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EQUITABLE DISCRETION, LEGAL DUTIES, AND ENVIRONMENTAL INJUNCTIONS

Daniel A. Farber*

I. INTRODUCTION

Generally, a plaintiff who proves the existence of a nuisance is entitled to damages. The granting of an injunction against the defendant is not, however, so routine. In the leading case of *Boomer v. Atlantic Cement Co.*, a New York court refused to enjoin the operation of a large cement plant that was causing serious air pollution because the hardship that would result from closing the plant exceeded the benefits to the plaintiffs. In reaching this result, the *Boomer* court "balanced the equities" to determine whether the benefits of an injunction would outweigh its costs. This balancing test is a corollary of the general principle that equitable remedies are discretionary.

This approach to the issuance of injunctions originated in cases where courts were the source not only of the relief but of the underlying rights as well. Today, however, environmental law is primarily statutory. It is by no means clear how to reconcile the tradition of equitable discretion with the needs of modern statutory enforcement. Congress has passed enormously complicated statutes gov-

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4. See Plater, supra note 3, at 540-45; O. Fiss, INJUNCTIONS 74 (1972).

5. For example, New York has refused to apply *Boomer* to zoning violations. Little Joseph Realty v. Babylon, 41 N.Y.2d 738, 363 N.E.2d 1163, 1168 (1977). See also Dobbs, supra note 1, at 364 (balancing unavailable for willful statutory violators). The most important discussions of statutory injunctions are Plater, supra note 3; Winner, The Chancellor's Foot and Environmental Law, 9 ENVTL. L. 477 (1979); Comment, The Statutory Injunction as an Enforcement Weapon of
erning air and water pollution, as well as a number of other environmental statutes. The strength of the standards and limitations created by these laws is contingent upon the courts’ support for the enforcement mechanisms provided by the statutes. Civil remedies are especially important because criminal penalties are generally reserved for the most egregious violators. For example, over forty thousand plants are covered by water pollution permits. These permits strictly limit the amount of pollution these plants may discharge and set deadlines for compliance. The extent to which these permit requirements are taken seriously is determined by the seriousness of the enforcement mechanism. If permit violations serve only as a basis for a court to decide, based upon its own conception of the public good, whether the violation may continue, the permits will serve more as cautionary guidelines than as rigid limitations.

In three recent cases involving water law, the Supreme Court has grappled with the problem of equitable discretion. Two cases, City of Milwaukee v. Illinois and Tennessee Valley Authority v. Hill, have sharply limited equitable discretion, while the third

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10. See Rodgers, supra note 7, at 346-47, 538-39; AIR POLLUTION, supra note 6, at 5-57 (equitable discretion may be an “overlooked loophole” in Clean Air Act). On the general importance of injunctions in enforcing statutes, see Comment, supra note 5, at 1034-37. As Judge Friendly has pointed out, judicial discretion in enforcement really means converting “rigid rules” into “accordion-like standards.” Friendly, supra note 5, at 755.


14. In Milwaukee II, the Court abolished the federal common law of nuisance, which had allowed courts to impose pollution restrictions beyond those in federal statutes. 451 U.S. at 417-
case, *Weinberger v. Barcelo-Romero*,\(^\text{15}\) appears to endorse a more traditional approach.\(^\text{16}\) Thus, the current state of the law is somewhat confused.

The general thesis of this article is that too much attention has been paid to general doctrines of equity jurisprudence and too little has been spent on ascertaining the specific duties created by Congress. In enforcing statutes, a court's first step should be to determine exactly what conduct Congress intended to require of a citizen in the defendant's situation. Normally, the injunction should simply order the defendant to do what law-abiding citizens in the same situation would do voluntarily.\(^\text{17}\) That order might necessitate the immediate cessation of the offending conduct, depending on congressional intent. The focus, however, should always be on congressional intent, unclouded by the equity mystique.

**II. EQUITABLE DISCRETION AND THE SUPREME COURT**

**A. The "Snail Darter" Case**

*Tennessee Valley Authority v. Hill*\(^\text{18}\) involved an injunction against the completion of a multimillion dollar dam. The dam would have threatened an endangered species of fish known as the snail darter. The main discussion in the Court's opinion concerns whether completion of the Tellico Dam would violate the Endangered Species Act.\(^\text{19}\) The Court also considered whether an injunction should be issued. The statute provided little guidance, merely authorizing suits "to enjoin" violators of the act.\(^\text{20}\)

The Court began its discussion of the injunction issue with the premise that a federal judge "is not mechanically obligated to grant an injunction for every violation of law."\(^\text{21}\) This statement suggests

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\(^1\text{15}\) In *TVA v. Hill*, the Court held that lower courts had no discretion in issuing injunctions against threats to endangered species. 437 U.S. at 193-95.

\(^1\text{16}\) 456 U.S. 305 (1982).

\(^1\text{17}\) In *Weinberger*, the Court held that district courts have discretion in choosing whether to enjoin an activity in order to enforce the permit requirements of the Clean Water Act. 456 U.S. at 311-13. For further discussion, *see infra* text accompanying notes 52-89.

\(^1\text{18}\) 437 U.S. 153 (1978).

\(^1\text{19}\) *Id.* at 171-93.

\(^1\text{20}\) 16 U.S.C. 1540(g)(1)(A) (1942).

\(^1\text{21}\) 437 U.S. at 193.
that it is appropriate for judges to balance the equities. The Court, however, refused to do so in the case before it.

But these principles take a court only so far. Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution . . . . It is . . . the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.22

Consequently, the Court rejected the invitation to shape a “reasonable” remedy.23 Congress had 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.”24 It was not the judicial function to reappraise the balance set by Congress.

In dissent, Justice Rehnquist declared that the Court had failed to apply the principle of equitable discretion25 established in the leading case of Hecht Co. v. Bowles.26 Hecht involved violations of wartime price controls. In that case, the federal district court found that the defendant had engaged in repeated violations of the price-control regulations.27 These violations had occurred despite the defendant’s exercise of exceptional diligence in attempting to comply. Once mistakes were discovered, they were immediately corrected and vigorous steps were taken to prevent further mistakes.28 Consequently, the district court concluded that the issuance of an injunction would have “no effect by way of insuring better compliance in the future.”29 The court of appeals, however, believed that issuance of an injunction was mandatory once violations were found, apparently regardless of whether an injunction would have any effect in improving compliance.30

22. Id. at 194.
23. Id.
24. Id.
25. Id. at 211-13. In a separate dissent, Justice Powell, joined by Justice Blackmun, argued that the Endangered Species Act did not apply to the dam in question. Id. at 195-244.
29. Id. at 326.
30. Id.
Finding the statute ambiguous, the Supreme Court resolved the ambiguity “in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings under this emergency legislation in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect.” Thus, the Hecht Court refused to award an injunction, even though the price control statute stated that an injunction “shall be granted” upon a showing of a violation of the statute. The Court emphasized the flexibility of equitable remedies, the breadth of judicial discretion, and the presumption that Congress has not intended to make abrupt departures from the tradition of discretion. Lower courts, the Court admonished, should not administer the statute grudgingly, and their discretion “must be exercised in light of the large objectives of the Act.” The standard for issuing an injunction would be the public interest, not “the requirements of private litigation.”

To the extent it was relevant to TVA v. Hill, Hecht fails to support Justice Rehnquist’s dissent. In Hecht, an injunction was denied because it would not have improved compliance with the relevant statute. In TVA v. Hill, the injunction ensured full compliance with the Endangered Species Act. The defendants in TVA v. Hill were not seeking to be released from an unnecessary injunction; rather, they hoped to avoid the duties imposed by Congress. Nothing in Hecht authorized courts to excuse compliance with statutes. On the contrary, the Hecht Court explicitly ruled that achievement of the congressional goal was the primary standard for the issuance of an injunction.

Later developments concerning the snail darter also supported

31. Id. at 330.
32. See id. at 321-22.
33. See id. at 329-30.
34. Id. at 331.
35. Id.
36. We do not mean to imply that courts should administer [the statute] grudgingly . . . . Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action . . . . The Administrator does not carry the sole burden of the war against inflation. The courts also have been entrusted with a share of that responsibility. And their discretion under [the statute] must be exercised in light of the large objectives of the Act. For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases.

