STATUTES AND JUDICIAL DISCRETION: AGAINST THE LAW . . . SORT OF

Jason David Fregeau[*]

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 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.[1]

I. INTRODUCTION: A THUMBNAIL SKETCH OF THE TRADITIONAL EQUITY CONSIDERATIONS IN INJUNCTIVE RELIEF

Problems occur when court-created procedures for issuing injunctions conflict with legislative enactments. If a law prohibits an act and the prohibited act likely will continue, an injunction against continuing the act normally would issue.[2] A court, however, seemingly would have the duty and the discretion to balance the injuries to the parties before enjoining the prohibited act. Following the traditional approach of equity, an injunction would not issue if the balance of the harms favored a party continuously breaking the law.[3]

An injunction is an equitable remedy.[4] Equitable remedies are not granted lightly, but only when intervention is essential to protect

---

[*] Articles Editor, 1990–1991, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

[1] Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 45 U. PITT. L. REV. 513, 535–36 (1984).

[2] *See, e.g.*, Tennessee Valley Authority (TVA) v. Hill, 437 U.S. 153, 194 (1978) (courts must enforce the law when enforcement is sought).

[3] *See, e.g.*, Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (national security outweighed limited harm to water quality; Navy allowed to continue practice bombing without water pollution permit).

[4] *Romero-Barcelo*, 456 U.S. at 311. Temporary injunctions are granted before the merits of a case have been tried and, even then, only when the party moving for the injunction will likely win on the merits. Conversely, permanent injunctions are granted after a trial on the merits. Therefore, the only difference between a permanent and a temporary injunction is

rights and property.[5] In federal courts, the traditional basis for injunctive relief has been irreparable injury coupled with the inadequacy of any legal remedy.[6] An injunction will issue only when an injury cannot be repaired and the legal remedy for the injury would be inadequate.

A concurrent injury, however, usually will result from an injunction, and usually will be borne by the party opposed to the motion for injunctive relief.[7] Therefore, a court, when considering the imposition of an injunction, must balance the injuries to be suffered by each party.[8] If this balance favors the moving party, then an injunction will issue; if this balance favors the opposing party, then an injunction will not issue.

The essence of equity is flexibility, empowering equity courts with the authority to shape remedies congruent to the situations at hand.[9] If, for example, persons not associated with a dispute would be harmed by an injunction that took effect immediately, then a court could, in its discretion, stay the injunction for a short period.[10] Similarly, if controverted actions had ceased, and if these actions were not likely to recur, then a court could, in its discretion, find equitable relief to be unnecessary.[11] Finally, a court would not order the obviously impossible or the needlessly destructive.[12]

---

whether or not the merits of the case have been tried. Amoco Prod. Co. v. Village of Gambell, Alaska, 480 U.S. 531, 546 n.12 (1987). *But see* Wisconsin v. Weinberger, 582 F. Supp. 1489, 1495 n.1 (W.D. Wis.), *rev'd*, 745 F.2d 412 (7th Cir. 1984) (suggestion that standard of harm for issuance of preliminary and permanent injunctions is different). This Comment will not distinguish between permanent and temporary injunctions.

[5] *Romero-Barcelo*, 456 U.S. at 311–12; *see* Harrisonville v. W.S. Dickey Clay Mfg. Co., 289 U.S. 334, 337–38 (1933); Cavanaugh v. Looney, 248 U.S. 453, 456 (1919).

[6] *Romero-Barcelo*, 456 U.S. at 312; *see also, e.g.*, Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 61 (1975). *But see* Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 726–27 (1990) (concerns other than adequate remedy at law guide courts' decisions to grant or deny equitable relief).

[7] *See, e.g.*, Amoco Prod. Co. v. Village of Gambell, Alaska, 480 U.S. 531, 545 (1987) (the Court balanced environmental harm against $70 million spent by oil companies). *But see* TVA v. Hill, 437 U.S. 153, 194 (1978) (the Court refused to balance extinction of endangered species against abandonment of nearly completed water project in presence of statutory mandate).

[8] *Romero-Barcelo*, 456 U.S. at 312; *see* Yakus v. United States, 321 U.S. 414, 440 (1944); *see also* Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

[9] *Romero-Barcelo*, 456 U.S. at 312; *Hecht*, 321 U.S. at 329.

[10] *See, e.g.*, Securities Industry Ass'n v. Board of Governors of the Fed. Reserve Sys., 628 F. Supp. 1438, 1444 (D.D.C. 1986) (court stayed injunction 10 days to allow a bank time to close commercial paper practice in orderly fashion, apparently to lessen impact upon customers); *see infra* notes 157–62 and accompanying text.

[11] *See, e.g., Hecht*, 321 U.S. at 326–28 (the Court noted lower court findings that statutory violations had ceased).

[12] *See, e.g.*, United States v. Niagara Falls, 706 F. Supp. 1053, 1063–64 (W.D.N.Y. 1989)

This Comment argues that the federal courts do not have the discretion to balance the equities when violations of statute occur. If the law has been violated, and if those violations likely will continue, then an injunction against those violations must issue. The Supreme Court took this position in one line of cases, which includes *United States v. City and County of San Francisco*[13] and *Tennessee Valley Authority (TVA) v. Hill.*[14] In these cases, the Court enjoined the continued violation of congressionally enacted statutes without weighing the equities.[15] Similarly, in *Griffin v. Oceanic Contractors, Inc.*,[16] the Court refused to consider equitable arguments that would minimize the impact of the strict interpretation of a statute.[17] Together, these three cases limit the federal courts' discretion to balance the equities when faced with statutory violations.

Under a second line of cases, however, the Supreme Court asserted the traditional discretionary principles of equity and balanced the harms before deciding not to issue an injunction. This second line of cases includes *Hecht Co. v. Bowles*,[18] *Weinberger v. Romero-Barcelo*,[19] and *Amoco Production Co. v. Village of Gambell, Alaska.*[20] This Comment argues that the Court, in this second line of cases, was not performing a traditional balance of the equities but actually was performing statutory interpretation. In this second line of cases, the Court looked to statute to determine if violations actually were occurring.[21] Only after a determination that no violations had occurred did the Court go on to assert that a balance of the equities would be necessary.

Section II of this Comment sets forth the holdings of both lines of Supreme Court cases. Likewise, Section II describes lower federal court decisions that apply various interpretations of the holdings of these Supreme Court cases. Section III of this Comment explores and compares the Supreme Court decisions, their contradictions, and their ramifications. Similarly, conflicts among the circuits are analyzed.

(court reluctant to order processing of sewage at a capacity harmful to treatment facility); *see infra* note 109; *see also infra* note 254.

[13] 310 U.S. 16 (1940).

[14] 437 U.S. 153 (1978).

[15] *See id.* at 195; United States v. City and County of San Francisco, 310 U.S. 16, 32 (1940).

[16] 458 U.S. 564 (1982).

[17] *Id.* at 577.

[18] 321 U.S. 321 (1944).

[19] 456 U.S. 305 (1982).

[20] 480 U.S. 531 (1987).

[21] *See id.* at 544; *Romero-Barcelo*, 456 U.S. at 306–12; *Hecht*, 321 U.S. at 328.

Finally, in Section III, this Comment argues that, because of conflict and confusion resultant from the contradictory Supreme Court decisions, the Court should adopt a single position: if violations of statute are likely to occur, then an injunction should issue without the traditional balancing of harms. While this position may seem overly restrictive, the federal courts nevertheless will retain their discretion in the context of statutory interpretation. They will continue to balance the harms to the parties as part of the statutory interpretation process. But this balance will at all times be colored by the statute in question. The seeming power of the courts to override legislative mandate will then be curtailed.

II. Background: Court Decisions Applying or Rejecting Equitable Discretion to Statutory Enforcement

A. The Supreme Court

In three cases, the Supreme Court found a clear statutory limitation on equitable discretion. In all three cases, certain acts were prohibited by law, and the Court explicitly refused to allow equitable considerations to temper the law. In *United States v. City and County of San Francisco*,[22] the federal government sought to enjoin San Francisco from reselling electric power generated at facilities specifically granted to the city by statute.[23] In shaping the grant, Congress explicitly had prohibited the city from reselling electric power.[24] The Department of the Interior, however, had not enforced this prohibition for twenty-four years.[25] The city argued that, in equity, the courts could not let the government enforce a law left dormant for so long.[26]

In holding for the United States, the Court reasoned that the case did not call for a balancing of equities.[27] The provisions of the grant clearly declared Congress's policy on the resale of electricity by the

---

[22] 310 U.S. 16 (1940).

[23] *Id.* at 18–19.

[24] *Id.* at 26.

[25] *See id.* at 31.

[26] *Id.* at 30–31.

[27] *Id.* at 30.

> [W]e are satisfied 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. The City is availing itself of valuable rights and privileges granted by the Government and yet persists in violating the very conditions upon which those benefits were granted.

Id.

city, and equitable arguments should not defeat the enforcement of that policy.[28] Any other conclusion would require the courts to pass judgment on the wisdom of congressional acts.[29]

In a second case, the Court likewise refused to question the wisdom of Congress and halted a multi-million dollar water project to ensure the statutorily mandated survival of a species of three-inch fish, the snail darter.[30] In *TVA v. Hill*,[31] the district court refused to grant an injunction against the completion and operation of a dam despite the assured destruction of an endangered species' habitat in violation of the Endangered Species Act (ESA).[32] The Supreme Court, however, held that Congress had made its policy choices clear.[33] The endangered species legislation took precedence over other areas of legislation and it would be beyond the equitable powers of a court to weigh the value of an endangered species against the value of a government project.[34]

Despite equitable arguments against an injunction,[35] the Court reasoned that equitable discretion should not be used to anticipate Congress's reaction to specific events.[36] Courts in equity, when confronted with a statutory mandate, may work only within the bounds of the statute.[37] While injunctions should not be granted mechanically for every statutory violation,[38] if the plain meaning of a statute were

---

[28] *Id.* at 30–32.

[29] *Id.* at 28–29. "It is not the office of the courts to pass upon . . . the efficacy of the measures chosen for putting [congressional policy] into effect. Selection of the emphatically expressed purpose embodied in this Act was the appropriate business of the legislative body." *Id.* at 26.

[30] *See* TVA v. Hill, 437 U.S. 153, 172–73 (1978); *see infra* notes 31–40 and accompanying text.

[31] 437 U.S. 153 (1978).

[32] *Id.* at 165–66; Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531–1544 (1988). The Sixth Circuit reversed the district court's decision, instructing the lower court to issue an injunction until such time as Congress exempted the dam from the ESA. *TVA*, 437 U.S. at 168. The Supreme Court affirmed the appeals court and allowed the injunction to stand. *Id.* at 195.

[33] *TVA*, 437 U.S. at 194. "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities. . . ." *Id.*

[34] *See id.* at 184, 194–95. "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is . . . for the courts to enforce them when enforcement is sought." *Id.* at 194.

[35] *Id.* at 166–67. The trial court explicated these arguments, which included passage of the ESA after substantial construction had already taken place, near completion of the project, and Congress's continued appropriations for the dam. *Id.*; *see also* Hill v. TVA, 419 F. Supp. 753, 758–60 (E.D. Tenn. 1976).

[36] *TVA*, 437 U.S. at 185.

[37] *Id.* at 194.

[38] *Id.* at 193.

discerned, and the statute found to be constitutional, the judicial process would be exhausted.[39] If Congress felt the Court's interpretation were too strict, then Congress could modify the law and allow the federal courts greater discretion.[40]

The dissents of Justices Powell and Rehnquist concentrated upon statutory construction and the seemingly absurd results of the Court's decision.[41] Both Justices would have interpreted the language of the Act narrowly and allowed the federal courts to order remedies consistent with the broad statutory purposes of the Act.[42]

In a third case, however, Justice Rhenquist, writing for the majority, refused to look to the broad purposes of an act and instead chose to apply the letter of the law. In *Griffin v. Oceanic Contractors, Inc.*,[43] the owners of a sea going vessel wrongly retained $412.50 of a seaman's wages.[44] The seaman brought an action under the Jones Act,[45] and sought double wages for each day the amount went unpaid.[46] The strict interpretation of the statute, and the resultant windfall to the seaman, were at issue.[47]

In its reasoning, the Supreme Court followed the plain meaning of the statute,[48] finding no room for equitable discretion in the language used by Congress.[49] Despite arguments that the statute's broad purpose was remedial and compensatory, and that a windfall to the plaintiff was clearly outside the intention of Congress, the

---

[39] *Id.* at 194. "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 of review, nor are we vested with the power of veto [over congressional legislation]." *Id.* at 194–95.

