the Navy to continue its discharges in violation of the statute until it can obtain an EPA permit or an exemption is contrary to the congressional intent evident in the FWPCA enforcement provisions.

The Court mistakenly implied that the FWPCA Amendments were not intended to depart significantly from the Rivers and Harbors Act of 1889. The Court cited Congressional language that “enforcement procedures . . . drew extensively . . . upon the existing enforcement provisions of the Rivers and Harbors Act of 1889.”170 Since “violations of [that] Act [had] not automatically led courts to issue injunctions,”171 the Court implied that the FWPCA allows similar judicial discretion.172 This discussion ignored the congressional determination that prior to the 1972 Amendments, the national pollution control effort was “inadequate in every vital respect.”173 This inadequacy was due in part to the “past failings” of the Rivers and Harbors Act, the very Act that the Court relied upon to interpret the scope of the FWPCA’s enforcement provisions.

The Court held that Congress intended to halt water pollution gradually, and “the scheme as a whole contemplates the exercise of discretion and balancing of equities. . . .”174 The Court reasoned that the Congressional “scheme of phased compliance” allows equitable discretion in enforcing the statute.175 The Court misunderstood the intent of the statutory scheme. That Congress recognized “the impracti-
cality of any effort to halt all pollution immediately”176 does not mean that it intended to exempt the Navy from the permit requirement. The requirement that each discharger submit to the permit process before polluting is crucial to the scheme of phased compliance. Congress has prohibited “the discharge of any pollutant,” unless an NPDES permit has been secured.177 An injunction in no way contradicts this system of phased compliance.

The EPA's administrative review of permit applications will be undermined if courts are permitted to allow an ongoing violation of the permit requirement. The mandatory administrative review and compliance schemes established in the FWPCA suggest that courts are denied this discretion. If courts could allow ongoing violations to continue, a discharger could pollute with impunity until the EPA denied its permit application and ordered a halt to the discharge. More importantly, dischargers will be tempted to wait until they are sued before filing permit applications. Even then they might try to escape the Act's prohibition against permitless discharges by arguing, as the Navy did, that the equities should allow them to continue discharging pollutants while their permit application is pending.

In *EPA v. National Crushed Stone Association*,178 the Court held that FWPCA deadlines for phased compliance are mandatory. The case was a challenge by mineral and mining industries to the EPA's restrictive variance provisions.179 The Court determined that considerations of cost and hardship do not excuse compliance with the statutory deadlines.180 The Court further found that all intermediate compliance deadlines must be observed. The NPDES permit is the initial requirement that must be satisfied to ensure compliance with the effluent limitations and the water quality standards. When the permit procedures are not strictly observed, national enforcement goals are jeopardized.

The Court also overlooked the role played by state governments in the permit process by reading judicial discretion into the permit re-

177. 33 U.S.C. § 1311(a). Unlike the environmental impact statement required by the NEPA, 33 U.S.C. § 1311(a) is not satisfied by filing an application; only EPA’s granting of an NPDES permit releases a party from that provision’s prohibition.
179. In National Crushed Stone Ass’n v. EPA, 601 F.2d 111 (4th Cir. 1979), three crushed stone manufacturers and an industry association challenged limitations applicable to the crushed stone and construction sand and gravel industries. The EPA had refused to grant variances on the grounds of a discharger’s inability to pay for the required pollution control technology. 449 U.S. at 68 n.4. In Consolidation Coal Co. v. Costle, 604 F.2d 239 (4th Cir. 1979), the plaintiffs were coal producers, their trade association, citizen’s environmental groups, and the Commonwealth of Pennsylvania. The cases were consolidated on appeal to the Supreme Court.
180. 449 U.S. at 85.
requirement. Section 401 of the Act protects a state’s right to impose more severe requirements than those contained in the proposed permit. A state has the authority to deny certification of the permit application or to attach conditions that must be included in the final permit. If the state denies certification, the EPA may not issue an NPDES permit. Although the Navy intimated that issuance of a permit for the discharge of munitions into Vieques water would be a simple formality, the Environmental Quality Board of Puerto Rico denied certification of the draft NPDES permit prepared by the EPA. Under Section 401 of the Act, the EPA would have to deny the Navy’s permit application. The Romero-Barcelo Court, however, undermined the state’s role by allowing a discharger to pollute while its permit application is under review by the state. The Romero-Barcelo Court held that the congressional purpose behind the FWPCA is to protect the integrity of the nation’s waters, not the integrity of the permit process. Therefore, according to the majority’s analysis, a court may compromise the permit process if the waters are not actually being harmed by the discharge of pollutants. Unless Congress has expressly allowed for the exercise of judicial discretion to remedy statutory violations, however, courts should not alter the remedial scheme of a federal statute. By requiring each discharger to obtain a permit before continuing to discharge pollutants, Congress has demonstrated its insistence on compliance with the statute. “[E]xercise of discretion and balancing of equities” were tasks delegated by Congress to expert agencies, not to federal courts.

Congress was also concerned by the “numerous examples of flagrant violations of pollution controls” and determined that “federal facilities shall be a model for the nation.” The Senate Report specifically targeted the Defense Department as a federal agency that ought to curb its pollution activities:

As recognized under section 31 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 request-

---

182. Id.
183. 102 S.Ct. at 1804 n.9.
184. Id. at 1813 (Stevens, J., dissenting).
185. Id.

Evidence received in hearing 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. This section requires that Federal facilities meet all control requirements as if they were private citizens.

ing appropriations to develop control measures, it is important to pro-
vide that citizens can seek, through the courts, to expedite the
government performance specifically directed under section 313.188

Congress recognized that there would be certain situations in
which these requirements would have to be tempered by countervailing
national interests. With these situations in mind, Congress drafted the
Presidential exemption provisions. The Court, however, held that
these provisions should not evidence Congress' determination that only
the President should judge when paramount national interests justify
noncompliance. This conclusion seems contrary to the weight of legis-
lative history.

Congress did not intend that the Department of Defense could dis-
regard the federal prohibitions against the discharge of pollutants.
Congress's intent that national interests be weighed by the President,
not the courts, is evidenced by the stringent limitations it placed on ex-
emptions. The President alone is empowered to grant an exemption, and
any exemption is limited in time. The President must also cer-
tify that the exemption is in the national interest. Thus, if the required
prohibition interferes with the "paramount interest of the United
States," the only remedy is the grant of a Presidential exemption. This
approach implicitly acknowledges the President's particular expertise
to assess national interests.

CONCLUSIONS

The Court's holding in this case, permitting the Navy to continue
its discharges without a permit or a Presidential exemption, cannot be
reconciled with Congressional intent or with the requirements of the
Act. The Navy permit application was not filed until December 28,
1979, and it has yet to obtain a permit or an exemption. The Navy has
therefore been in violation of the Act for the ten year period since it
was passed in 1972, and it has been given "judicial exemption" for a
period far beyond the one year provided by the statute.

189. The Committee recognizes, however, that it may be in the paramount interest of the
United States that a plant or facility not achieve full water pollution control with the time
required. Therefore, the bill would provide case by case exceptions, on the basis of determina-
tion by the President, for a period of no more than one year. Id. at 67-68.
190. Id.
191. Id.
192. The exercise of this discretion has been held to be nonreviewable. Carter v. Colon,
633 F.2d 964, 967 (1st Cir. 1980). If this exercise of discretion is nonreviewable, then courts
necessarily should be precluded from substituting their judgment for the President's: they
should not decide whether national security considerations justify noncompliance with the
Act in a particular case.