Id. at 330-31. See generally, Plater, supra note 3, at 548-49, 554-56.
the correctness of the Court's refusal to balance the equities in *TVA v. Hill*. The effect of the Court's decision was to "remand" the problem to Congress. In response to that decision, Congress amended the act in 1978 by creating a special Endangered Species Committee consisting of several cabinet-level officers and other high-ranking officials. The committee was authorized to grant exemptions to agency actions that harmed endangered species if: no reasonable alternatives to the agency action existed; the benefits of the action clearly outweighed those of compliance with the act; and the agency action was in the public interest and had at least regional significance. The committee unanimously denied an exemption for Tellico Dam because reasonable alternatives to completion of the dam, with acceptable cost-benefit ratios, were available. The committee also found that, despite the millions already invested in the dam, the benefits of completing the dam did not clearly outweigh the benefits of the alternatives. The dam, the committee believed, was a dubious venture from the beginning, quite aside from its effect on the snail darter. These developments demonstrate that, for a court to have balanced the equities in the case adequately, it would have had to engage in a far-reaching cost-benefit analysis of the entire project. Such an analysis would not only have strained the expertise and capabilities of a court, it would have required a court to question Congress's original decision to build the dam. That sort of reexamination would place a court in the uncomfortable (and perhaps unconstitutional) position of reassessing the wisdom of a decision made by a coordinate branch of government. On the other hand, by refusing to balance the equities, the Court prompted Congress to reconsider its initial policy decision and to create a carefully defined system of exemptions.

The inherently nonjudicial nature of the decision about the dam was further emphasized when Congress, largely at the insistence of the Tennessee congressional delegation, decided to order

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38. See 9 ENVTL. L. REP. 10,033. Note that Congress ordered the operation of the Tellico Dam despite the recommendation of the Endangered Species Committee. See Pub. L. No. 96-69, tit. IV, 93 Stat. 437, 449 (1979) (TVA "is authorized and directed to complete construction, operate and maintain Tellico Dam and Reservoir.").
39. This task could not be avoided simply by presuming that Congress must have found a net benefit to the construction of the dam. The size of the net benefit would have to be ascertained by the court so it could balance the benefit against the loss of the endangered species.
completion of the dam despite the adverse report of the committee. In the end, like most water projects, the construction of the Tellico Dam was mostly dependent on political determinations, which should remain entirely outside the judicial realm.

Thus, *TVA v. Hill* established that a court cannot use equitable discretion as a pretext for reordering priorities that Congress already has set. The facts surrounding the case suggest that balancing the equities is sometimes inappropriate because the balancing process involves too much intrusion by a court into issues better left to the political branches of government.

**B. City of Milwaukee v. Illinois**

The Supreme Court decision of *City of Milwaukee v. Illinois* involved a nuisance action brought against Milwaukee under federal common law. The controversy first reached the Court in *Illinois v. Milwaukee*, where the Court held that federal common law did recognize such a cause of action, but left open the question of whether the result was affected by the passage of the 1972 Amendments to the Water Pollution Control Act. On remand, the lower courts concluded that the cause of action had survived the new statute and that injunctive relief was appropriate. On appeal, the Supreme Court reversed that decision because the defendant's activities were governed by administrative permits regulating its pollution. Although the lower courts might disagree with the approach taken by the agency issuing the permits, they lacked the authority to amend that program with federal common law.

The result in *Milwaukee II* plainly was not dictated by the statute. As the dissent forcefully argued, the statute contains several savings clauses, making it clear that Congress intended to preserve existing remedies and to allow regulations more stringent than those


42. For further discussion of this point, see infra text accompanying notes 165-73.


44. 406 U.S. 91 (1972).


46. See *Illinois v. City of Milwaukee*, 599 F.2d 151 (7th Cir. 1979).

established under the Clean Water Act.\textsuperscript{48} Certainly, nothing in the statute indicates an intention to preempt the federal common law. The Court's holding therefore seems to have been based on the desire to avoid an independent policymaking role for the courts in an area where Congress had acted.\textsuperscript{49}

The question of enforcement under the statute was not before the court. Nevertheless, the opinion does have direct implications for the judicial role in enforcement. The basic rationale of \textit{Milwaukee II} is that the Clean Water Act deprives courts of any independent policymaking role in pollution law. "[V]ague . . . maxims of equity"\textsuperscript{50} should provide no greater pretext for diminishing the duties established by Congress than they do for augmenting those duties. Although courts are not necessarily stripped of all discretion in enforcement actions, to be consistent with \textit{Milwaukee II}, whatever discretion they do possess should be limited so as to avoid involving the courts in fundamental policy decisions. In other words, the basic policy decisions contained in the Clean Water Act must be accepted; judicial discretion enters the picture only when the statute

\textsuperscript{48} See id. at 339-47 (Blackmun, J., dissenting).

\textsuperscript{49} This basis for the Court's holding is shown most clearly in the initial discussion of the federal common law:

Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision. [T]he enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress . . . .

When Congress has not spoken to a particular issue, however, and when there exists a "significant conflict between some federal policy or interest and the use of state law," . . . the Court has found it necessary, in a "few and restricted" instances, . . ., to develop federal common law. [N]othing in this process suggests that courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary are inapplicable . . . . [F]ederal common law is a "necessary expedient" . . . and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of law-making by federal courts disappears.

\textsuperscript{50} The full quotation is:

\begin{quote}
We conclude that, at least so far as concerns the claims of respondents, Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory programs supervised by an expert administrative agency.
\end{quote}

\textsuperscript{451} U.S. at 312-13 (citations omitted). Significantly, one of the cases cited in this passage is \textit{TVA v. Hill}.
itself provides no guidance. Whatever the precise parameters of judicial discretion after Milwaukee II, the decision must be read to imply substantial limitations on discretion.\textsuperscript{51} Those limits are derived from environmental policy decisions made by Congress, which cannot be constitutionally altered or augmented by courts. All of this might seem a truism if it were not for the deeply ingrained tradition of broad equitable discretion, which has sometimes obscured the limited role of discretion in the statutory context.

\section*{C. Discretionary Enforcement and Weinberger v. Romero-Barcelo}

\textemdash \textit{Weinberger v. Romero-Barcelo,}\textsuperscript{52} the Court's most recent discussion of equitable discretion, arose out of a peculiar set of facts. During naval exercises near a small island off the Puerto Rican coast, pilots occasionally missed land-based targets, resulting in ordinance falling into the sea. Occasionally, water targets were intentionally bombed. In a suit brought by the Puerto Rican government, the trial judge held that these incidents constituted "discharges from point sources." Although the judge concluded that these discharges had no harmful effect on water quality,\textsuperscript{53} permits under the Clean Water Act were necessary.\textsuperscript{54} The statute itself merely provided that courts have jurisdiction to "enforce" various statutory requirements.\textsuperscript{55} The judge ordered the Navy to apply for a permit, but refused to enjoin the training activities pending issuance of the permit.\textsuperscript{56} On appeal the First Circuit reversed the decision not to enjoin the Navy, relying primarily on \textit{TVA v. Hill.}\textsuperscript{57} The Supreme Court in turn reversed the First Circuit.

The Court's opinion begins with a collection of quotations from

\textsuperscript{51} Among other things, the Court's opinion stresses that the area of water pollution is particularly unsuited to judicial intervention because of the need for technical expertise and national regulatory uniformity.\textsuperscript{451 U.S. at 325. These considerations equally apply when a court is asked to use discretion in formulating a remedy. This point did not escape the dissent in \textit{Weinberger.}}


\textsuperscript{54} \textit{Id.} at 663-64.

\textsuperscript{55} See \textit{Clean Water Act \S 505(a), 33 U.S.C. \S 1365(a) (Supp. V 1981).}

\textsuperscript{56} \textit{Id.} at 705-08. At last report, the government was appealing the administrative denial of its permit application. See \textit{United States v. Puerto Rico,} 551 F. Supp. 864 (D.P.R. 1982).

prior cases concerning the broad discretion of equity courts.\textsuperscript{58} \textit{TVA v. Hill} was distinguished as an exceptional case in which only an injunction could vindicate the objectives of the statute.\textsuperscript{59} In concluding that \textit{Weinberger} did not present a similar exception, the Court relied on several features of the Clean Water Act. First, questions of practicality play a major role in establishing standards under the statute.\textsuperscript{60} Second, while the section relating to emergency situations contains language appearing to mandate immediate termination of the pollution, the other remedy provisions are less specific.\textsuperscript{61} Generally, the administrative practice had been to issue remedial orders setting out a detailed schedule of compliance, as opposed to requiring immediate compliance.\textsuperscript{62} Third, the purpose of the act was to ensure the integrity of the nation’s waters, not the integrity of the permit process.\textsuperscript{63} Fourth, the act provides a variety of other sanctions.\textsuperscript{64} In a strong dissent, Justice Stevens argued that the Court had sanctioned “an ongoing deliberate violation of a federal statute.”\textsuperscript{65} He chided the Court for the glibness of its opinion and insisted that it had granted “an open-ended license to federal judges to carve gaping holes” in the statutory scheme.\textsuperscript{66}