[40] *See id.* at 194–95.

[41] *Id.* at 203–04 & n.14 (Powell, J., dissenting).

> The Court professes to find nothing particularly remarkable about the result produced by its decision in this case. Because I view it as remarkable indeed, and because I can find no hint that Congress actually intended it, . . . I am led to conclude that the congressional words cannot be given the meaning ascribed to them by the Court.

Id. at 204 n.14; *see id.* at 211–12 (Rehnquist, J., dissenting).

[42] *Id.* at 196, 204–05 (Powell, J., dissenting); *id.* at 212 (Rehnquist, J., dissenting).

[43] 458 U.S. 564 (1982) (decided two months after *Romero-Barcelo*).

[44] *Id.* at 567.

[45] 46 U.S.C. § 688 (Supp. V 1987).

[46] *Griffin*, 458 U.S. at 567–68 n.3; *see* 46 U.S.C. § 596 (1982). The district court used its equitable discretion to mitigate the damages and limit the number of days of penalty pay to which the seaman was entitled. *Griffin*, 458 U.S. at 568. On appeal, the Fifth Circuit affirmed the district court's decision despite the statutory mandate because of precedent within the circuit. *Id.* at 568–69; Griffin v. Oceanic Contractors, Inc., 664 F.2d 36, 40 (5th Cir. 1981).

[47] *Griffin*, 458 U.S. at 574–76.

[48] *Compare id.* at 570–71, 574–76 (Rehnquist, J., writing for the court) *with* TVA v. Hill, 437 U.S. 153, 212–13 (1978) (Rehnquist, J., dissenting); *see supra* notes 41–42 and accompanying text.

[49] *Griffin*, 458 U.S. at 570.

Court held that a literal application of the statute was well within Congress's purposes.[50] If a literal application were outside Congress's intent, then Congress would be free to clarify the law.[51] The Court refused to recognize the seaman's reemployment as a mitigation of damages and allowed the seaman to be awarded $302,790.40.[52]

Justice Stevens, dissenting as in *Romero-Barcelo*,[53] pointed to the absurdity and injustice of the result.[54] To be faithful to the legislative intent, a departure from the statutory text would be necessary.[55] Further, all judicial discretion would be eliminated by the Court's interpretation of the statute.[56] Courts would be required to order an automatic, calculated award of damages regardless of the equities of the situation.[57]

The following three cases involve decisions by the Supreme Court in which equitable discretion was found not to have been curtailed or eliminated by clear statutory mandate of Congress. In *Hecht Co. v. Bowles*,[58] the government sought an injunction prohibiting a department store from overcharging its customers in violation of the Emergency Price Control Act.[59] The Supreme Court adopted the district court's findings that the department store had acted in good

---

[50] *See id.* at 570–71. The Court rejected these compensatory arguments and relied upon the punitive aspect of the statute. *Id.* at 572–75.

[51] *Id.* at 576; *cf. TVA*, 437 U.S. at 194–95; *supra* notes 37–40 and accompanying text.

[52] *Griffin*, 458 U.S. at 579 (Stevens, J., dissenting); *see id.* at 575 (majority did not place an exact figure on plaintiff's potential award).

[53] *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 322 (1982) (Stevens, J., dissenting); *infra* notes 77–80 and accompanying text.

[54] *Griffin*, 458 U.S. at 586. A case of interest, for which Justice Stevens wrote the majority opinion, is Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). There, Justice Stevens echoed his sentiments expressed in *Romero-Barcelo*: when the intent of Congress is clear, the courts must give effect to that intent. *Id.* at 842–43 & n.9. Policy arguments are properly addressed to legislators and not to the courts. *Id.* at 864. Courts are neither experts nor legislators and, though they sometimes decide between competing policy objectives, they do so objectively and not based upon "personal policy preferences." *Id.* at 865. In the end, political responsibility and decision-making rests with the political branches. *See id.* at 866.

[55] *Griffin*, 458 U.S. at 586. "Moreover, since the result . . . in this case is both absurd and palpably unjust, this is one of the cases in which the exercise of judgment dictates a departure from the literal text in order to be faithful to the legislative will." *Id.*; *cf. Romero-Barcelo*, 456 U.S. at 322 (departure from literal interpretation of CWA unnecessary to preserve legislative will).

[56] *Griffin*, 458 U.S. at 589.

[57] *Id.*

[58] 321 U.S. 321 (1944).

[59] *Id.* at 324; Emergency Price Control Act of 1942, 50 U.S.C. §§ 901–946 (1946) (repealed June 30, 1947).

faith to correct past violations and was now in substantial compliance with the Act.[60]

The Court then interpreted the Act and found within the phrase "injunction . . . or other order"[61] an acknowledgement from Congress of the courts' equitable discretion to fashion remedies.[62] The Court noted that if Congress had wanted to limit the traditional equitable power of the courts, then Congress would have made its language unequivocal.[63] Express language from Congress would be needed to place equitable discretion out of the reach of the courts.[64] Therefore, any ambiguity in the language of the Act would be interpreted in favor of equitable discretion.[65] Consistent with this reasoning, the court remanded the case and suggested that some remedial order would be appropriate.[66]

After a lapse of nearly forty years, the Court again asserted the traditional power of equitable discretion in the context of statutory enforcement.[67] In *Weinberger v. Romero-Barcelo*,[68] a district court found that Navy target training off the Puerto Rican coast violated the Federal Water Pollution Control Act ("Clean Water Act" or CWA), which prohibits discharges of munitions into coastal waters without a permit.[69] The district court, however, did not enjoin the

---

[60] *See Hecht*, 321 U.S. at 325. The district court dismissed the complaint, finding that the department store acted in good faith in eventually bringing its prices within the guidelines of the Act and that, because the department store was now in compliance, no injunction need be issued. *Id.* at 325–26. The court of appeals reversed, however, finding the Act unequivocal in its mandate that an injunction should issue if past violations were proven, regardless of current compliance. *See id.* at 326. The Supreme Court reversed the court of appeals and remanded for consideration of whether the district court abused its discretion by dismissing the complaint and not granting some other remedial order. *Id.* at 328, 331.

[61] The Act stated in pertinent part: "[U]pon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices [as constitute a violation of] a permanent or temporary injunction, restraining order, or other order shall be granted without bond." 50 U.S.C. § 925 (repealed June 30, 1947).

[62] *See Hecht*, 321 U.S. at 328.

> It seems apparent on the face of [the Act] that there is some room for the exercise of discretion on the part of the court. For the requirement is that a 'permanent or temporary injunction, restraining order, or other order' be granted. Though the Administrator asks for an injunction, some 'other order' might be more appropriate. . . .

Id.

[63] *Id.* at 329.

[64] *Id.* at 329–30.

[65] *Id.* at 330.

[66] *Id.* at 328, 331.

[67] *Hecht* was decided in 1944 and *Romero-Barcelo* was decided in 1982.

[68] 456 U.S. 305 (1982).

[69] *Id.* at 308–09; *see* Romero-Barcelo v. Brown, 478 F. Supp. 646, 651–52 (D.P.R. 1979). The Federal Water Pollution Control Act (FWPCA) is commonly referred to as the Clean

Navy from further discharges, but balanced the equities and allowed the Navy to continue its weapons practice while seeking the necessary CWA permit.[70]

The Supreme Court concurred with the district court's reasoning that the CWA was meant to protect the environment from actual physical harm.[71] Because the Navy discharges were not harming the environment, the permitless discharges were merely technical violations of the CWA and not substantive violations of the broad purposes of the Act.[72] Citing *TVA* for the proposition that the courts are not obligated to grant injunctive relief mechanically for every statutory violation,[73] the Court reasoned that courts are able to fashion such remedies as necessary to ensure compliance as long as the law in question did not specifically curtail their equitable discretion.[74] Although the Navy was required under the CWA to obtain a permit for its discharges, the district court had the discretion to allow the Navy to continue its discharges while seeking the permit.[75] If the Navy were not pursuing a permit, or if a permit were denied to the Navy, then the district court would need to reconsider the balance of equities.[76]

Water Act (CWA). 33 U.S.C. §§ 1251–1387 (1982 & Supp. V 1987). The Act requires permits for all discharges of pollutants from federal facilities. *Id.* § 1323(a). The Act defines the discharge of munitions as pollution. *Id.* § 1362(6).

[70] *See Romero-Barcelo*, 456 U.S. at 309–10. The Court of Appeals for the First Circuit reversed, finding that the CWA gave an absolute statutory prohibition against discharges without a permit. *Id.* at 310–11; *see also* Romero-Barcelo v. Brown, 643 F.2d 835, 861–62 (1st Cir. 1981). The Supreme Court reversed and remanded the case to the appeals court for a determination of whether the district court abused its discretion in denying the injunction. *Romero-Barcelo*, 456 U.S. at 320.

[71] *See Romero-Barcelo*, 456 U.S. at 314–15.

[72] *Id.* at 310, 314–15. "The integrity of the Nation's waters, however, not the permit process, is the purpose of the FWPCA. . . . This purpose is to be achieved by compliance with the Act, including compliance with the permit requirements. Here, however, the discharge of ordinance had not polluted the waters. . . ." *Id.* at 314–15; *cf.* Public Interest Research Group v. Powell Duffryn Terminals, Inc., 720 F. Supp. 1158, 1167 (D.N.J. 1989) (court found defendant's pollution discharges harmful despite existing heavy pollution of receiving waterway).

[73] *Romero-Barcelo*, 456 U.S. at 313; *see* TVA v. Hill, 437 U.S. 153, 194 (1978); *supra* note 38 and accompanying text.

[74] *See Romero-Barcelo*, 456 U.S. at 313–14. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Id.* at 313 (quoting Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946)).

[75] *Id.* at 320.

[76] *Id.*

> The District Court did not face a situation in which a permit would very likely not issue, and the requirements and objective of the statute could therefore not be vindicated if discharges were permitted to continue. Should it become clear that no

In his dissent, Justice Stevens warned against the use of equitable discretion to undermine public interests as expressed by Congress through statute.[77] In all but a very few cases, Justice Stevens reasoned, the courts should make a strong presumption in favor of enforcing the clear meaning of the law as written by Congress,[78] and the courts should require the immediate cessation of illegal activity.[79] By allowing the Navy to continue violating a clear statutory mandate, the Court was issuing a "judicial permit" and delving into areas of policy and national security reserved for administrative agencies and for the President.[80]

In the final case of this second line, the Court reinforced its holding in *Romero-Barcelo*.[81] In *Amoco Production Co. v. Village of Gambell, Alaska*,[82] Native Alaskans, utilizing the Alaska National Interest Lands Conservation Act (ANILCA),[83] sought to enjoin the Sec-

---

> permit will be issued and that compliance with the FWPCA will not be forthcoming, the statutory scheme and purpose would require the court to reconsider the balance it has struck.

Id.

In fact, the government of Puerto Rico declined to issue a permit and further litigation ensued. *See* United States v. Puerto Rico, 551 F. Supp. 864, 865, 869 (1982) (CWA did not remove from federal courts jurisdiction over discharge permit appeals); *see also Romero-Barcelo*, 456 U.S. at 315 n.9, 320. The Navy asked the district court to enjoin Puerto Rico from refusing to issue approvals that were prerequisite to the issuance of a National Pollutant Discharge Elimination System (NPDES) permit under the CWA. *Puerto Rico*, 551 F. Supp. at 865; CWA, 33 U.S.C. § 1342(a) (1982 & Supp. V 1987) (an NPDES permit establishes the terms and conditions under which pollutants may be discharged). Once jurisdictional problems were decided, however, the parties settled out of court. Telephone interview with Marvin B. Durning, attorney for the plantiffs in *Romero-Barcelo* (Mar. 1, 1990) (Navy allowed some public use of lands, reduced amount and modified times of bombing, and promised to open contracts and jobs to island residents; government of Puerto Rico dropped suit and did not pursue court remedies further).

[77] *Romero-Barcelo*, 456 U.S. at 322–23 (Stevens, J., dissenting).

> [The majority] overlooks 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. Of greater importance, the Court's opinion grants an open-ended license to federal judges to carve gaping holes in a reticulated statutory scheme designed by Congress to protect a precious natural resource from the consequences of ad hoc judgments about specific discharges of pollutants.

Id.

[78] *Id.* at 326 (Stevens, J., dissenting).

[79] *Id.* at 322 (Stevens, J., dissenting).

[80] *See id.* at 324–25 (Stevens, J., dissenting).

[81] *See Amoco*, 480 U.S. at 544.

[82] 480 U.S. 531 (1987); *see* Village of Gambell v. Hodel, 869 F.2d 1273, 1280 (9th Cir. 1989) (remand to district court for determination whether plaintiffs possess aboriginal subsistence rights to the Outer Continental Shelf (OCS) and whether oil leases would interfere with those rights significantly).

[83] Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§ 3101–3233 (1988).

retary of the Interior from leasing parcels of the Outer Continental Shelf (OCS) to oil companies for exploration.[84] The Supreme Court found no difference between *Amoco* and *Romero-Barcelo*.[85] In both cases, the lower courts had concentrated upon statutory procedure and had missed the underlying substantive policy behind the statute.[86] Because the Secretary had prepared an Environmental Impact Statement (EIS)[87] addressing issues similar to those raised under the procedures of ANILCA, he had, in effect, complied with ANILCA.[88] Moreover, the balance of harms—possible but unlikely interference with subsistence uses versus the loss of seventy million dollars already invested by the oil companies—required the courts to deny injunctive relief.[89] Congress did not establish that subsistence uses were more important than oil exploration; Congress had merely identified subsistence uses as important, requiring their reconciliation with other competing public interests.[90]

The above three Supreme Court cases, *Hecht*, *Romero-Barcelo*, and *Amoco*, embody a traditional equitable approach to the discernment of the requirements of an injunction. Contrary to the Court's

---

[84] *Amoco*, 480 U.S. at 535. The district court denied the Alaskans' motion for preliminary injunction despite finding a strong likelihood of success on the merits because the balance of the equities tipped in favor of the nation's need for energy independence. *Id.* at 539–40. The Court of Appeals for the Ninth Circuit reversed the district court's decision and granted a preliminary injunction, reasoning that Congress had already balanced competing policy concerns and had intended to protect Alaskan subsistence rights above other national interests. *See id.* at 540–41; Village of Gambell v. Hodel, 774 F.2d 1414, 1426 n.2, 1428 (9th Cir. 1985). The Supreme Court vacated the preliminary injunction and remanded the case to the Ninth Circuit. *Amoco*, 480 U.S. at 555. The court of appeals subsequently found that the native Alaskans had retained their aboriginal rights and remanded the case to the district court. *Village of Gambell*, 869 F.2d at 1280. The district court currently is considering whether the native Alaskans' aboriginal rights apply to the OCS and if so, whether oil company exploration will interfere with these rights. *Id.*

[85] *Amoco*, 480 U.S. at 544.

[86] *Id.* The Court's reasoning, however, had less to do with the balance of equities than with statutory interpretation: the Court went on to find that ANILCA did not apply to the OCS, eliminating any need for hearings by the Secretary of the Interior. *See id.* at 546–55; *see also id.* at 555–56 (Stevens, J., concurring in the judgement); Sierra Club v. Marsh, 872 F.2d 497, 502 (1st Cir. 1989), *rev'g*, 701 F. Supp. 886, 896 n.11 (D. Me. 1988).

The Court also noted that harm to the environment is often irreparable. Therefore, if injury is sufficiently likely, the balance of equities will usually tip in favor of the issuance of an injunction. *Amoco*, 480 U.S. at 545.

[87] An EIS is required by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321–4370(a) (1982 & Supp. V 1987), for "major Federal actions significantly affecting the quality of the human environment." *Id.* § 4332(c).

[88] *See Amoco*, 480 U.S. at 539–40, 544.

[89] *Id.* at 545; *cf.* TVA v. Hill, 437 U.S. 153, 172 (1978) (Supreme Court enjoined operation of dam despite congressional appropriations in excess of one hundred million dollars).

[90] *Amoco*, 480 U.S. at 545–46.

approach in *TVA*, *San Francisco*, and *Griffin*, the traditional equitable approach would allow violations of statute to continue. This conflict between approaches of the Supreme Court has affected the consistency of lower federal court decisions involving statutes and injunctions. The inconsistencies are explored below.

B. The Federal District Courts and Circuit Courts of Appeal

The federal trial and appeals courts of the District of Columbia, First, Second, Third, Seventh, and Ninth Circuits have considered cases involving equity and statutes.[91] Because of the large number of cases involving the National Environmental Policy Act (NEPA), those cases are considered as a group separate from those cases that deal with other statutes.

1. The Application of Equitable Discretion by the Lower Federal Courts to the National Environmental Policy Act

a. The First Circuit

The first case of interest decided by the Court of Appeals for the First Circuit, *Massachusetts v. Watt*,[92] is controlling precedent for NEPA violations in the circuit.[93] The Department of the Interior appealed from an injunction prohibiting the auction of oil drilling rights in the North Atlantic until a Supplemental Environmental Impact Statement (SEIS) could be prepared.[94] Upholding the injunction,[95] the court of appeals reasoned that, although impact statements would not in themselves stop harm to the environment, decision-makers relying upon accurate impact statements likely would avoid some environmental harm.[96] The court distinguished NEPA

---

[91] *See infra* notes 92–225 and accompanying text. The courts for the Federal, Fourth, Fifth, Sixth, Eight and Tenth Circuits have not considered cases on point.

[92] 716 F.2d 946 (1st Cir. 1983).

[93] Sierra Club v. Marsh, 872 F.2d 497, 497–98 (1st Cir. 1989); *see infra* note 101 and accompanying text.

[94] *Massachusetts*, 716 F.2d at 947–48; *see* Conservation Law Found. v. Watt, 560 F. Supp. 561, 569–71 (D. Mass. 1983). An SEIS was required under NEPA. *See* 42 U.S.C. § 4332(2)(C) (1982).

[95] *Massachusetts*, 716 F.2d at 953.

[96] *Id.* at 952.

> NEPA is not designed to prevent all possible harm to the environment; it foresees that decisionmakers may choose to inflict such harm, for perfectly good reasons. Rather, NEPA is designed to influence the decisionmaking process; its aim is to make government officials notice environmental considerations and take them into account.

Id.

from the CWA as interpreted by *Romero-Barcelo*.[97] While the goal of the CWA was clean water, the focus of NEPA was information-gathering for decision-making.[98] Harm to the environment from violations of the CWA permit process was readily discernible; harm to the environment from poor decision-making due to lack of relevant information might be difficult to foresee.[99] Although injunctions would not flow automatically from violations of NEPA, the balance of possible harms supported the trial court's grant of injunctive relief.[100]

The court of appeals reasserted this NEPA precedent in *Sierra Club v. Marsh*.[101] This case involved an attempt by the Army Corps of Engineers (Corp) to build a dry cargo terminal on a deserted island off the coast of Maine.[102] In its decision, the court of appeals distinguished *Amoco*, finding procedural checks upon administrative decisions in ANILCA that were not present in NEPA.[103]

The only harm that NEPA could guard against was lack of information in making environmentally important decisions.[104] If NEPA procedures were thwarted and the necessary data for making an informed decision were lacking, then the harm would be irreparable.[105] In ANILCA, however, the statute provided for later substantive agency review of the impact of oil exploration on subsistence uses.[106] This availability of further review likewise allowed the courts

---

[97] *Id.*

[98] *Id.*

[99] *See id.*

[100] *Id.* at 952–53.

[101] 872 F.2d 497, 499 (1st Cir. 1989). The court of appeals vacated the lower court's decision and remanded the case for further consideration. *Id.* at 505. In the original trial, the district court denied plaintiff's motion for preliminary injunction despite strong proof of NEPA violations. *See* Sierra Club v. Marsh, 701 F. Supp. 886, 891–94 (D. Me. 1988). The district court reasoned that *Amoco* undercut controlling NEPA precedent in the First Circuit. *Id.* at 895 ("It is impossible to escape the conclusion that Amoco severly undercuts [*Massachusetts v. Watt*]."); *cf.* Massachusetts v. Watt, 716 F.2d 946, 952 (1st Cir. 1983); *supra* notes 96–100 and accompanying text. Only irreparable injury—as decided by balancing the harms under the court's equitable discretion—would be enough for an injunction to be issued. *Sierra Club*, 701 F. Supp. at 897. "Amoco . . . appears to preclude preliminary injunctive relief predicated on a likely NEPA violation unaccompanied by a showing of irreparable environmental injury." *Id.* (footnote omitted). Because the claimed NEPA violations were merely procedural, and the harm to the environment from the construction could be reversed, there was no basis for an injunction while an SEIS was being prepared. *See id.* at 898–99.

[102] *Sierra Club*, 872 F.2d at 498.

[103] *Id.* at 503.

[104] *See id.* at 503–04.

[105] *See id.* "[T]he risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation." *Id.* at 504.

[106] *See id.* at 503.

greater discretion in deciding upon the irreversibility of harms.[107] The court of appeals instructed the trial court to consider the actual harm to the environment should the project be built only to be torn down as a result of possible negative findings of the SEIS.[108]

b. The Second Circuit

Sierra Club v. Hennessy[109] involved a NEPA challenge to the Westway highway project in New York City.[110] The trial court directed the Corps to prepare and circulate an SEIS and enjoined the Federal Highway Administration (FHWA) from reimbursing New

---

[107] *Id.*

> [I]n the case of ANILCA, unlike NEPA, if (for example) the initial decision unreasonably harms subsistence uses, the [statute] will *require* the agency to change direction. . . . For that reason, the injury that ever-growing bureaucratic commitment to a project can work may prove to be 'irreparable harm' in a NEPA case in a sense not present in an ANILCA case.

Id. (parenthetical and emphasis in original).

[108] *Id.* at 504. Duly admonished, the trial court granted the preliminary injunction. Sierra Club v. Marsh, 714 F. Supp. 539, 593 (D. Me 1989), *dismissed*, 907 F.2d 210, 215 (1990). Following the suggestions of the court of appeals, the trial court found that NEPA indeed implements a legislative determination that the public interest is best served when agency officials have the data necessary to make informed decisions. *Id.* at 592–93. The court further reasoned that, when environmental harm from lack of information seems sufficiently likely, an injunction should be granted. *Id.* at 592. Finding both of these elements present, the trial court enjoined further work on the project pending compliance with NEPA requirements. *Id.* at 593.

[109] 695 F.2d 643 (2d Cir. 1982). A more recent decision in the Second Circuit, United States v. Niagara Falls, 706 F. Supp. 1053 (W.D.N.Y. 1989), addressed injunctive relief under the CWA. In *Niagara Falls*, a district court permanently enjoined the city of Niagara Falls from continuing discharges of untreated sewage in violation of the CWA and the city's NPDES permit. *Id.* at 1053; United States v. Niagara Falls, 674 F. Supp. 1013, 1020 (W.D.N.Y. 1987); *see* 33 U.S.C. §§ 1251, 1342(a) (1982 & Supp. V 1987). In shaping a remedy, however, the court took technical aspects of waste disposal into consideration and allowed the city to continue dumping those effluviums that exceeded the capacity of its sewage treatment system. *Niagara Falls*, 706 F. Supp. at 1062–64. After reviewing *Romero-Barcelo* and *Amoco*, the court concluded that injunctive relief could not be granted mechanically and that the underlying purposes of the CWA had to be taken into consideration. *Id.* at 1058–59.

Although the city clearly was violating the underlying purposes of the CWA in a way that required an injunction, the court nevertheless found that equitable discretion encompassed the fashioning of appropriate remedies beyond the mere granting or denial of relief. *Id.* at 1059, 1064. Forcing the city to process sewage at capacities harmful to the treatment system would have been imprudent, with the potential for harming the treatment facilities. *Id.* at 1064. The court, in its equitable discretion, allowed the continued discharge of sewage that exceeded the safe capacity of the treatement system, even though these discharges violated the limits set in the city's NPDES permit. *Id.* at 1064.

[110] *Hennessy*, 695 F.2d at 645; *cf.* Sierra Club v. United States Army Corps of Engineers, 732 F.2d 253, 258 (2d Cir. 1984) (appeals court admonished trial court to pay attention to the law; the law expressed Congress's intent and should not be contravened lightly; if care were not taken, the trial court could intrude into the legislative domain).