The common reading of \textit{Weinberger} seems to be that the Court licensed the Navy to violate the Clean Water Act.\textsuperscript{67} As a general matter, the act creates two separate duties. First, dischargers must obtain permits; second, any discharge not covered by a permit must

\textsuperscript{58} \textit{Weinberger}, 456 U.S. at 311-13.
\textsuperscript{59} \textit{Id}. at 313-14.
\textsuperscript{60} \textit{Id}. at 316.
\textsuperscript{61} \textit{Id}. at 317-18.
\textsuperscript{62} \textit{Id}. at 318. For discussion of the administrative practice, see Quarles, \textit{Impact of the 1977 Clean Water Act Amendments on Industrial Dischargers}, 8 ENV. REP., MONOGRAPH NO. 25, 3-4 (1978). Actually, the Court seems to have missed the most significant point concerning administrative remedies. See infra text accompanying notes 97-103.
\textsuperscript{63} 456 U.S. at 314.
\textsuperscript{64} \textit{Id}. This point seems to be largely irrelevant. Criminal or civil penalties were hardly likely to be forthcoming against the defendant, who was the secretary of defense. (The government is not liable for civil penalties, and it is doubtful that Secretary Weinberger would be either. See Clean Water Act § 313, 33 U.S.C. § 1323 (Supp. V 1981)). Thus, these other penalties have little significance in the context of the case. If the Secretary’s actions were subject to criminal penalties, however, as a government official he should not be heard to argue that he should be allowed to violate criminal laws because he thinks it best to ignore them.
\textsuperscript{65} 456 U.S. at 328.
\textsuperscript{66} \textit{Id}. at 323.
\textsuperscript{67} See Plater, supra note 3, at 593 (classifying \textit{Weinberger} as the first case to sanction an ongoing statutory violation); Comment, \textit{Environmental Law—Federal Water Pollution Control Act Amendments of 1972}, 23 NAT. RESOURCES J. 451, 452, 455 (1983).
cease. It may appear, therefore, that the Weinberger Court authorized the Navy to violate the statutory duty to stop discharging materials until it had obtained a permit. This argument, however, is technically incorrect. The act prohibits "any person" from discharging materials without a permit. The act's definition of "person" does not, however, include the federal government. For this reason, the Court had previously held in Environmental Protection Agency v. State Water Resources Control Board that the prohibition on discharges without a permit does not apply to the federal government.

Federal dischargers are under a duty to obtain a permit, but the discharge itself is not "unlawful" without a permit. Although other aspects of State Water Board were overruled in the 1977 amendments to the act, this portion of the decision was not. Thus, although the Navy was under a statutory duty to obtain a permit, it had no duty to cease discharging until the permit had been obtained. It is unclear, however, whether the Weinberger Court was

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71. 426 U.S. 200 (1976) (Environmental Protection Agency is hereinafter referred to as EPA).

72. The authority to require permits rests on § 402 alone, not on § 301(a), and it was under § 402 that the Administrator issued his regulation subjecting federal instrumentalities to the EPA permit system. § 301(a) simply makes it "unlawful" for "any person" not to have the required permit. That federal agencies, departments, and instrumentalities are not "persons" within the meaning of § 301(a) and the Amendments (citing § 502(5)), does not mean either that federal discharges are not required to secure NPDES [national pollution discharge elimination system] permits, or that their obligation to secure an NPDES permit derives from a different provision of the Amendments. A federal discharger without a permit is no less out of compliance with § 402 than a nonfederal discharger; the federal discharge is however not "unlawful."

Id. at 222 n.37 (citations omitted, emphasis added).

73. The primary holding in the case was that federal instrumentalities need EPA permits but not state permits. The provision in question, § 313, 33 U.S.C. § 1323 (1976 & Supp. V 1981), now provides that federal facilities are required to comply with all state requirements, including "any requirement respecting permits."

The important issue obviously is not whether the Weinberger decision is correct on the very peculiar facts of the case. Rather, the significant issue is whether the dissent of Justice Stevens is accurate in its contention that the decision carves a giant loophole in the statute. How much discretion does Weinberger give federal judges in enforcing the Clean Water Act?

Unfortunately, the Weinberger opinion is unclear on the critical issue of the extent of equitable discretion. Some portions of the opinion suggest that courts enjoy the same breadth of discretion in enforcing the Clean Water Act as they have in nuisance actions. In the opening paragraphs of the discussion of the merits, the Court recited language from various earlier opinions extolling the virtues of equitable discretion. For instance, the Court quoted language from Hecht concerning the function of equity in arriving at a "nice adjustment and reconciliation" between competing claims. This language suggests that perhaps courts may balance the congressional policy of keeping water clean against the hardship to the defendant resulting from that policy. On the other hand, in the closing portion of the opinion, the Court summarized its holding as follows:

We do not read the [Clean Water Act] as foreclosing completely the exercise of a court's discretion. Rather than requiring a District Court to issue an injunction for any and all statutory violations, the [act] permits the District Court to order that relief it considers necessary to secure prompt compliance with the Act. That relief can include, but is not limited to, an order of immediate cessation.

75. As Professor Plater points out, supra note 3, at 594, the Weinberger opinion is a bit unclear as to whether the statute actually had been violated. Justice White was the author of both State Water Board and Weinberger, and conceivably may have remembered the earlier opinion. The briefs, as far as can be determined, do not refer to this point.

76. For example, in a footnote the Court compares the Act to traditional nuisance law "where courts have fully exercised their equitable discretion and ingenuity in ordering remedies." 456 U.S. at 314 n.7 [citing Boom, 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (1970)]. See also infra note 77. Consequently, some commentators adopt a broad reading of the opinion. See AIR POLLUTION, supra note 6, at 27 (1983 Supp.) (suggesting that Weinberger allows courts to grant de facto variances); Comment, Supreme Court Declares Injunctions Optional for FWPCA Violators, 12 ENVTL. L. REP. 10,060, 10,063 (1982). Other commentators also support the view that traditional equity doctrines fully apply to Clean Water Act enforcement. See RODGERS, supra note 7, at 538-39; T. SCHOENBAUM, ENVIRONMENTAL POLICY LAW 804 (1982); Winner, supra note 5, at 506.

77. Weinberger, 456 U.S. at 311-13 (quoting Hecht, 321 U.S. at 312). The sentence following the Hecht quotation in the opinion refers to balancing the "convenience of the parties."

78. Id. at 320.
This language suggests that the trial judge has discretion over the choice of means but no discretion over the goal of obtaining prompt compliance with the statute. The reference to promptness indicates that only relatively brief delays can be granted in the name of equitable discretion. Thus, different portions of the opinion lead to opposite conclusions. The most important question about *Weinberger* is which of these conclusions is correct.

Three arguments favor a narrow reading of the opinion. The first relates to the disposition of the case. In its brief, the government argued that the district court's remedy clearly was correct, in light of the absence of any ecological damage from its activities and the important national security interest they served.\(^{79}\) As a fallback position, the government requested a remand to the court of appeals "should this Court harbor doubts as to the appropriateness of the district court's exercise of equitable discretion."\(^{80}\) This was the disposition finally adopted by the Court,\(^{81}\) which suggests that the Court had qualms about the trial judge's exercise of his discretion. If so, the scope of discretion contemplated by the Court must not have been very broad.

The second argument is that *Weinberger* must be read in the context of *TVA v. Hill* and *Milwaukee II*. The *Weinberger* opinion was joined by virtually all of the Justices in the majority in those previous cases, including Justice Blackmun, the strongest environmentalist on the Court.\(^{82}\) There is no reason to construe *Weinberger* as marking an abrupt reversal in the earlier trend towards restriction of equitable discretion. It would make very little sense for the Court to abolish the federal common law of nuisance, as it did in *Milwaukee II*, and then give federal judges the same degree of discretion in statutory pollution cases as they had enjoyed at common law.\(^{83}\)

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80. *Id.* at 26. In its Reply Brief, the government stated that “[o]nly one feature of the remedial response is automatic and mandatory: that the remedial order be designed to bring the violator into compliance with the Act’s requirements within a reasonable time.” Reply Brief for Petitioner at 9, 456 U.S. 305 (1982). If the Court had meant to reject the government’s reading of the Clean Water Act, presumably it would have so stated.
81. *Weinberger*, 456 U.S. at 320 (standard of review is whether district court “abused its discretion in denying an immediate cessation order;” case remanded to court of appeals for proceedings consistent with Court’s opinion). If the Court had thought the trial judge was clearly within his discretion, the disposition would have been an outright reversal of the court of appeals, as Justice Powell urged in his concurring opinion, 456 U.S. at 321-22 (Powell, J., concurring).
82. Of the *TVA v. Hill* majority, only Justice Stevens dissented in *Weinberger*.
83. All of the Justices comprising the majority in *Milwaukee II* joined *Weinberger*. 
That interpretation of *Weinberger* is even less reasonable because the same statute was involved in both *Weinberger* and *Milwaukee II*. It should not be hastily assumed that the Court meant to take such an anomalous position.