York State for lands acquired for the project.[111] The Court of Appeals for the Second Circuit reversed the injunction against the FHWA,[112] reasoning that the reimbursement was merely ministerial and would not threaten the objectivity of New York State in its participation in the preparation of the SEIS.[113] Therefore, only negligible harm to the NEPA decision-making process might occur, as opposed to the substantial economic harm surely to be suffered by the state if funds were withheld.[114]

An equitable balance of harms also was required by the court of appeals in *Huntington v. Marsh*,[115] when a trial court's permanent injunction was vacated for lack of equitable balancing.[116] The court of appeals concurred with the trial court that the Corps, in designating an underwater dump site in Long Island Sound for dredged material, had violated NEPA by filing an incomplete EIS.[117] Nevertheless, the court cited *Romero-Barcelo* for the proposition that, even if statutory violations clearly were present, an equitable balance of the harms would be required.[118] The court remanded the case for determination of the necessity for injunctive relief using traditional equitable principles.[119]

c. The Seventh Circuit

In *Wisconsin v. Weinberger*,[120] the state of Wisconsin sought preliminary and permanent injunctions against the Defense Depart-

[111] *Hennessy*, 695 F.2d at 646.

[112] *Id.* at 650.

[113] *Id.* at 647–48. "In all those decisions that have reviewed alleged violations of NEPA, the courts that have granted injunctions have expressly prohibited the *future* acquisition of a right-of-way. . . . In our case the property has already been acquired by the State. . . ." *Id.* (emphasis in original).

[114] *Id.* at 649–50.

[115] 859 F.2d 1134 (2d Cir. 1988).

[116] *Id.* at 1143.

[117] *Id.* at 1135, 1142–43.

[118] *Id.* at 1143. "[I]njunctive relief does not follow automatically upon a finding of statutory violations, including environmental violations. On the contrary, '[a]n injunction should issue only where the intervention of a court of equity is essential in order effectually to protect property rights against injuries otherwise irremediable.'" *Id.* (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (quoting in part Cavanaugh v. Looney, 248 U.S. 453, 456 (1919))).

[119] *Id.* at 1143. On remand, the district court again failed to balance the equities before issuing an injunction. *See* Huntington v. Marsh, 884 F.2d 648, 649 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1296 (1990). The Second Circuit Court of Appeals, in deciding the second appeal, reiterated the importance of balancing the actual physical harms and not the violations of the law or the possible harms. *Id.* at 654. Evidence of actual damage would be necessary before a permanent injunction could issue. *Id.*

[120] 582 F. Supp. 1489 (W.D. Wis.), *rev'd*, 745 F.2d 412 (7th Cir. 1984).

ment's Extremely Low Frequency (ELF) project until an SEIS, addressing new research into extremely low-frequency radiation, could be prepared.[121] The Court of Appeals for the Seventh Circuit overturned the trial court,[122] distinguished *TVA*,[123] and observed that NEPA was merely procedural in scope and was meant only to supplement the decision-making process.[124] Unlike the congressionally defined harm that would result from a violation of the ESA,[125] no congressionally defined harm would result from the NEPA violation.[126] The new information involving extremely low-frequency radiation was inconclusive; the ELF project had complied fully with

---

[121] *Wisconsin*, 745 F.2d at 414; *Wisconsin*, 582 F. Supp. at 1491.

[122] The trial court granted an injunction, 578 F. Supp. 1327, 1365 (1984), and later denied the Defense Department's motion to vacate. *Wisconsin*, 582 F. Supp. at 1491–92, 1496. The trial court reasoned that, unlike the CWA violations in *Romero-Barcelo* when an injunction would not further the purposes of Congress, the intent of Congress as embodied in NEPA could be furthered only by an injunction. *Id.* at 1493–94; *cf. Romero-Barcelo*, 456 U.S. at 314; *supra* notes 69, 72–74 and accompanying text. The harm to be guarded against was not actual physical harm to the environment, but harm to the decision-making process as required by NEPA. *Wisconsin*, 582 F. Supp. at 1494. "[W]hen federal officials make a decision without first evaluating its environmental consequences, the harm that the Act is intended to prevent has been suffered." *Id.* (citing Massachusetts v. Watt, 716 F.2d 946, 952 (1st Cir. 1983)); *see supra* notes 96–99 and accompanying text.

The trial court further found that, just as Congress had foreclosed equitable discretion under the ESA, Congress had foreclosed equitable discretion under NEPA. *Wisconsin*, 582 F. Supp. at 1493–94; *see* TVA v. Hill, 437 U.S. 153, 194 (1978); *supra* notes 34–39 and accompanying text. "In much the same way that it has chosen to preserve endangered species, Congress has chosen to impose a decision-making process on federal agencies by enacting the National Environmental Policy Act." *Wisconsin*, 582 F. Supp. at 1494. "[I]t is clear that a court's discretion to decline to issue an injunction is strictly confined by the purposes and language of the Act." *Id.* at 1495. A balance of the equities—national security versus congressional environmental policies—was not within the power of the courts. *See id.* "I conclude that, when an action is being undertaken in violation of the National Envirnmental Policy Act, there is a presumption that injunctive relief should be granted prohibiting continuation of the action until the agency brings itself into compliance." *Id.* at 1495.

The Court of Appeals for the Seventh Circuit vacated the trial court's injunction, 736 F.2d 438 (7th Cir. 1984), and reversed the trial court in a later opinion. *Wisconsin*, 745 F.2d at 428.

[123] *Wisconsin*, 745 F.2d at 425.

[124] *Id.* "NEPA cannot be construed to elevate automatically its procedural requirements above all other national considerations." *Id.*

[125] *See id.* at 426; TVA v. Hill, 437 U.S. 153, 194 (1978); *supra* notes 33–34 and accompanying text. The court found significant Congress's unequivocal ban on the destruction of a species via the destruction of its critical habitat. *Wisconsin*, 745 F.2d at 426.

[126] *Wisconsin*, 745 F.2d at 426.

> The only irreparable injury under NEPA if the Navy were permitted to proceed with Project ELF, as perceived by the district court, was that it would later lead to biased decision-making by the Navy. . . . Although the goal of NEPA is to force agencies to consider the environmental consequences of major federal actions . . . that goal is not to be achieved at the expense of a total disregard for countervailing public interests.

Id. (citation omitted).

NEPA in the past; and, because the ELF project was at a late stage of construction, the decision-making process protected by NEPA would not be harmed further by continuing work.[127] The court of appeals overturned the trial court's presumption in favor of injunctive relief, reasoning that, absent a mandate from Congress, the courts always must balance the equities.[128]

d. The Ninth Circuit

The first case of interest from this circuit is *Save the Yaak Committee v. Block*.[129] In *Save the Yaak*, the Court of Appeals for the Ninth Circuit reversed the district court and granted an injunction under NEPA to stop the reconstruction of the Yaak River Road and associated logging on national forest lands in Montana.[130] Citing *Amoco* for the proposition that proof of irreparable harm was necessary before an injunction could issue,[131] the court of appeals weighed the probable harms that could result from the Forest Service's decision not to prepare an EIS.[132] The court found evidence that grizzly bear and caribou populations might be affected adversely by Forest Service actions.[133] Further, the court could find no countervailing harm to the defendant or to third parties that might tip the equitable balance against the injunction.[134]

---

[127] *See id.* at 422–24, 427.

[128] *See id.* at 424–25.

[129] 840 F.2d 714 (9th Cir. 1988). There is an additional NEPA case of interest from the Ninth Circuit. In Oregon Natural Resources Council (ONRC) v. Marsh, 677 F. Supp. 1072 (D. Or. 1987), the district court considered the problem of designing an injunction under NEPA to halt the construction of a partially completed dam. *Id.* at 1073. The district court originally had held that no injunction was required. ONRC v. Marsh, 626 F. Supp. 1557, 1569 (D. Or. 1986), *rev'd*, 832 F.2d 1489 (9th Cir. 1987), *rev'd*, 109 S. Ct. 1851 (1989). In fashioning this relief, the district court allowed construction of the dam to continue until a certain level was reached. *ONRC*, 677 F. Supp. at 1075. The court also allowed certain other ancillary construction activities at the dam to be completed. *Id.* at 1078. The court balanced the equities and found that the safety of people downstream required the stabilization of the structure and that the harm to the environment would be greater if the ancillary construction were incomplete. *Id.* at 1074, 1076, 1078.

> Under the balance I have struck, first in importance is the safety of the children who attend school immediately downstream, and of those who reside nearby. Their lives and property would be in danger if a flood were to ensue, as feared—properly, in my view—by the defendants, if no elevation of the structure were permitted.

Id. at 1078. In exercising its discretion, the court noted but did not analyze a tension between *Romero-Barcelo* and *Amoco* on the one hand, and Ninth Circuit controlling precedent on the other. *Id.* at 1077.

[130] *Save the Yaak*, 840 F.2d at 716, 722.

[131] *See id.* at 722.

[132] *See id.* at 717–19.

[133] *Id.* at 722.

[134] *Id.*

The balance of harms in *Sierra Club v. United States Forest Service (USFS)*[135] caused the court of appeals to reverse a district court's denial of a preliminary injunction.[136] The court of appeals found that irreparable harm not only could occur from the timber harvests in question, but that irreparable harm already had occurred.[137] The Forest Service's Environmental Assessments (EA) were erroneous in finding that no significant harm would result from modified clear cutting around giant sequoias.[138] As a matter of law, an EIS should have been prepared.[139] The balance of harms required by *Amoco* favored the issuance of the injunction.[140]

Likewise, in *People ex rel. Van de Kamp v. Marsh*,[141] an EA issued by the Corps stated that a plan to fill an area of wetlands near an airport would not require an EIS.[142] Even though the Corps had evaluated the impact to the environment in internal documents and for the administrative record,[143] the district court found these evaluations unreasonable in light of several aspects left unexplored.[144] For each unexplored aspect, the court weighed the likelihood of environmental injury.[145] Finding a substantial overall likeli-

---

[135] 843 F.2d 1190 (9th Cir. 1988).

[136] *Id.* at 1196.

[137] *Id.* at 1195–96. "[T]he Sierra Club has made a factual showing not that environmental injury is likely, but that is [sic] has occurred." *Id.* at 1195.

> It is our understanding that at this time, harvesting in the Cabin and Solo sales has been completed. . . . [H]arvesting in the Peyrone sale is eighty percent complete and in the Camp sale, thirty-nine percent complete. . . . In each of the Peyrone and Camp sales, two cutting units with giant sequoias remain. . . . [H]arvesting [in] the Lion sale is thirty-three percent complete; in the Church sale, eighty-five percent complete; and in the Eye sale, forty-three percent complete. . . . Tie and Snow sales presently are on administrative appeal.

Id. at 1196 n.4.

[138] Bare mineral soil, produced by the burning of ground cover and lesser trees, is necessary for giant sequoia reproduction. *Id.* at 1194. Modified clear cutting would remove all vegetation (except the giant sequoias themselves) and thereby endanger reproduction and the future existence of the sequoia groves in question. *Id.* An EA is prepared to determine whether an EIS is necessary and is required by NEPA. *See* 42 U.S.C. § 4332 (1982).

[139] *USFS*, 843 F.2d at 1191; *see id.* at 1193–96.

[140] *Id.* at 1195. "[W]hen environmental injury is 'sufficiently likely . . . the balance of harms will usually favor the issuance of an injunction to protect the environment.'" *Id.* (quoting Amoco Prod. Co. v. Village of Gambell, Alaska, 480 U.S. 531, 545 (1987)); *see supra* note 86.

[141] 687 F. Supp. 495 (N.D. Cal. 1988).

[142] *Id.* at 497. The EPA initially recommended that an EIS be prepared, but later found the project to be environmentally satisfactory. *Id.*

[143] *Id.*

[144] *See id.* at 501. The aspects left unexplored by the Corps included consideration of alternatives to the project, environmental impact on wetlands and wetland denizens, water pollution from rain water runoff, and the cumulative impact of this project with other projects in the area. *Id.* at 499–501.