The third argument supporting a narrow reading of *Weinberger* is that allowing broad equitable discretion in Clean Water Act cases would contravene congressional intent. The legislative history makes it manifest that Congress wanted enforcement to be "swift and direct," with a minimum of discretion.\(^{84}\) Allowing broad judicial discretion in the enforcement stage simply would invite polluters to violate the act and take their chances on the sympathies of the local federal judge.\(^{85}\) Recognizing a broad degree of discretion would reduce the threat of realistic enforcement and give polluters additional opportunities for delay by making enforcement cumbersome and time-consuming.\(^{86}\) These policy considerations may not be vital enough to require elimination of all discretion in enforcement actions, but they do suggest strongly that discretion should be narrow. The Court's reference to "prompt compliance"\(^ {87}\) is entirely consistent with the underlying statutory policies; there is no reason to presume that the Court intended to undermine the statutory enforcement scheme.

If *Weinberger* is given a narrow reading, the Supreme Court's decisions on equitable discretion form a consistent pattern. In each case, the Court has placed the primary emphasis on vindication of the congressional scheme. In *TVA v. Hill*, the Court refused to allow the use of equitable balancing as means for granting exemptions from the duties created by Congress. In *Milwaukee II*, the Court prohibited the lower courts from supplementing the congressional scheme with their own policy determinations. In *Weinberger*, the Supreme Court directed lower courts to use their equitable discretion to obtain "prompt compliance" with the statute. A judge's equitable discretion is limited to choosing between immediate

\(^{84}\) S. REP. NO. 414, 92d Cong., 1st Sess. 64, 80 (1971). See also id. at 65 ("threat of sanction must be real, and enforcement provisions must be swift and direct").

\(^{85}\) One of the chief problems with equitable discretion, conceded even by its proponents, is that very important decisions depend a great deal upon the identity of the judge. See Chayes, Foreward: Public Law Litigation and the Burger Court, 96 HARV. L. REV. 4, 55 (1982); Comment, supra note 3, at 1289.

\(^{86}\) As noted above, the government sought to avoid these problems by requesting only a narrow degree of equitable discretion. See Reply Brief for Petitioner at 5, nn.6, 8, 456 U.S. 305 (1982).

\(^{87}\) See supra text accompanying note 78.
compliance and prompt compliance, a choice that cannot be seen as significantly impairing the statutory objectives. In none of these cases has the Court reaffirmed the traditional use of equitable balancing as a means of judicial policymaking.88 Rather, these decisions uphold the view that courts are agents of Congress with a mandate to enforce congressional policy decisions; competing interests can be considered, therefore, only after the primary goal of enforcement has been met.89

III. STATUTORY INJUNCTIONS AGAINST WATER POLLUTION

The only issue directly before the Court in Weinberger was enforcement against polluters who failed to obtain permits. The case therefore leaves open a number of important questions that arise in other enforcement proceedings. Two of the most important proceedings are those seeking to enjoin individuals violating permits under the Clean Water Act,90 and those seeking emergency injunctions against hazardous pollution.91

A. Injunctions Against Permit Violations

When it was passed in 1972, the Clean Water Act established a two-phase program for eliminating water pollution.92 Permits issued under section 402 were to achieve the first set of standards by 1977.93 These standards were not based on water quality, but instead required all industrial sources to use the “best practicable technology”94 to control pollution.94 When the act was passed, Congress apparently considered this scheme as establishing absolute deadlines. Plants were to comply by the deadlines or else shut

88. This is, after all, what “balancing the equities” involves. See Justice Frankfurter’s concurrence in the Steel Seizure Case, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 609-10 (1952); see also infra note 172.

89. This view is also supported by earlier Supreme Court decisions, most notably Hecht, 321 U.S. 321 (1944) and United States v. San Francisco, 310 U.S. 16, 31 (1940) (“equitable doctrines . . . do not militate against the capacity of a court of equity as a proper forum in which to make the declared policy of Congress effective”). See also Albermarle Paper Co. v. Moody, 422 U.S. 405, 415-17 (1975); United States v. Morgan, 307 U.S. 183, 194 (1939).

90. See infra text accompanying notes 92-110.

91. See infra text accompanying notes 111-35.


93. See id. at 121, 126-28. E.I. duPont settled the vexing issue of the precise relationship between Clean Water Act § 301 effluent limitations and § 402 permits.

If the Clean Water Act had remained unchanged, an individual failing to meet the deadline would have been in much the same position as the defendant in *TVA v. Hill*. Since Congress had determined the “order of priorities” by deciding that clean water was more important than plant closures, a court would not be empowered to reassess this decision under the guise of “balancing the equities.”

As 1977 approached, however, it became clear that large numbers of industrial sources would be unable to meet the deadline. In many cases, the noncompliance would have occurred despite good faith efforts. To some extent, these failures were due to unforeseen delays in the regulatory process, resulting in issuance of some permits only shortly before the deadline. In response to these problems, Congress adopted two new provisions. First, the EPA was authorized to grant an extension of the compliance date up to April 1, 1979 if a discharger met certain conditions. Second, the EPA was permitted to issue compliance orders that allowed violators a “reasonable time” to comply, instead of the previously mandated immediate compliance. Under section 309(a)(5)(A), the time allowed for compliance is determined by “taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.”

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95. See *EPA v. National Crushed Stone Assn.*, 449 U.S. 64, 76, 79-83 (1980). For this reason, Professor Currie has attacked the act as too rigid. See *Water Pollution*, supra note 6, at 59.

96. See *supra* the discussion of *TVA v. Hill* in text accompanying notes 21-59.

97. According to the legislative history, approximately 85%-90% of industrial sources were in compliance. S. REP. No. 370, 95th Cong., 2d Sess. at 7 (1977). For more precise figures, see Comment, *Federal Enforcement under the 1977 Clean Water Act*, 51 TEMPLE L.Q. 884, 892 & n.46 (1968) (also extensively discussing industry problems in seeking to comply with the 1977 deadline, as well as the judicial response, *id.* at 897-907).

98. See 123 CONG. REC. 38,990 (remarks of Rep. Anderson); *id.* at 10,413 (remarks of Rep. Oberstar; *id.* at 26,691 (remarks of Sen. Muskie). The EPA estimated that 7.5% of industry was guilty of bad faith; other violators were unable to comply despite good faith efforts. See *id.* at 10,404 (remarks of Rep. McKinney). Among major sources, the percentage of bad faith violations was said to be slightly smaller—only about 5% did not comply “because of lack of diligence, lack of good faith, or lack of interest.” S. REP. No. 370, supra note 97, at 7. See also Comment, supra note 97, at 895 n.61.


101. See S. REP. No. 370, supra note 97, at 7.

Section 309(a) actually gives much stronger support for the result reached in *Weinberger* than did any of the Court's arguments. It clearly indicates that Congress generally did not intend that individuals violating the act cease operations immediately. Rather, Congress contemplated that, while violators might suffer sanctions such as civil penalties, they would normally be given time to bring themselves into compliance. There is no indication that Congress meant to give the courts less remedial discretion than it had given the EPA. The almost unavoidable inference is that courts retained discretion over the speed of compliance.

*Weinberger* speaks of "prompt compliance" but does not indicate the factors to be considered in determining the speed of compliance. Section 309 indicates that two primary factors are the violator's good faith and the seriousness of the violation. In seeking extensions, violators may attempt to rely on two other factors. First, they may argue that their permits are unduly burdensome. Second, they may argue that their violations do not affect water quality. The legislative history of the Clean Water Act shows, however, that neither of these latter considerations is relevant. In the Senate report on the citizen suits provision of the act, the Public Works Committee specifically dealt with these issues:

good faith was required for any extension. *Id.* at 3915. On the meaning of good faith, see *supra* note 104 and Monongahela Power Co. v. EPA, 586 F.2d 318, 321 (4th Cir. 1978). On the significance of good faith in nonstatutory cases, see Dobbs, *supra* note 1, at 53; on its general significance in nonenvironmental statutory cases, see Comment, *supra* note 5, at 1030.

103. *See Air Pollution, supra* note 6, at 51-52 (reaching same conclusion under Clean Air Act). Senator Muskie noted during the debates that good faith could be raised as a "mitigating factor" in any judicial enforcement proceeding. *See* 123 CONG. REC. at 26,695. His view was supported by State Water Control Bd. v. Train, 559 F.2d 921, 927 (4th Cir. 1977). The conference report expressly states that preexisting judicial orders were to be left intact by the amendments. H.R. REP. No. 830, 95th Cong., 1st Sess. 89 (1977). When the EPA has considered the relevant factors in issuing an enforcement order and is seeking judicial enforcement of its administrative order, a court should give some deference to the agency's determination.

104. *See supra* note 102 and accompanying text. "Reasonable time" compliance orders should not become an excuse for procrastination. Congress was very concerned that the limited exemption available under the 1972 Clean Water Act had been abused and that, through use in prolonged litigation, the exemption had in effect created enormous loopholes. *See* S. REP. No. 370, 95th Cong., 2d Sess. 42 (1977). Moreover, the purpose of the more flexible compliance order was to ensure compliance within a "reasonable and expeditious" time, 123 CONG. REC. 39,185 (remarks of Sen. Muskie); noncompliance was to be treated "sternly but fairly," *id.* at 39,218 (remarks of Sen. Moynihan). As Senator Muskie said, good faith is to be measured against the "extraordinary efforts" needed if "the vital and ambitious goals of the Congress are to be met. This means that business as usual is not enough. Prompt, vigorous, and in many cases expensive pollution control measures must be initiated and completed as soon as possible." *Id.* at 39,184.
Section 505 would not substitute a "common law" or court-developed definition of water quality. An alleged violation of an effluent control limitation or standard, would not require reanalysis of technological [or] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provisions. Therefore, an objective evidentiary standard will have to be met by any citizen who brings an action under this section.

The standards for which enforcement would be sought either under administrative enforcement or through citizen enforcement procedures are the same. Whether abatement is sought by an agency or by a citizen, there should be a considerable record available to the courts in any enforcement proceeding resulting from the Federal and State administrative standard-setting procedures. Consequently, the factual basis for enforcement of requirements would be available at the time enforcement is sought, and the issue before the courts would be a factual one of whether there had been compliance.105

For similar reasons, the Court in EPA v. National Crushed Stone Association106 held that the factors considered in setting the best practicable technology [BPT] for an industry could not be reconsidered in a variance proceeding for a particular source. As the Court put it, "every BPT limitation represents a conclusion by the Administrator that the costs imposed on the industry are worth the benefits in pollution reduction that would be gained by meeting those limits."107 The Court went on to say that "[i]f the statutory goal is to be achieved, these costs must be borne or the point source eliminated."108 The same considerations that apply when the agency grants a variance apply when a court allows a time extension.109

Thus, an enforcement proceeding should not be allowed to provide an opportunity for collaterally attacking the reasonableness of a permit. It must be assumed for purposes of judicial enforcement that the benefits of compliance with the permit outweigh the costs,

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106. 449 U.S. 64 (1980).
107. Id. at 75-77. For the same reasons that National Crushed Stone precludes consideration of economic burden in best practicable technology [hereinafter BPT] variance proceedings, consideration of water quality is also precluded. See Appalachian Power Co. v. EPA, 671 F.2d 801, 808 (4th Cir. 1982); Crown Simpson Pulp Co. v. Costle, 642 F.2d 323, 327 (9th Cir. 1981), cert. denied, 102 S. Ct. 596-97 (1981); Weyerhauser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978).
108. 449 U.S. at 78.
109. See Rodgers, supra note 7, at 539; see also supra note 103.
since that determination was made in the process of issuing the permit. Time extensions should not be granted simply because a court finds that a permit is financially burdensome. Instead, time extensions should be available only to achieve "prompt compliance" with the permit.

B. Emergency Injunctions Against Hazardous Pollutants

Section 504(a) of the Clean Water Act reads as follows:

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, such as inability to market shellfish, 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 causing or contributing to such pollution or to take such other action as may be necessary.

Thus, this provision specifically authorizes the issuance of emergency injunctions against hazardous pollution of surface waters. Similar provisions are found in two more recent statutes, the Resource Conservation and Recovery Act [RCRA] and the Comprehensive Environmental Response, Compensation and Liability Act [CERCLA], both of which indirectly control groundwater pollu-

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110. As the Court stated in National Crushed Stone, To grant a variance because a particular owner or operator cannot meet the normal costs of the technological requirements imposed on him, and not because there has been a recalculation of the benefits compared to the costs, would be inconsistent with this legislative scheme and would allow a level of pollution inconsistent with the judgment of the Administrator. 449 U.S. at 77. Clean Water Act §§ 301(e), (g) and (j) address quite specifically the availability of variances from the Phase II standards. Because the availability of these variances has received so much congressional attention, it is hard to believe that Congress intended to allow courts to grant de facto variances or extensions where the statutory ones are unavailable.


tion caused by hazardous wastes. Although the Clean Water Act provision has been used only rarely, and the CERCLA provision is too new to have received much use, the RCRA provision has been a major enforcement tool against hazardous waste sites.

The effect of these provisions is not entirely clear. The leading case under the predecessor of the current Clean Water Act provision was Reserve Mining Company v. EPA. In that case, the Eighth Circuit declined to issue an injunction against continued discharge of asbestos-like fibers which had been found to present a potential risk to the public as a carcinogen. Instead, after balancing the equities, the court allowed a reasonable time for the defendant to switch

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115. RCRA § 7003, 42 U.S.C. § 6083 (Supp. V 1981), is virtually identical to the Clean Water Act provision, except that the dangerous activities are defined more broadly to include “the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste.” CERCLA § 106, 42 U.S.C. § 9606 (Supp. V 1981), describes the relief to be sought in the complaint somewhat differently: “[s]uch relief as may be necessary to abate such danger or threat.” Section 106 of CERCLA instructs the district court to enter “such relief as the public interest and the equities of the case may require.” The reason for the use of different language in CERCLA is unclear. The reasons for deleting any mention of “immediate” cessation may have been: (a) in some cases there is no ongoing affirmative activity to regulate; and (b) in some instances attempts to immediately remove the hazardous waste may actually increase the risk. See S. Rep. No. 848, 96th Cong., 2d Sess. 57 (1980). The reference to the “equities” of the case may be explained by congressional concern about equitable apportionment between defendants, especially those such as waste generators who had no control over disposal methods. See S. Rep. No. 848 supra, at 11; 126 Cong. Rec. S15,008 (daily ed. Nov. 24, 1980) (remarks of Sen. Simpson). For judicial discussion of this problem, see United States v. Price, 13 Env'l. L. Rep. 20,843, 20,847 (D.N.J. July 28, 1983). Similar language is found in § 311(e) of the Clean Water Act, which deals with oil spills.

There are several indications that courts were not intended to balance the equities. CERCLA is based on the premise that “it is preferable to err on the side of protecting public health, welfare, and the environment.” S. Rep. No. 848, supra, at 11. See also 126 Cong. Rec. H11,798 (daily ed. Dec. 3, 1980) (remarks of Rep. Edgar); id. at S14,971 (daily ed. Nov. 24, 1980) (remarks of Sen. Moynihan). This goal is reflected in the “necessary to protect health” language of § 106. Indeed, the bill was attacked for failing to take cost into account. 126 Cong. Rec. H11,790 (daily ed. Dec. 3, 1980) (remarks of Rep. Broyhill). Furthermore, § 106 was based in part on the Clean Water Act provision that Weinberger has interpreted as nondiscretionary. Finally, Congress was concerned about the inadequacies of the emergency response authority under RCRA and wished to provide a more effective remedy, see S. Rep. No. 848, supra, at 11-12, 62. On balance, it seems unlikely that Congress intended to give any different weight to hardship under CERCLA’s emergency provision than under the similar provisions in other statutes.

116. See Rodgers, supra note 7, at 536.


119. 514 F.2d 492 (8th Cir. 1977).
to a land-based method of disposal.\textsuperscript{120} Several lower court decisions have indicated that while RCRA provides a federal forum, it leaves intact the traditional doctrines of nuisance law.\textsuperscript{121} On the other hand, dictum in \textit{Weinberger} suggest a very different approach. Referring to section 504(a) of the Clean Water Act, the \textit{Weinberger} Court spoke of a “rule of immediate cessation.”\textsuperscript{122} Conceivably such a “rule” might have exceptions, but presumably the implication is that immediate cessation is the normal, preferred remedy.

The \textit{Weinberger} dictum is supported by the legislative history. The committee report on Clean Water Act section 504 states:

> If a pollution source presents an imminent or substantial endangerment to the health of persons, \textit{EPA shall issue an immediate abatement order}. If a pollution source could present a substantial economic injury to persons because of their inability to market shellfish, EPA shall initiate a civil suit for relief.