[145] *See id.*

hood that the Corps had neglected to include various environmental injuries in its assessment, the court vacated the dredge-and-fill permit issued by the Corps, continued an injunction already in effect, and remanded the matter to the Corps for further study.[146] As in *Save the Yaak*, the court cited *Amoco* for the proposition that environmental harm is often irreparable.[147]

Similarly, the district court in *Morgan v. Walter*[148] held that environmental harm is often irreparable.[149] In *Morgan*, a private landowner sought to construct and operate a fish hatchery on public lands in Idaho.[150] Neighboring landowners sought an injunction against the construction, claiming that the Bureau of Land Management (BLM) had created a flawed EIS.[151]

After an extensive exploration of the probable harms unaddressed in the EIS,[152] the court found for the plaintiffs and issued an injunction.[153] The court, however, only reluctantly issued the order.[154] Greater harm to the environment could occur if the defendant landowner decided to build the fish hatchery on his own private land, circumventing any moderations required by the EIS.[155] Nevertheless, the court held that an injunction was required in light of the violations of NEPA and the potential harm to the environment.[156]

2. The Application of Equitable Discretion by the Lower Federal Courts to Non-NEPA Cases

a. The District of Columbia Circuit

In *Securities Industry Association v. Board of Governors of the Federal Reserve System*,[157] a private organization, the Securities Industry Association, forced the Federal Reserve System to stop a bank from selling commercial paper in violation of sections 16 and

---

[146] *Id.* at 501.

[147] *Id.*; *see supra* note 86.

[148] 728 F. Supp. 1483 (D. Idaho 1989).

[149] *Id.* at 1494.

[150] *Id.* at 1484–85.

[151] *Id.* at 1486.

[152] *Id.* at 1488–92.

[153] *Id.* at 1495.

[154] *Id.* at 1494. "Although the court must issue the preliminary injunction pursuant to the standards which the law imposes, it does so with great reservation." *Id.*

[155] *Id.*

[156] *Id.*

[157] 628 F. Supp. 1438 (D.D.C. 1986).

21 of the Banking Act.[158] The court found for the Association and issued a permanent injunction against the bank.[159] The court reasoned that, because the bank was violating federal law, it was acting contrary to the public interest.[160] Because the bank's request to continue an illegal activity was extraordinary, the showing of irreparable harm on behalf of the bank would have to have been overwhelming to avoid an injunction.[161] Nevertheless, the court allowed the bank ten days from the date of the decision to get its affairs in order and phase out its commercial paper services in a reasonable fashion.[162]

The district court rejected a similar attempt to use equitable discretion to defeat the enforcement of statute in *American Hawaii Cruises v. Skinner*.[163] In this case, the Coast Guard granted a coasting license to the owners of a rebuilt cruise ship.[164] Competitors sought an injunction against the use of the vessel in coastal waters, claiming that the rebuild was done in violation of the Jones Act.[165] Citing *Romero-Barcello*, the defendants asked the court to balance the harms in their favor and deny the injunction.[166] The court declined to balance the harms and distinguished *Romero-Barcelo*: while the CWA implicitly allowed discretion, the Jones Act did not.[167] Further, the balance of economic harms did not favor the defendants clearly.[168]

b. The First Circuit

In *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*,[169] the Court of Appeals for the First Circuit relied upon the reasoning of *Romero-Barcelo* and *Hecht* to decide antitrust claims under the Clay-

---

[158] *Id.* at 1440; *see* Securities Indus. Ass'n v. Board of Governors, 627 F. Supp. 695, 711 (D.D.C. 1986); Banking Act of 1933, 12 U.S.C. §§ 24, 378(a)(1) (1988) (commonly known as the Glass-Steagall Act).

[159] *Securities Industry*, 628 F. Supp. at 1444.

[160] *Id.* at 1442.

[161] *Id.*

[162] *Id.* at 1444.

[163] 713 F. Supp. 452 (D.D.C. 1989), *dismissed*, 893 F.2d 1400 (D.C. Cir. 1990).

[164] *Id.* at 454. A coasting license is a license to operate in coastal waters.

[165] *Id.* at 454–55; *see* Jones Act, 46 U.S.C. § 883 (Supp. V 1987).

[166] *Skinner*, 713 F. Supp. at 459.

[167] *Id.* at 459–60.

[168] *Id.* at 460. The court went on to interpret the section of the Jones Act in question and to review the Coast Guard's decision in light of that interpretation. *Id.* at 460–64. Finding the Coast Guard's decision to grant the license unsubstantiated, the court remanded the case back to the agency and dismissed the action. *Id.* at 468–69. No injunction was issued. *Id.* at 469.

[169] 754 F.2d 404 (1st Cir. 1985).

ton Act.[170] An independent gasoline vendor sought the divestiture of a competitor's acquired assets.[171] The trial court denied plaintiff's motion for permanent injunction, holding that the Act limited divestitures to actions brought by public agencies.[172] The court of appeals reversed this decision and remanded for further deliberation.[173] The court of appeals could find no limitation on equitable discretion in the Clayton Act. Therefore, courts could exercise their inherent equitable powers in fashioning relief under the Act, potentially including divestiture of offending assets.[174]

c. *The Second Circuit*

An exercise of the courts' equitable powers was foreclosed by statute in *New York v. Gorsuch*.[175] The district court found that the Administrator of the Environmental Protection Agency (EPA) had failed to conform to a statutory timetable[176] in promulgating emission standards for inorganic arsenic under the Clean Air Act (CAA).[177] The Administrator had appealed to the court's equitable discretion and had cited *Romero-Barcelo* and *TVA* for the proposition that injunctive relief need not be granted mechanically for statutory violations.[178] The court, however, citing these same cases, reasoned that Congress may limit a court's equitable discretion through statutory mandate.[179] The court found that Congress already had balanced the need for prompt regulation against the need for well-

---

[170] *Id.* at 416–17; Clayton Act, 15 U.S.C. §§ 12–13, 14–21, 22–27 (1988); *see supra* notes 63–66, 74–76 and accompanying text. The Supreme Court recently approved of this reasoning in California v. American Stores, 110 S. Ct. 1853, 1859 (1990).

[171] *Cia. Petrolera*, 754 F.2d at 406–07.

[172] *See id.* at 406.

[173] *Id.* at 430.

[174] *See id.* at 416–17. "[W]e believe Congress intended that courts should fashion their injunctions by exercising sound discretion according to the exigencies of the particular situation before them, which is to allow courts their 'traditional equitable discretion.'" *Id.* at 417 (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 319 (1982)); *see* Clayton Act, 15 U.S.C. § 26 (1988); *cf. supra* notes 63–66, 74–76 and accompanying text.

[175] 554 F. Supp. 1060 (S.D.N.Y. 1983).

[176] Clean Air Act (CAA), 42 U.S.C. § 7412(b)(1)(B) (1982).

[177] *Gorsuch*, 554 F. Supp. at 1062; *see* CAA, 42 U.S.C. §§ 7401–7642 (1982 & Supp. V 1987).

[178] *See Gorsuch*, 554 F. Supp. at 1062–63. The Administrator felt that more time was necessary to allow for the gathering of the best statistical information possible. *Id.* at 1065. The Administrator argued that compliance with the Act was "impossible" under the circumstances. *Id.* at 1064.

[179] *See id.* at 1062–63. "While in the normal instance I would defer to the wisdom of the Administrator, I cannot when Congress has so clearly spoken on the issue. . . . Accordingly, I find that the Administrator should be compelled to comply with the *statutory mandate*." *Id.* at 1066 (emphasis added).

informed standards and had chosen prompt regulation.[180] If the Administrator needed more time, reasoned the court, then she should appeal to Congress to amend the law and not appeal to equitable discretion.[181] The court ordered a permanent injunction requiring the EPA to publish standards within 180 days.[182]

d. The Third Circuit

The Court of Appeals for the Third Circuit, in *United States v. Wheeling-Pittsburgh Steel Corp.*,[183] likewise strictly interpreted the CAA[184] in reversing a district court decision to stay enforcement of the Act.[185] The trial court had exercised its equitable discretion, weighed the circumstances of the defendant company,[186] and found that the company need not comply with deadline dates mandated by the CAA.[187] The court of appeals, however, looked to the language and purpose of the statute and found that the deadlines had been set by Congress with deliberation and without qualification.[188] Therefore, the statute eliminated any exercise of discretion by the court.[189] The court of appeals further precluded any balance of the equities by finding that, while the public's economic interests might be enhanced by the continued operation of the plant in question, Congress already had balanced public policy and had found clean air to be the predominant concern.[190] Citing *TVA*, the court reasoned, *à fortiori*,

---

[180] *Id.* at 1064.

[181] *Id.* at 1066. "If the Administrator disagrees with the burden Congress has imposed upon her Agency, her proper recourse is to persuade Congress to amend the statute, not to defy the statute and seek relief from the courts." *Id.*

[182] *Id.* at 1066.

[183] 818 F.2d 1077 (3d Cir. 1987).

[184] *See id.* at 1083–84; CAA, 42 U.S.C. § 7410(a)(2)(A) (1982).

[185] *Wheeling-Pittsburgh*, 818 F.2d at 1089.

[186] The circumstances included bankruptcy, a 98-day strike, financial losses, and a change in management. *Id.* at 1082.

[187] *Id.* at 1081–82. The defendant operated a sinter windbox in connection with its steel manufacturing facilities. *Id.* at 1079. Installation of pollution control equipment was required no later than three years from the date of EPA approval of state pollution standards. *See id.* at 1079–80; CAA, 42 U.S.C. § 7410(a)(2)(A) (1982).

[188] *See Wheeling-Pittsburgh*, 818 F.2d at 1083–84.

[189] *Id.* at 1084. "It is evident therefore from the language of the statute and its legislative history that Congress placed great significance on the compliance dates and intended to limit, if not entirely eliminate, the district court's equitable discretion to extend compliance." *Id.*

[190] *Id.* at 1088.

> While continued operation of steel facilities may advance a state's economic interest, the Clean Air Act reflects a congressional policy decision that removal of pollutants from the air which endanger the lives and health of the populace is a more compelling public interest. The district court was not authorized to impose its own balancing of policy over that of Congress.

Id.

that if Congress had limited equitable discretion in deference to the snail darter, then certainly Congress had limited equitable discretion in deference to healthy air.[191]

In *United States v. Vineland Chemical Co.*,[192] the defendant's hazardous waste dump had not met EPA certification standards under the Resource Conservation and Recovery Act of 1976 (RCRA)[193] within the time periods set by law.[194] The defendant invoked equitable defenses citing *Romero-Barcelo*.[195] The district court, however, permanently enjoined the defendant from continuing toxic waste disposal.[196] The court acknowledged the defendant's astute use of *Romero-Barcelo*—if traditional equitable powers could be used to enforce a statute, then traditional equitable defenses likewise should be allowed—yet distinguished *Romero-Barcelo* nevertheless.[197] While the Supreme Court had affirmed the use of equitable discretion to secure compliance with the law, the defendant was attempting to use equitable discretion to defeat enforcement of the law.[198]

e. The Seventh Circuit

A subsequent district court case from the Seventh Circuit found just such a mandate from Congress. In *Natural Resources Defense Council v. Outboard Marine Corp.*,[199] a manufacturer was proved to be discharging toxins into navigable waters in violation of its National Pollutant Discharge Elimination System (NPDES) permit.[200] In deciding to enjoin further discharges permanently, the district court cited *Romero-Barcelo*, noting that courts are not obligated automatically to enjoin statutory violations.[201] Nevertheless, the court proceeded to apply a lower-threshold standard for the

---

[191] *Id.*

[192] 692 F. Supp. 415 (D.N.J. 1988).

[193] Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6991(j) (1982 & Supp. V 1987).

[194] *Vineland*, 692 F. Supp. at 417; *see* RCRA, 42 U.S.C. § 6925(e)(2) (Supp. V 1987).

[195] *Vineland*, 692 F. Supp. at 423.

[196] *Id.* at 417, 424.

[197] *Id.* at 423.

[198] *Id.* "[T]he [*Romero-Barcelo*] court, by its own description, affirmed a district court's exercise of equitable power to '*secure prompt compliance*' with federal law. . . . This is a very different exercise of equitable power from that which defendants request here, where an enforcement action is sought to be defeated on equitable grounds." *Id.* (emphasis in original) (citation omitted) (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982)).

[199] 692 F. Supp. 801 (N.D. Ill. 1988).

[200] *Id.* at 804, 824; *see supra* note 76 (definition of NPDES permit).

[201] *Outboard Marine*, 692 F. Supp. at 822; *see* Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982); *supra* note 74 and accompanying text.

injunction, reasoning that, because the injunction was authorized by statute, a plaintiff need only prove a reasonable likelihood of future violations.[202]

f. The Ninth Circuit

In *Northern Cheyenne Tribe v. Hodel*,[203] a Native American tribe appealed the modification of the enjoinment of the nearby mining of coal from leases issued by the Secretary of the Interior.[204] The Court of Appeals for the Ninth Circuit considered the application of NEPA and the Federal Coal Leasing Amendments Act (FCLAA) to the leases.[205] The court held that both acts were similar to the CWA, as interpreted in *Romero-Barcelo*, and unlike the ESA as interpreted in *TVA*.[206] NEPA and the FCLAA did not limit the courts' traditional equitable powers.[207] The substantive underlying policy of the acts in question would continue to be served if the leases were suspended

---

[202] *Outboard Marine*, 692 F. Supp. at 822. "When Congress expressly authorizes such injunctive relief, that brings into play a different set of factors from those in the court-created setting. . . . 'Once a violation is demonstrated, the moving party need show only that there is some reasonable likelihood of future violations.'" *Id.* (quoting CFTC v. Hunt, 591 F.2d 1211, 1220 (7th Cir.), *cert. denied*, 442 U.S. 921 (1979)); *see* CWA, 33 U.S.C § 1365(a) (1982 & Supp. V 1987) (authorizes citizen suits seeking enforcement against CWA violators).

[203] 851 F.2d 1152 (9th Cir. 1988). There is an additional case of interest from the Ninth Circuit. In American Motorcyclist Ass'n v. Watt, 714 F.2d 962 (9th Cir. 1983), the Ninth Circuit Court of Appeals upheld the district court's decision not to issue a preliminary injunction despite the plaintiff's probable success on the merits. *Id.* at 964–65, 967. The Bureau of Land Management (BLM) had attempted to implement a land management plan for the California Desert Conservation Area (CDCA), but had substantially failed to follow public comment and planning procedures required by the Federal Land Policy and Management Act of 1976 (FLPMA). *Id.* at 963–64; *see* FLPMA, 43 U.S.C. § 1781(d) (1982). Despite these violations of law, however, the court of appeals agreed with the district court's finding that the balance of the equities favored implementation of the plan because the harm resultant from the BLM's procedural violations was less than the environmental injury that FLPMA was intended to prevent. *Watt*, 714 F.2d at 966. Further, the appeals court noted that under *Romero-Barcelo*, the public interest also must be weighed when considering the issuance of an injunction. *Id.* at 967. The public interest in this case was best served by implementing the flawed plan and protecting the environment. *See id.* at 966.

[204] *Cheyenne*, 851 F.2d at 1154–55.

[205] Federal Coal Leasing Amendments Act of 1976, Pub. L. No. 94-377, 90 Stat. 1083 (codified as amended in scattered sections of 30 U.S.C.).

[206] *See Cheyenne*, 851 F.2d at 1156.

[207] *See id.* at 1156–58. "[NEPA's] high aim 'to create and maintain conditions under which man and nature can exist in productive harmony,' 42 U.S.C. § 4331, does not show a congressional intent to foreclose equitable balancing by a court enforcing its requirements." *Id.* at 1158. "We accordingly focus 'on the underlying substantive policy' that Congress designed the statute to effect. . . . Nothing in the Act[s] indicates that Congress intended to restrict the court's jurisdiction in equity." *Id.* at 1156 (quoting Amoco Prod. Co. v. Village of Gambell, Alaska, 480 U.S. 531, 544 (1987)); *cf.* 30 U.S.C. § 201(a)(3) (1982).

and not voided.[208] Further, because the modifications to the EIS were relatively minor, there was no danger that "bureaucratic commitment" would impair these impact statements if the leases were suspended rather than voided.[209]

Conversely, in *Friends of the Earth v. United States Navy*,[210] the court of appeals looked to the ESA as interpreted in *TVA* and found that the National Defense Authorization Act (NDAA)[211] included similar limitations on equitable discretion.[212] The plaintiffs sought to enjoin the Navy's Carrier Battle Group Homeport project near Everett, Washington, because the state Shorelines Hearing Board had not approved a shoreline permit as required by the NDAA.[213] The court of appeals found that Congress had provided only one method to enforce compliance with the NDAA: any construction would halt until all federal, state, and local permits were acquired.[214] The

---

[208] Cheyenne, 851 F.2d at 1156. "Congress's underlying substantive policy concern was to develop the coal resources in an environmentally sound manner. This purpose lays as much stress on . . . developing the coal resources as it does on the environmental effects of development." *Id.*

[209] *Id.* at 1156–57; *cf.* Massachusetts v. Watt, 716 F.2d 946, 952–53 (1st Cir. 1983); *supra* notes 92–100 and accompanying text. The court of appeals found that the district court had abused its discretion by balancing the equities on an inadequate record. *Cheyenne*, 851 F.2d at 1158. While the lower court was not required by NEPA or the FCLAA to issue an injunction, the mining was going forward under a fundamentally flawed EIS and an injunction might be appropriate after a balance of the harms. *Id.* at 1157–58.

[210] 841 F.2d 927 (9th Cir.), *modified*, 850 F.2d 599 (9th Cir. 1988).

[211] National Defense Authorization Act for fiscal years 1988 and 1989 (NDAA), Pub. L. No. 100-180, 101 Stat. 1019 (1987).

[212] *Navy*, 841 F.2d at 933. "As in TVA . . . an examination of the language, history, and structure of the NDAA demonstrates that Congress intended that no construction should commence prior to issuance of all required permits." *Id.*; *see* NDAA, Pub. L. No. 100-180, § 2322(c), 101 Stat. at 1219.

> Funds appropriated [for the Homeport project] . . . may not be obligated or expended for such purpose until— (A) all Federal, State, and local permits required for the dredging activities to be carried out . . . have been issued, including all permits required pursuant to, or otherwise in connection with, the Federal Water Pollution Control Act.

Id.

[213] *Navy*, 841 F.2d at 928–30. The city of Everett had issued the permit, but the state Shorelines Hearings Board had not completed its review when the Navy contracted to begin construction. The plaintiffs sued to halt construction until the permit received final approval. The district court denied the plaintiffs' motion for a preliminary injunction for failure to establish irreparable harm and for lack of standing. The court of appeals reversed, holding that the trial court had abused its discretion in withholding injunctive relief. *Id.* at 930–31, 937.

[214] *Id.* at 929, 934. "The NDAA limits the discretion of the courts, because by its plain language, Congress has already struck a balance favoring environmental review prior to construction of the homeport. Congress provided only one method to achieve its purpose. Thus, the district court lacked equitable discretion to deny the injunction." *Id.* at 934.

NDAA, unlike the CWA as interpreted in *Romero-Barcelo*, limited the courts' equitable discretion.[215] The court of appeals reversed the district court and permanently enjoined further work on the project.[216]

Finally, in *Wilderness Society v. Tyrrel*,[217] a California district court temporarily enjoined the Forest Service from harvesting burned timber adjacent to a designated wild and scenic river in violation of the Wild and Scenic Rivers Act (WSRA).[218] To determine the underlying substantive policy of the Act, the court compared the language, history, and structure of the WSRA with the ESA, as analyzed by the Supreme Court in *TVA*, and with ANILCA, as analyzed by the Supreme Court in *Amoco*.[219] If these elements of the WSRA were similar to those of the ESA, then Congress had eliminated the court's equitable discretion and an injunction must issue.[220] Conversely, if these elements were similar to those of AN-

---

[215] *Id.* at 934. The district court followed this precedent in another Homeport project case, Friends of the Earth v. Hall, 693 F. Supp. 904 (W.D. Wash. 1988). In that case, the district court granted a permanent injunction against the Army Corps of Engineers and the Navy, stopping the Homeport project until permit requirements under NEPA, the CWA, and the NDAA were met. *Id.* at 911–14. Looking to these statutes, the district court found congressional intent to prohibit national defense expenditures if environmental permit requirements were not met prior to the initiation of construction. *Id.* at 912, 914. Explaining that courts must first look to the statutes to see if Congress had restricted equitable discretion, the district court examined the CWA and found a violation of its substantive policies. *Id.* at 948–49. The project undoubtedly would cause the irreparable environmental injury foreseen and prohibited by Congress. *Id.* at 949. The court distinguished *Romero-Barcelo*, noting that in *Romero-Barcelo* no pollution had occurred from the Navy's discharges of munitions into the water. *Id.* (citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 314–15 (1982)). Whereas in *Hall*, "[a] failure to enjoin the Navy's disposal [of dredged material] would subject the Nation's waters to a real and present danger of pollution. This aspect distinguishes the instant situation from Romero-Barcelo." *Id.* at 949. Although national security was a consideration, the court found that the delay would not cause harm to the nation's defense capabilities and therefore would not outweigh the "significant risk of major irreparable environmental impact" if the permits were neglected. *Id.* at 949.

[216] *Navy*, 841 F.2d at 937. The court of appeals dissolved its injunction when the state Shorelines Hearings Board deadlocked, thereby upholding the Everett permit. 850 F.2d at 600–01.

[217] 701 F. Supp. 1473 (E.D. Cal. 1988).

[218] *Id.* at 1475–76; *see* Wild and Scenic Rivers Act (WSRA), 16 U.S.C. § 1271 (1988).

[219] *Tyrrel*, 701 F. Supp. at 1478–79. The court cited *Amoco* and *Romero-Barcelo* for the proposition that a court sitting in equity is not obligated to grant injunctions mechanically for violations of the law. *Id.* at 1477; *see Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). The court further explained that the Ninth Circuit had rejected any presumption of irreparable injury from violations of NEPA and the CWA. *Tyrrel*, 701 F. Supp. at 1477; *see Romero-Barcelo*, 456 U.S. at 320; Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1158 (9th Cir. 1988); Save the Yaak Committee v. Block, 840 F.2d 714, 722 (9th Cir. 1988); *supra* notes 130–31, 204–08 and accompanying text.

[220] *Tyrrel*, 701 F. Supp. at 1478.

ILCA, then Congress had not foreclosed equitable discretion, and the court must balance the harms before deciding upon an injunction.[221]

The district court found the WSRA to be most similar to ANILCA in that, though Congress already had weighed the conflicting interests, the statute still allowed agencies flexibility in enforcing the Act.[222] Therefore, courts were allowed similar flexibility in determining whether an action violated the substantive values of the Act.[223] Though the Act did not require an automatic presumption of irreparable injury, the statute and its objectives would guide the court in balancing the equities.[224] The district court balanced the relative harms and found environmental injury to be of sufficient likelihood to allow a preliminary injunction to issue.[225]

In summary, whether the federal courts are interpreting NEPA or other, non-NEPA statutes, the lower courts have taken disparate stands on the applicability of equitable discretion to injunctive relief. The balance of harms, and the character of these harms—whether probable or merely likely—is at the center of this controversy. The next section will explore the conflicting interpretations of what is meant by the balance of harms and equitable discretion.

III. Equitable Discretion, Statutory Interpretation, and the Balance of Harms

A. Contradictory Applications of Equitable Discretion in the Lower Federal Courts

1. Equitable Discretion and NEPA

The National Environmental Policy Act (NEPA) establishes procedural requirements for government agencies to follow when proj-

---

[221] *Id.* at 1478–79.

[222] *Id.* at 1478. The National Park Service's recommendations to Congress, and the designation of the river as wild and scenic,

> suggest that all the balancing between conflicting interests occurred prior to the instant litigation and that in effect Congress ordered preservation of the area. . . . Nonetheless . . . the fact that the WSRA directs that the executive engage in a relatively flexible review process militates against a similar analytical process being prohibited to the court.

Id.

[223] *Id.* "Such a statutory scheme does not require a necessary and inescapable inference that Congress intended to remove this court's equitable discretion." *Id.* at 1478–79 (citing Amoco Prod. Co. v. Village of Gambell, Alaska, 480 U.S. 531, 544 (1987)).

[224] *Id.* at 1479.

[225] *See id.* at 1490–92.

ects are being considered.[226] A violation of NEPA will not in itself harm the environment, though harm may result if its procedures are not followed and avoidable injuries to the environment are not discovered. In fact, after an agency prepares an Environmental Impact Statement (EIS), that agency may follow a plan that it knows to be harmful to the environment. The EIS requirement is meant merely to insure that an agency is informed fully about the environmental impact of its decisions.