This emergency authority provides for \textit{immediate effective action} whenever the discharge of water pollutants reach [sic] levels of concentration that present an imminent or substantial endangerment to the health or welfare of persons. In addition, the bill provides emergency abatement authority to protect shellfish and shellfish products.

When the prediction can reasonably be made that such elevated levels could be reached \textit{even for a short period of time}—that is that they are imminent—an emergency plan should be implemented to reduce or terminate the discharge of pollutants and prevent the occurrence of substantial endangerment.\textsuperscript{123}

Thus, emergency conditions are not to be tolerated even for short

\textsuperscript{120} \textit{Id.} at 536-37 (noting, however, that no “imminent hazard to health or welfare” had been shown). For further discussion of \textit{Reserve Mining}, see Plater, \textit{supra} note 3, at 571-73.


\textsuperscript{122} \textit{Weinberger}, 456 U.S. at 317.

\textsuperscript{123} S. \textit{Rep. No. 414, supra} note 105, at 3744.
periods of time.  

The Weinberger dictum is also supported by the statutory language. The only remedy specifically mentioned in section 504(a) is a court order to "immediately restrain any person . . . to stop the discharge of pollutants." This remedy would not have been singled out for special mention unless it was at least the preferred approach. Similar language is contained in the RCRA provision.

In reaching its conclusions, the Weinberger Court relied heavily on an examination of the overall statutory scheme. Equitable discretion was normally allowed in Clean Water Act enforcement because the act demonstrated a strong concern for practicality. In that act, and in the later statutes dealing with groundwater pollution, Congress has shown a great deal less concern for practicality when toxic chemicals are involved. The 1972 water pollution statute required standards for toxic chemicals based solely on health considerations. In 1977, Congress amended that statute to allow standards based on the best achievable technology (BAT) when adequate health information concerning a chemical was unavailable. Unlike the other provisions of the act, these BAT requirements are not subject to variances. Similarly, the regulatory provisions of RCRA require health-based standards and do not provide for con-

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124. Certainly, nothing in the legislative history or the language of the statute indicates that danger to the public can be prolonged to save the defendant money.
126. See supra note 115. Much of the language of the RCRA section seems to be borrowed from § 1431 of the Safe Drinking Water Act, 42 U.S.C. § 300f (1982). That language was intended to be "construed . . . so as to give paramount importance to the objective of protection of public health." H.R. Rep. No. 1185, 93d Cong., 2d Sess. 36 (1974). Despite the somewhat different language, the CERCLA provision, should be given the same interpretation, as explained in note 115, particularly given its reference to "such relief as may be necessary to abate such danger or threat."
127. "That the scheme as a whole contemplates the exercise of discretion and balancing of equities militates against the conclusion that Congress intended to deny courts their traditional equitable discretion in enforcing the statute." Weinberger, 456 U.S. at 316.
128. Id. For further discussion, see supra text accompanying notes 60-64.
131. Clean Water Act § 301(q), 33 U.S.C. § 1311(l) (Supp. V 1981), provides that the EPA "may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 1317(a)(1) of [Clean Water Act § 307(a)(1)]".

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sideration of cost. In the National Contingency Plan for cleaning up hazardous wastes under CERCLA, cost-benefit analysis is used only to set priorities for allocating limited federal resources between various sites. No provision is made for a cost-benefit analysis in preparing cleanup plans for individual sites. In short, Congress has consistently demonstrated a commitment to place health before economic cost in dealing with toxic chemicals. This is strong evidence that equitable discretion in granting injunctive relief is precluded.

Thus, both the dictum specifically addressing emergency injunctions and the general rationale of support, at least, a strong preference for "immediate cessation" orders in emergency injunction cases. This would represent a shift towards stricter enforcement than that found in some of the lower court holdings under these statutes. Ironically, although superficially appears to be at least a minor setback for environmentalism, it may actually represent a significant advance toward stricter enforcement of environmental statutes.

IV. Equitable Discretion and Legal Duty

A. The Chancellor and the Conscientious Citizen

When Congress has prohibited certain conduct, law-abiding citizens presumably refrain from that conduct voluntarily. The defendant in an injunction proceeding who asks the court to balance

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132. For example, the section governing standards for waste disposal requires the EPA to "promulgate regulations establishing such performance standards . . . as may be necessary to protect human health and the environment." See RCRA § 3004, 42 U.S.C. § 6924 (1976).

133. Section 105 of CERCLA, 42 U.S.C. § 9605 (Supp. V 1981), governs the national contingency plan. Under subsection (8)(A), the priority list is to be based upon "relative risk or danger to public health or welfare or the environment." Section 104(c)(4) of CERCLA, 42 U.S.C. § 9604 (Supp. V 1981), provides, however, that health risks must be balanced against site cleanup costs in setting priorities for federally funded actions.


135. Congress has demonstrated the same commitment to health over cost in regulating toxic chemicals in the workplace. See American Textile Mfrs. Inst. Inc. v. Donovan, 452 U.S. 490 (1981) (once substantial risk is shown to exist, no cost-benefit analysis is necessary; rather, regulation must proceed until the risk is eliminated or the limits of feasibility are reached).
the remedies in his favor is, in effect, asking the court to approve of his decision not to comply with the duties that law-abiding citizens comply with voluntarily. Thus, the court is being asked to voice its approval of lawless conduct.136

Professor Plater has argued, based on an analysis like the one above, that courts lack authority to allow any delay in compliance with a statute.137 His argument has considerable force.138 Nevertheless, as noted in a previous section, Congress specifically allowed good faith violators of the Clean Water Act a reasonable time to comply with their permits.139 That flexibility suggests that the judicial remedial process may create exemptions from the normal legal duty of compliance with permits. Under this view, the remedial process would allow individuals to engage in conduct that their law-abiding neighbors would feel compelled to avoid. Thus, the “reasonable time” compliance order seems to leave a court in the position of approving a defendant’s continuation of illegal conduct.140

To resolve this paradox, a closer look at the concept of legal duty is required. The Clean Water Act, for example, imposes strict deadlines on the use of certain forms of technology. Flagrant, willful violations may result in criminal penalties. Even those who make good faith attempts to meet deadlines are subject to sanctions such as civil penalties if they fail.141 In addition, they face the stigma of being labeled violators. In a sense then, their conduct is unlawful; indeed, it is so labeled by section 301 of the Clean Water Act.142 Nevertheless, in pronouncing this conduct unlawful, Congress apparently did not intend to create an absolute duty to avoid

136. This seems to be the thought behind the lengthy quotation from Bolt’s A Man For All Seasons in TVA v. Hill, 437 U.S. at 195 (“The Law, Roper, the law. I know what’s legal, not what’s right . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you—where would you hide, Roper . . . ?”).
137. Plater, supra note 3, at 579-83.
138. After all, if Congress intended citizens to comply immediately, courts should not grant time extensions. If Congress did not intend citizens to comply immediately, absolution by the chancellor would be unnecessary, for no duty of immediate compliance would exist for the chancellor to enforce or excuse.
139. See supra text accompanying notes 97-102.
140. For this reason, Plater disapproves of the result in Weinberger. Plater, supra note 3, at 593.
141. See Quarles, supra note 62, at 3.
142. The legislative history reflects a congressional awareness that such labeling is not without significance. See H.R. REP. No. 830, 95th Cong., 1st Sess. 89 (1977); Comment, supra note 97, at 900-01 n.89.
Rather, Congress wished to create an incentive for others to avoid the "violator" category. Thus, noncompliance status triggers a variety of mechanisms intended to prevent the individual from enjoying any advantages as a result of noncompliance. It also activates a remedial program to bring the violator into compliance as rapidly as possible. Congress did not insist that a law-abiding company that finds itself in noncompliance should close its plant. At least by the time of the 1977 amendments, Congress clearly did not envision widespread plant closings as an acceptable price for clean water. Moreover, there is no indication that Congress regarded plant closings as a desirable voluntary means of achieving compliance. In other words, the legal duty created by the Clean Water Act is a qualified one. The duty is something more than a mere use of best efforts, for even individuals who use their best efforts are subject to some sanctions if they fail. Nevertheless, it is also something less than an absolute duty, for Congress did not contemplate the use of all available means (such as plant closings) to avoid noncompliance.

In failing to create an absolute duty, the act is typical of a number of environmental statutes. As other writers have noted, these statutes typically create ambitious goals and strong incentives for individuals to meet those goals. Yet, Congress often has realized that the goals themselves may not be attainable, at least not on the original schedule. Although the statutes originally adopting these deadlines have often been phrased as absolute rules, it has become clear over the years that Congress does not regard them as such. Congress consistently has been willing to adjust deadlines and sanctions in order to maintain some incentive for compliance while avoiding the disastrous consequences that would attend strict enforcement.

In the environmental context, therefore, two kinds of legal duties are discernible. To borrow terms used in the cases (though perhaps not with the same meanings), absolute duties can be

143. The administrative construction of the act is consistent with this interpretation. See Annual Review of Significant Developments—1981, 15 NAT. RESOURCES LAW. 383, 401-02.
144. See supra note 102.
146. See id. at 1446, 1452, 1466. One notable example is the 1977 creation of a new standard for "conventional" pollutants. See Quarles, supra note 62, at 6-7.
distinguished from qualified legal duties.\textsuperscript{147} An absolute duty is simply an unconditional command from Congress to refrain from certain conduct except where some statutory exemption applies. Most of the traditional criminal law takes this form, as did the statute involved in \textit{TVA v. Hill}.\textsuperscript{148} The second form of legal duty, which can be called a “qualified duty,” is somewhat more complex. Every individual is under a duty to use best efforts toward compliance with a qualified duty. Those unsuccessfully using best efforts also may have various kinds of sanctions applied to them, including being labeled as violators. Nevertheless, they are not under an immediate duty to comply. Instead, they are subjected to a remedial mechanism intended to cure their noncompliance. The purpose of their violator status is essentially to mark them and place them on the special remedial track.

This analysis demonstrates that the difference between \textit{Weinberger} and \textit{TVA v. Hill} does not derive from a special attribute of equitable remedies. The defendant in \textit{TVA v. Hill} was under a duty to cease operations on the dam. The defendant in \textit{Weinberger} was not under a corresponding legal duty to end the naval exercises immediately. If there had been such a duty, it would be fair to assume that a cabinet officer would obey the law voluntarily, rather than seeking judicial permission to continue a willful violation of the law.

\textbf{B. A Typology of Statutory Injunctions}

The traditional analysis in this area has focused too much on the special nature of the judicial process and too little on the nature of the underlying legal duties.\textsuperscript{149} That emphasis has obfuscated the distinctions between various statutory provisions and their corresponding remedial schemes. A typology of statutory injunctions, demonstrating the distinctive relations between different injunctive provisions and underlying legal duties, will serve to obviate some of the confusion. The critical factors in determining the nature of a statutory injunction are its relationship to a defendant’s underlying legal duty and the nature of that duty. Based on this analysis, injunctions can be divided into four groups.

\textsuperscript{147} See \textit{Weinberger}, 456 U.S. at 316 n.11 (distinguishing between absolute standards and other standards under the Clean Water Act).
\textsuperscript{148} See supra text accompanying notes 18-24.
1. The Enforcement Injunction. This category involves direct enforcement of an absolute legal duty. In these cases, the defendant is under a legal duty, but refuses to carry out actions that a law-abiding citizen would perform voluntarily. The purpose of the injunction is to force the defendant to do that which the defendant ought to have done without legal compulsion. *TVA v. Hill* is a clear example of this type of injunction. Since the purpose of the injunction is simply to put the defendant in the same position as the law-abiding citizen, balancing the equities is inappropriate. Asking a court to balance the virtues of obedience to the law against the benefits of violating the law is wholly inappropriate.¹⁵⁰

2. The Compliance Injunction. This category involves cases like *Weinberger*, in which the defendant is in breach of a qualified duty. Once again, the purpose of the injunction is to force the defendant to act as law-abiding citizens voluntarily do, but here the duty does not amount to immediate compliance. Congress did not intend that citizens shut plants as a routine method of meeting permit deadlines. For the same reason, Congress did not expect courts to make this a routine remedy. As before, the remedy tracks the underlying legal duty. In this category, however, there is more room for consideration of burden in defining the underlying duty itself.

3. The Ancillary Injunction. In the preceding two categories, the hypothetical defendant was in breach of a legal duty that was the basis of the injunction. Often, however, the defendant is in breach of a procedural duty.¹⁵¹ Obviously, the court can order the defendant to apply for a permit, issue an environmental impact statement or comply with some other procedure. The question is the extent to which a court should also enjoin the activity to which the procedure relates. For example, Congress requires agencies engag-

¹⁵⁰ If violation of the law has any place in our society, it is as a form of civil disobedience, not as a part of remedies law. By postulating that various considerations may allow a court to excuse recalcitrant officials from full compliance with the Constitution or a statute, the conventional analysis tacitly assumes that the statute and the Constitution create no duties that law-abiding officials must perform voluntarily. Instead, the assumption seems to be that legal duties exist only after a court issues an enforcement order. For criticism of this view of legal duty, see Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387, 403-11. For a recent example of the conventional analysis clearly exhibiting this flaw, see Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 598-606 (1983) (arguing that courts properly may decline to give full enforcement of constitutional rights).

¹⁵¹ A similar problem is encountered when an agency seeks an injunction pending the outcome of agency hearings. See infra note 154. As with a procedural defect (such as failure to obtain a permit), the court is asked to grant relief without knowing how the agency ultimately will rule on the defendant's conduct.
ing in major federal actions with substantial environmental impacts to issue environmental impact statements.152 The relevant statute does not, however, expressly create a legal duty to refrain from implementing a project until the impact statement is prepared. But it would be futile for a court simply to issue an order to prepare an impact statement while allowing the underlying federal action to proceed.153 In Weinberger, the Navy was not under a direct duty to refrain from discharges while its permit application was pending.154 Nevertheless, if those discharges had been causing ecological harm, allowing the activity to continue until the permit proceeding had been completed would have undermined the function of the permit process.155

Injunctions falling into this category, in which the underlying activity is enjoined because of the breach of a procedural duty, can be classified as ancillary injunctions. Ancillary injunctions can be found in many other contexts: for example, where an agency seeks injunctive relief pending the outcome of an administrative proceeding. Courts have discretion in this situation, but must carefully avoid undermining the integrity of the procedures mandated by Congress. Typically, the merits of the underlying dispute have been committed to another forum, but the injunctive proceeding requires at least some examination of the merits. Resolution of these cases depends upon the particular statutory scheme. In general, the court’s task is (1) to avoid intrusion into the domain of the agency considering the merits, and (2) to preserve that agency’s power to effectuate its later decision. At the same time, the court must protect the defendant from unnecessary injunctive relief.156

4. The Freestanding Injunction. In each of the previous categories, the injunction was used as a means of enforcing, either directly

152. See § 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) [hereinafter NEPA].
153. On the NEPA problem, see Winner, supra note 5, at 507-10.
154. See supra text accompanying notes 70-75.
155. As the Weinberger Court pointed out, the lower court did not face a situation in which “a permit would very likely not issue, and the [statutory] requirements and objective of the statute could therefore not be vindicated if discharges were permitted to continue”; under those circumstances, the district court would have to “reconsider the balance it has struck.” 456 U.S. at 320. Note that the permit at issue in Weinberger was later denied. See supra note 56.
156. The difficulty of this task is that although the court must not prejudice the merits, which are committed to the agency for decision, it must take enough of a “peek” at the merits to determine the need for an injunction (unless, of course, the statute makes injunctive relief mandatory at the application of the agency). In other areas, courts have experienced considerable difficulty with this task. See R. Gorman, BASIC TEXT ON LABOR LAW 288-91 (1976).
or indirectly, an underlying statutory duty. Congress sometimes provides, however, for an injunctive proceeding without creating any separate statutory duties to be enforced in the proceeding, as in the emergency provision under the Clean Water Act. Three possible interpretations of such provisions are possible. First, Congress may simply intend that the provision create a federal forum in which state law will be applied. Second, Congress's aim might be that federal courts create a body of federal common law governing these disputes. Third, such provisions may signify that Congress intends injunctive relief to be mandatory once statutory threshold requirements are met. Environmental emergency provisions arguably are intended to trigger creation of a federal common law, but they actually seem to come closer to the mandatory injunction category.

The discretion a court has in issuing emergency injunctions relates more to fashioning the most effective form of relief than to balancing the public health against hardship to the defendant.

One of the reasons for the considerable confusion in the area of statutory injunctions seems to have been a failure to distinguish


158. The emergency environmental statutes were plainly intended to make at least some change in traditional common law. See Skaff, supra note 114, at 315-18. Even in a common law case, courts today might well decline to balance hardship to the defendant against danger to the public health. See Harrison v. Indiana Auto Shredders Co., 528 F.2d 1107, 1122-23 (7th Cir. 1976); Illinois v. City of Milwaukee, 599 F.2d 151, 166 (7th Cir. 1979) (rev’d on other grounds in Milwaukee II, 451 U.S. 304 (1981)).