Legal challenges brought under NEPA usually aver that an agency has gathered insufficient information or has neglected one or more significant procedures. If the reasoning of *Weinberger v. Romero-Barcelo*[227] and *Amoco Production Co. v. Village of Gambell, Alaska*[228] is followed, however, an injunction will issue only if irreparable harm is proven. Consequently, because NEPA indirectly affects the environment, no injunction might ever issue for a violation of NEPA if the *Romero-Barcelo* and *Amoco* reasoning were used. Therefore, the lower courts have been careful to distinguish their reasoning from the reasoning in *Romero-Barcelo* and *Amoco* when confronted with violations of NEPA. Because of this careful distinguishment, the decisions in the lower courts have been less than consistent.

At one extreme, the courts of the First Circuit take notice of potential harms to the environment when deciding challenges to the NEPA process.[229] Actual harm to the environment need not be shown. The courts of the First Circuit recognize that bureaucratic commitment to existing project plans eventually may cause real environmental harm. While NEPA does not prohibit environmental harm directly, the statute is meant to guard against harm from uninformed decision-making. In essence, the creation of a proper EIS is analogous to the substantive procedural checks expressly provided for in ANILCA and other statutes.[230]

At the other extreme, the courts of the Second and Seventh Circuits require a showing of actual environmental harm resultant

---

[226] Wisconsin v. Weinberger, 745 F.2d 412, 426 (7th Cir. 1984) ("NEPA itself is procedural"); *see* NEPA, 42 U.S.C. § 4332 (1982); *see also, e.g.*, Environmental Effects in the United States of Department of Defense Actions, 32 C.F.R. §§ 214.1–214.6 (1989); Environmental Protection Agency Purpose and Functions, 40 C.F.R. § 1.3 (1989).

[227] 456 U.S. 305 (1982).

[228] 480 U.S. 531 (1987).

[229] *See* Sierra Club v. Marsh, 872 F.2d 497, 503–04 (1st Cir. 1989); Massachusetts v. Watt, 716 F.2d 946, 952 (1st Cir. 1983).

[230] *See Sierra Club*, 872 F.2d at 503.

from a flawed EIS.[231] Mere bureaucratic commitment and the consequent potential harm to the environment are not enough. For example, dredge wastes dumped at underwater disposal sites have to pose an actual harm to coastal waters.[232] A violation of the procedures of NEPA, coupled with mere potential harm, is not enough injury to sustain injunctive relief.

In between lie the courts of the Ninth Circuit, which require convincing proof of potential harm.[233] While the courts of the Ninth Circuit recognize the inherent dangers of bureaucratic commitment, they require a showing that potential harm likely will result. A showing of actual harm is not required. Likewise a showing that a harm potentially could occur is insufficient. The potential harm must be likely to occur.

Unfortunately, the approach of the courts in the Ninth Circuit is information-dependent. The courts must consider any and all factors involved with a project, in essence compiling their own quasi-EIS.[234] The quasi-EIS is then compared to the allegedly flawed EIS and a decision is made based upon the likely potential harms unaddressed by the official EIS. An obvious problem, beyond the burden of having to gather information in an agency-like fashion, is the possibility that insufficient data will be presented to a court. If insufficient data are presented, then a court may decide that, for example, no harm will come from the clear cutting of undergrowth in a sequoia forest.[235] Later, more thorough presentations may change a court's decision, but by then the environmental injury likely will have occurred.[236]

Equitable discretion is of little use when environmental harm likely will occur whether an injunction is issued or not. In *Morgan v. Walter*,[237] for example, the court found that environmental harm likely would occur if a project went forward under a flawed EIS.[238] The court noted, however, that the project might go forward anyway on private land with consequential harm to the environment.[239] When

---

[231] *See* Huntington v. Marsh, 859 F.2d 1134, 1143 (2d Cir. 1988); *see also* Huntington v. Marsh, 884 F.2d 648, 654 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1296 (1990).

[232] *See Huntington*, 884 F.2d at 654.

[233] *See* Sierra Club v. United States Forest Service (USFS), 843 F.2d 1190, 1195–96 (9th Cir. 1988); Save the Yaak Committee v. Block, 840 F.2d 714, 717–19 (9th Cir. 1988); Morgan v. Walter, 728 F. Supp. 1483, 1492 (D. Idaho 1989); People *ex rel* Van de Kamp v. Marsh, 687 F. Supp. 495, 501 (N.D. Cal. 1988).

[234] *See, e.g., Van de Kamp*, 687 F. Supp. at 499–501.

[235] *See USFS*, 843 F.2d at 1195.

[236] *See id.*

[237] 728 F. Supp. 1483 (D. Idaho 1989).

[238] *Id.* at 1494.

[239] *Id.*

faced with this Hobson's choice, the court retreated to the sanctuary of the law and enjoined those harms that it could reach.[240] Equitable discretion, the creation of a quasi-EIS, and the evaluation of bureaucratic commitment were of little use in balancing and preventing the likely harms to the environment to be encountered as a consequence of either decision.

The lower federal courts also are in conflict as to the use of equitable discretion, as defined in *Romero-Barcelo* and *Amoco*, to determine whether there exists bureaucratic commitment to a project as planned or, if this commitment clearly exists, whether it would harm the NEPA decision-making process.[241] For example, the Court of Appeals for the Seventh Circuit looked to the actual harms that would occur if current studies on the health effects of low-level electromagnetic radiation were not incorporated into an EIS for the Navy's project ELF.[242] In addition to finding the studies ambiguous and unpersuasive, the court of appeals weighed the possibility of bureaucratic commitment against the Navy's previously thorough Environmental Impact Statements.[243] The court of appeals found that the Navy usually took all current information into consideration.[244] If new, pertinent information became available, the Navy would take that information into account when proceeding with the project.

In other words, the organization responsible for an EIS for a project might not, in a court's view, be committed irrevocably to aspects of that project. Again, equitable discretion allows a court to determine not only the actual or probable harms to be encountered as the project progresses, but an organization's commitment to going forward with the project despite these harms.[245] If an organization seemed committed to going forward regardless of the harms, then a court might be more inclined to issue an injunction. But if an organization seemed flexible and accommodating, then a court might be disinclined to issue an injunction and more inclined to rely upon the reasonableness of the decision-makers.

These contradictory positions of the lower courts come as a direct result of the Supreme Court's decisions in *Romero-Barcelo* and

---

[240] *See id.*

[241] *Compare* Sierra Club v. Hennessy, 695 F.2d 643, 647–48 (2d Cir. 1982) *with* Massachusetts v. Watt, 716 F.2d 946, 952 (1st Cir. 1983).

[242] Wisconsin v. Weinberger, 745 F.2d 412, 422–24 (7th Cir. 1984).

[243] *Id.*

[244] *Id.*

[245] *See Hennessy*, 695 F.2d at 647–48; *Wisconsin*, 745 F.2d at 422–24.

Amoco. The requirement of actual, irreparable harm before an injunction can issue is counter to the intent of Congress in enacting NEPA.[246] Further, the Court itself has found that harm to the environment is often irreparable and should be given the consideration necessary to guard it sufficiently. Procedural diligence, and the price to be paid for the violation of required procedures, should become the prime concern of both the agencies and the courts.[247] Otherwise, merely procedural statutes such as NEPA become futile exercises in bureaucracy. Meanwhile the environment, whether harmed in direct violation of a substantive statute or indirectly through violation of NEPA, will suffer.[248]

2. Equitable Discretion and Non-NEPA Statutes in the Lower Federal Courts

The lower federal courts have rejected attempts to use equitable discretion to defeat the enforcement of non-NEPA statutes.[249] For example, in *New York v. Gorsuch*[250] the administrator of the EPA unsuccessfully appealed to the district court's equitable discretion, arguing that special considerations should block the enforcement of CAA statutory time limits under which the EPA operated. In *United States v. Wheeling-Pittsburgh Steel Corp.*,[251] the court of appeals, unlike the trial court, was unpersuaded that the unfortunate circumstances of the steel industry could be considered and that the burdens of meeting CAA standards could be eliminated by judicial fiat. Likewise, the trial court in *American Hawaii Cruises v. Skinner*[252] was unimpressed by appeals to its equitable discretion and enforced its interpretation of the Jones Act. Finally, in *United States v.*

---

[246] *See, e.g.*, Sierra Club v. Marsh, 872 F.2d 497, 499 (1st Cir. 1989).

[247] *E.g., id.* at 500 ("[T]he district court should take account of the potentially irreparable nature of this decisionmaking risk to the environment. And other courts seem to agree.").

[248] *E.g., id.* "[T]he harm at stake is the harm to the *environment*, but the harm consists of the added *risk* to the environment that takes place when the governmental decisionmakers make up their minds without having before them an analysis . . . of the likely effects of their decision upon the environment." *Id.* (emphasis in original)).

[249] While not an environmental case, Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404 (1st Cir. 1985), is interesting in its use of equitable discretion to extend the enforcement of statutory requirements. The court found that the antitrust statute did not limit equitable discretion. Therefore, the court concluded that private parties could state a claim for divestiture as part of injunctive relief. *See supra* notes 169–74 and accompanying text.

[250] 554 F. Supp. 1060 (S.D.N.Y. 1983).

[251] 818 F.2d 1077 (3d Cir. 1987).

[252] 713 F. Supp. 452 (D.D.C. 1989), *dismissed*, 893 F.2d 1400 (D.C. Cir. 1990).

Vineland Chemical Co.,[253] the court acknowledged an astute attempt by the defendant to defeat enforcement of the RCRA using the *Romero-Barcelo* precedent.

All of these cases had a common thread of argument: inequitable results if statutory law were enforced.[254] Fortunately, the Supreme Court in *United States v. City and County of San Francisco*[255] set a precedent preventing the use of equitable considerations to defeat statutory requirements. There, the city argued that enforcement of the statute had lapsed for twenty-five years; if enforcement were to commence after so long a time, circumstances unfair to the city would result. The Supreme Court, however, decided that the intent of Congress—as manifest by the language of the statute and by the legislative history—was clear. The law, once interpreted by the courts to prohibit the conduct in question, must be enforced regardless of the equitable considerations.

But because precedent is limited, the lower federal courts have a difficult time applying equitable discretion to statutes uninterpreted by the Supreme Court. Usually, a method of analogy is applied: if the statute is similar to the Clean Water Act (CWA) as interpreted

---

[253] 692 F. Supp. 415 (D.N.J. 1988).

[254] On rare occasion courts will allow prohibited activities to continue. *See* Plater, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524, 536, 560–62 (1982) (discussing *Hecht*). For example, in *Oregon Natural Resources Defense Council (ONRC) v. Marsh*, the court allowed construction of a dam to continue even though the project was found to be in violation of NEPA. 677 F. Supp. 1072, 1075, 1078 (D. Or. 1987). This construction was allowed to continue to a level that the court found would ensure the safety of lives and property downstream. *Id.* Once this level was reached, however, the court required construction to be stopped. *Id.*

Similarly, in American Motorcyclist Ass'n (AMA) v. Watt, the Court of Appeals for the Ninth Circuit allowed a desert conservation plan to be implemented despite substantial violations of the law under which the plan was developed. *AMA*, 714 F.2d 962, 964–65, 967 (9th Cir. 1983). The court, however, went on to distinguish these violations in a manner similar to that in *Romero-Barcelo* and in *Amoco*, finding the plan to be in compliance with the spirit of the law. *See id.* at 966. Congress's intent was to protect the desert in question, and the plan, though flawed, would do just that. *See id.* at 966–67.

Finally, the courts are reluctant to order the impossible or the needlessly destructive. *See, e.g.*, United States v. Niagara Falls, 706 F. Supp. 1053, 1064 (W.D.N.Y. 1989). In shaping relief for CWA permit violations, the *Niagara Falls* trial court considered capacities at which the sewage facilities could operate safely. *Id.* The court acknowledged the futility of ordering the city to process sewage at capacities sure to damage the treatment facilities. *Id.*; *see supra* note 109.

When fashioning relief, however, courts must be careful not to allow the shape of the relief to overshadow the law, as was the case in *Romero-Barcelo*. There, the Supreme Court allowed the "relief"—no injunction because a permit was being pursued—to run directly counter to the requirements of the CWA. *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982); *supra* notes 74–76 and accompanying text.