159. Following the lead of Milwaukee II, the federal common law has been held to be preempted by the Clean Air Act, CERCLA, and RCRA. See Miller, supra note 74, at 10,322. The emergency-injunction situation differs from the gap-filling common law rejected in Milwaukee II. See Comment, supra note 118, at 599. Rather than invent common laws to fill a gap, courts in this situation are acting at the behest of Congress. See, e.g., Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (applying federal common law to cases arising under § 301 of the Taft-Hartley Act).

160. See supra text accompanying notes 123-35. But see Comment, supra note 118, at 610 ("main purpose" of § 7003 of RCRA is to allow the EPA to bring suit in federal court). One reason for doubting that these statutes were only meant to provide access to a federal forum is that the federal courts already have jurisdiction over all cases brought by the federal government. See 28 U.S.C. § 1345 (1976). It should be noted that even a court applying common law might well refuse to balance the equities when the public health is threatened. See supra note 158.

161. Balancing money against human life is a quintessentially legislative judgment. See American Textile Mfrs. Inst. v. Donovan, 442 U.S. 490, 547-48 (1981) (Rehnquist, J., dissenting) (The author does not necessarily agree with Justice Rehnquist's argument that the legislature cannot delegate this decision, but as a policy matter such delegations should not be favored.).
clearly between these various varieties of statutory injunction. While the typology given here certainly will not resolve all disputes about statutory injunctions, it may provide a clearer framework for settling these disputes.

C. Resolving Close Cases

The primary factor in determining the scope of equitable discretion is congressional intent. Where that intent can be discerned, it must be obeyed. It is often unclear, however, whether Congress meant to create an absolute or qualified duty, or whether a freestanding injunction was meant to be mandatory or based on federal common law. After the normal methods of statutory construction are exhausted, how should these cases be resolved?

The traditional approach would be to rely on a presumption in favor of equitable discretion. Nevertheless, in the environmental context, arguments for a presumption against equitable discretion seem stronger. Three reasons exist for deciding close cases in favor of nondiscretionary enforcement.

First, equitable discretion is superfluous in most modern statutory schemes. When equity jurisprudence arose, the existing legal system was rigid and somewhat outmoded. Some mechanism was needed for introducing discretion and flexibility into the system. In contrast, modern environmental statutes, like the Clean Water Act, contain elaborate mechanisms for taking cost and hardship into account while providing considerable discretion to administrative agencies. It is unnecessary to introduce yet an additional forum in which to raise arguments of hardship.

Second, in many environmental cases, equitable discretion involves a balancing process that is more appropriately conducted elsewhere. In TVA v. Hill, the court was asked to balance harm to an endangered species against the economic benefits of a dam. In Weinberger, the court might have had to balance national security

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163. See Dobbs, supra note 1, at 582; Quarles, supra note 62.
164. See Plater, supra note 3, at 582. Weinberger was a prime example of this. The statute there gave the President the power to exempt federal facilities from compliance when he determined that an exemption was "in the paramount interest of the United States." Clean Water Act § 313(a), 33 U.S.C. § 1323(a) (Supp. V. 1981). Certainly, the President was in a much better position than the courts to determine if exemption of the naval exercises in Weinberger was required by national security.
165. See supra text accompanying notes 37-42.
against water pollution. Such determinations involve value judgments that are inherently political in nature and that should be made by a politically accountable entity.

Third, to the extent that existing statutory schemes are too rigid, Congress has proved that it is quite capable of providing legislative remedies. Polluters have found that it is possible to obtain congressional relief from unduly harsh statutory provisions. For example, when the courts correctly held that the special attributes of the Pacific Ocean did not justify a variance for two paper mills, Congress quickly provided a special variance for the plants. The availability of legislative relief reduces the need for judicial assistance. Indeed, by obscuring the effects of existing laws and providing ad hoc relief to individual violators, equitable discretion reduces congressional accountability and makes it more difficult for Congress to determine the effects of its previous enactments.

All three arguments essentially come down to a single point. The traditional balancing of equities is basically a policymaking function. As modern environmental statutes have developed, pol-

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166. As Justice Stevens pointed out in dissent:

The two principal bases for the temporary judicial permit were matters that Congress did not commit to judicial discretion. First, the District Court was persuaded that the pollution was not harming the quality of the coastal waters, . . . [S]econd, the court was concerned that compliance with the Act might adversely affect national security . . . . The Court of Appeals correctly noted that the first consideration is the business of the EPA and the second is the business of the President. Weinberger, 456 U.S. at 324-25 (citations omitted). The problem would be less severe, however, if there clearly was no impact at all on water quality and hence no need to balance water quality against national security.


168. See supra note 146 for an example.


170. See Pub. L. No. 97-440, 96 Stat. 2289 (1983) (adding § m(1) to § 301 of the Clean Water Act). It is noteworthy that the statute imposed a series of tight restrictions on the availability of this exemption; only the two mills involved in the case can even apply.

For another example, see Plater, supra note 3, at 582 n.276.

171. Because judicial discretion is exercised in individual cases, often in unreported decisions, it is quite difficult for Congress to monitor. In contrast, issuance of an injunction helps crystallize the issues, thereby functioning as a “remand” to Congress. See Plater, supra note 3, at 583-86.

172. See Dobbs, supra note 1, at 361-62; Winner, supra note 5, at 497-505, 512, 513 n.165 (values and policy judgments are involved in equitable balancing; in issuing injunctions, courts are “beginning to resemble administrative agencies” and judicial decisions are becoming “more
icy decisions have been shifted to Congress and, to a lesser extent, to the EPA. For courts to provide an additional forum for balancing hardship against environmental quality would be at best superfluous, and would at worst undermine policy decisions already made by other branches of government. In the context of today's complex environmental statutes, the presumption therefore should be against the exercise of equitable discretion. This presumption would only come into play, however, when the congressional intent behind the particular statute involved could not be discerned.

V. CONCLUSION

Three recent Supreme Court cases involve equitable discretion in environmental law. In *TVA v. Hill*, the Court held that an injunction was mandatory to enforce the provisions of the Endangered Species Act. In *Milwaukee II*, the Court held that courts do not have discretion to go beyond enforcement of the dictates of the Clean Water Act. Finally, in *Weinberger*, the Court held that lower courts have discretion to choose between immediate compliance and "prompt" compliance in enforcing the Clean Water Act. Taken together, these three cases establish that the only judicial role in environmental injunction cases is to implement the congressional objective.

*Weinberger*, in particular, has important implications for pollution enforcement. It indicates that permit violators can, at most, hope only for an order requiring prompt compliance. Moreover, the good faith of the violator and the gravity of the situation will be important considerations when the court determines what is "prompt." With respect to emergency injunctions against imminent dangers, statutory language, legislative history, and *Weinberger* all indicate that the normal remedy is an order requiring immediate termination of the dangerous activity.

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173. It should be noted that this presumption applies only to judicial balancing of the equities, not to the various threshold determinations made by equity courts nor to other forms of discretion that may be involved in shaping effective relief. *See supra* note 5.

174. *See supra* text accompanying notes 18-41.

175. *See supra* text accompanying notes 43-51.

176. *See supra* text accompanying notes 79-89.

177. *See supra* text accompanying notes 100-10.

178. *See supra* text accompanying notes 123-35.

179. *See supra* text accompanying note 122.
When injunctions are analyzed on the basis of their relationship to underlying legal duties, four distinct categories of injunctions surface. In turn, the four classifications may be useful indicators of the amount of discretion a court should exercise in a given proceeding. But the primary key to determining the appropriate extent of judicial discretion is necessarily congressional intent. It is only when that intent cannot be discerned that a presumption concerning equitable discretion is utilized. On balance, a presumption against the exercise of judicial discretion is proper. Given the nature of modern environmental statutes and the availability of legislative relief, "balancing the equities" should be left to the politically accountable branches of government, except where Congress has decreed otherwise.

References to judicial discretion have served to obfuscate the important policy considerations that enter into issuance of an injunction. Rather than the vague generalities about the history of equitable discretion, which courts are fond of reciting, there should be careful analyses of the role that injunctions play in particular statutes. The issues in injunctive enforcement of environmental statutes relate less to the special requirements of the judicial role and more to the question of what forms of compliance were mandated by Congress. As the Supreme Court has declared, attention must be shifted away from the "often vague and indeterminant nuisance concepts and maxims of equity jurisprudence" and toward the requirements of modern statutory schemes.

180. See supra text accompanying notes 150-61.
181. See supra text accompanying notes 162-73.
183. As the Court has said: "The question . . . is not what a court thinks is generally appropriate to the regulatory process, it is what Congress intended . . . ." Weinberger, 456 U.S. at 316-17 n.11, quoting E.I. duPont, 451 U.S. at 138 (1977).