[255] 310 U.S. 16, 31 (1940).

in *Romero-Barcelo*, or ANILCA as interpreted in *Amoco*, then equitable discretion is allowed. A balance of harms must then take place. If, however, the statute is similar to the Endangered Species Act (ESA) as interpreted in *TVA v. Hill*,[256] then no equitable discretion is allowed. No balance of harms may take place.

The courts of the Ninth Circuit, particularly, have incorporated this method of analogy, with varying results. In *Northern Cheyenne Tribe v. Hodel*,[257] the court compared the FCLAA to the ESA and the CWA, looking at the intent of Congress as defined by the statutory requirements. The court found the FCLAA most like the CWA, relying upon the reasoning of the Supreme Court in *Romero-Barcelo*: no harm would come to the substantive goals of the FCLAA if the coal leases in question were frozen instead of completely voided. By harm, the court meant the harm defined in *Romero-Barcelo*: actual, irreparable harm to the moving party, not just potential or temporary harm. Using the standard of *Romero-Barcelo*, the court found within its discretion the power to limit the sanctions for the violation of the statute.

Conversely, in *Friends of the Earth v. United States Navy*,[258] the court of appeals compared a provision of the NDAA—its language, history, and structure—to the ESA and found that Congress had limited equitable discretion. The court found it significant that the only method to enforce the Act was via injunctive relief. This single method of enforcement required the court to enjoin further work on the project, regardless of the type of work or the probability that the necessary permits would be issued.[259] Contrary to *Romero-Barcelo*, no actual harm was necessary beyond the mere violation of statutory requirements.

Finally, in *Wilderness Society v. Tyrrel*,[260] this method of analogy apparently became precedent for the courts of the Ninth Circuit. When faced with a statute that the Supreme Court has not interpreted in terms of equitable discretion, such as the WSRA, a court must compare that statute to the ESA and ANILCA. Consequently, in the Ninth Circuit, before any balancing of the equities can take place, a federal court must look to the statute and determine whether

---

[256] 437 U.S. 153 (1978).

[257] 851 F.2d 1152 (9th Cir. 1988).

[258] 841 F.2d 927 (9th Cir.), *modified*, 850 F.2d 599 (9th Cir. 1988).

[259] *Cf.* Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982) (the Court refused to allow injunction, based upon probability that permit would be issued coupled with lack of actual environmental harm and national security value of project).

[260] 701 F. Supp. 1473, 1478 (E.D. Cal. 1988).

Congress has limited equitable discretion. This determination, however, encompasses both the unique circumstances of the case and the legislative and textual considerations of the statute. The courts will consider not only whether the statute is structured similarly to the ESA or ANILCA, but also whether Congress intended the statute to apply to the situation in dispute.[261] The harms to the parties are persuasive factors in deciding whether the statute should apply.[262] Consequently, however, once the determination is made as to the limits upon equitable discretion, not much else remains to be balanced. Equitable discretion has, in effect, been subsumed by statutory interpretation.

In summary, the courts of the Ninth Circuit have come almost full circle in their reasoning. The courts of that circuit now balance the probable harms in light of the statute at issue. Violation of the statute, in most cases, gives sufficient weight to the probable harms, and injunctive relief usually follows. This consideration of statutory requirements is similar to that used by the courts of the First Circuit when considering NEPA injunctions, as in *Massachusetts v. Watt*,[263] where probable harms, as defined by the statute, were enough to tip the balance in favor of injunctive relief. Similar reasoning should be adopted by the other circuits.

B. Supreme Court Precedent Is Unclear Because the Court Has Obfuscated a Process That Is Essentially One of Statutory Interpretation

Given any case in which continued violations of statute are at issue, the Supreme Court has a choice of precedent. If the Court decides that Congress has limited equitable discretion, then the Court would add to its *TVA v. Hill*[264] line of precedents and would find an injunction appropriate. If the Court decides, however, that Congress has not limited equitable discretion, then the Court would add to its *Weinberger v. Romero-Barcelo*[265] line of precedents and likely would find an injunction inappropriate.[266]

---

[261] *See, e.g., id.* at 1478 (court compared assured destruction of snail darter habitat with contested allegations of harm to the river area).

[262] *See, e.g., id.* at 1478–79 (irreparable nature of environmental harm makes presumption of harm for violation of statute unnecessary).

[263] 716 F.2d 946 (1st Cir. 1983).

[264] 437 U.S. 153 (1978).

[265] 456 U.S. 305 (1982).

[266] The Court usually finds that equitable discretion has not been limited and then disallows an injunction to stop statutory violations. *See, e.g.*, Amoco Prod. Co. v. Village of Gambell,

In deciding which precedent to follow, the Court would look to the statute itself, as well as to the legislative history and the circumstances of the case. When Congress's mandate is clear, as in *TVA* when the Court found a strict prohibition against harming an endangered species,[267] then no equitable discretion would be available. No harms could be balanced. But when Congress's mandate does not clearly encompass the circumstances of the case, as in *Romero-Barcelo* when the Court found no strict prohibition against dumping munitions into coastal waters as long as those waters were not harmed,[268] then equitable discretion would be available. The Court then could balance the harms and make a decision as to the necessity of an injunction.

The statutory language necessary to limit a court's equitable discretion is unclear.[269] The method that the Supreme Court has applied to interpret congressional intent is inconsistent from case to case. In *TVA*, the Court identified language from the legislative histories that indicated the paramount importance of preserving endangered species.[270] Equitable arguments to the contrary were insufficient to overcome this clear mandate from Congress.[271] The Court refused to weigh the necessity of the project against the unknown potential value of an endangered species, and instead reserved this balance of policy priorities for the legislature.[272]

Conversely, in *Romero-Barcelo* the Court ignored clear statutory language limiting the discharge of munitions into coastal waters.[273] Instead, the Court looked to the intent of Congress in enacting the statute—clean water—and relied upon the determination by the trial court that the bombing was not a harm to water quality.[274] Because

---

Alaska, 480 U.S. 531, 544 (1987); *Romero-Barcelo*, 456 U.S. at 314. The Court has yet simultaneously to find unlimited equitable discretion and to allow an injunction to issue. In other words, "equitable discretion" is a signal from the Court that it will not issue an injunction, even though the harms are supposedly balanced.

[267] *See TVA*, 437 U.S. at 184–86; *supra* notes 33–36 and accompanying text.

[268] *See Romero-Barcelo*, 456 U.S. at 314–15; *supra* notes 71–74 and accompanying text.

[269] The courts are subordinate to legislative mandate except when exercising the rights of judicial review. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 283 (1989). An analysis of legislative supremacy is beyond the scope of this Comment.

[270] *See TVA*, 437 U.S. at 177–87.

[271] *See id.* at 193–94; *supra* note 35 and accompanying text. The government would lose millions if the project were abandoned. *TVA*, 437 U.S. at 172. Also, Congress had been made aware of the controversy and yet continued to vote funds for the project. *Id.* at 189.

[272] *See TVA*, 437 U.S. at 194.

[273] *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 308–09 (1982); *supra* note 69 and accompanying text.

[274] *See Romero-Barcelo*, 456 U.S. at 314–15; *supra* notes 71–72 and accompanying text.

Congress meant to prohibit the discharge of munitions only if water quality were being harmed, the Court could determine that equitable discretion had not been limited. Finally, because equitable discretion had not been limited, equitable considerations such as national security could be weighed and, indeed, were found to outweigh bald statutory prohibitions.

The Court attempted to distinguish the outcome in *Romero-Barcelo* from the outcome in *TVA*.[275] In *TVA*, the extinction of a species was at stake. If the Court did not follow the prohibitions of Congress, then a potentially valuable life form would be lost forever. In *Romero-Barcelo*, however, not only were the stakes not as great—the level of water quality in the waters off a bombing range—but the possible harm was reparable. If, however, the courts always have retained the power to fashion injunctive relief, as the Court reasoned in *Romero-Barcelo*,[276] then the Court in *TVA* should have been able to shape an injunction to accommodate all parties. The Court could have issued an order prohibiting the impoundment of water until the endangered species had been relocated successfully, or the Court could have required that genetic samplings of the endangered species be taken and stored.[277] The specific shape of the remedy would have been unimportant, though, as long as the intent of Congress—the preservation of an endangered species—were accomplished.

The intent of Congress, however, might not be defined so easily. In *Griffin*,[278] the Court found clear statutory language: if a seaman's pay were retained illegally, then each and every day of retainment had to be counted toward compensation.[279] Further, the Court found that Congress's intent in enacting the statute was in part punitive.[280] Therefore, an award of $302,790.40 for the wrongful withholding of

---

[275] *See Romero-Barcelo*, 456 U.S. at 314.

[276] *See id.* at 312–13.

[277] The price control statute in *Hecht*, which allowed the courts to issue an "injunction . . . or other order," could be seen as a codification of the courts' ability to shape remedial relief. *See* Hecht Co. v. Bowles, 321 U.S. 321, 322, 326–27 (1944); *supra* notes 61–62 and accompanying text. If, however, the courts traditionally have had the ability to shape relief regardless of statutory mandate, then this phrase in the statute is superfluous. Congress likely recognized the heavy burdens upon regulated businesses in its requirement that an injunction "shall" issue upon the determination of violations. *See id.* Knowing that the courts would be bound by such a strict statutory requirement, Congress no doubt expressly allowed the courts to have discretion in shaping remedial relief under the statute by including the phrase "or other order" in the provisions. *See id.*

[278] Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982).

[279] *See id.* at 570.

[280] *Id.* at 572.

$412.50 was well within the intent of Congress, even though the award was nearly 734 times the amount withheld.

The district court and the court of appeals, however, had held an award of $6881.60 to be sufficiently punitive and within the intent of Congress.[281] Further, in dissent, Justice Stevens found room for the lower courts' determinations in his interpretation of the phrase "[wages withheld] without sufficient cause."[282] Justice Stevens reasoned that, once a seaman became gainfully reemployed, there arose sufficient cause to withhold wages and the counting of days would stop.[283] Therefore, while the intent of Congress was clearly punitive, the extent of the punishment was a matter of interpretation.

Even with the text of the statute and the full legislative history as a guide, the decision of the Supreme Court in any single case cannot be predicted. Congress has available no magic words to limit the courts' equitable discretion. Even if Congress states explicitly in a statute that certain conduct is prohibited or required, such as the discharge of munitions into coastal waters, the courts nevertheless can exercise their equitable discretion—their interpretation of the intent of Congress—and allow the conduct to continue or lapse. Conversely, if the courts decide to hew close to the textual line, disregarding the equitable circumstances of a case, as in *Griffin v. Oceanic Contractors, Inc.*, then absurd consequences may result.

There are few Supreme Court precedents as to the limits of equitable discretion. Because of this paucity of precedent, the lower courts have developed contradictory methods for applying equitable discretion. Further, because these methods are contradictory, the decisions issued by courts applying these methods are likewise contradictory: cases with similar facts may be decided differently from circuit to circuit.

To alleviate these problems, the Supreme Court should acknowledge that statutory interpretation lies at the heart of equitable discretion. While the Court couches its reasoning in terms of equity and the fashioning of remedial relief, in reality the Court merely is interpreting statute.[284] The Court has asserted that it may utilize

---

[281] *See id.* at 568.

[282] *See id.* at 583–84 (Stevens, J., dissenting).

[283] *See id.* at 580, 583 n.9 (Stevens, J., dissenting).

[284] *Cf.* Plater, *supra* note 254, at 527–28 (once a statute is interpreted to prohibit an act, courts cannot apply equitable discretion to allow act to continue; such discretion would be judicial amendment of the statute); Comment, *Preliminary Injunctions as Relief for Substantial Procedural Violations of Environmental Statutes: Amoco Production Co. v. Village of Gambell*, 4 ALASKA L. REV. 105, 106 (1987) (interpretation of Congress's intent and nature

discretion and allow violations of statute to continue. But the Court is not exercising this discretion. Instead, the Court is placing disputed conduct outside the statute; the Court is interpreting the statute so that disputed conduct is not a violation.[285]

In *Romero-Barcelo*, the Court interpreted the CWA and found that Congress had not intended to prohibit flatly the discharge of pollutants without a permit.[286] Specifically, the Court found that Congress had not intended to prohibit the Navy from inadvertently dumping munitions during the course of target practice. While the discharge of munitions into coastal waters without a permit was prima facie illegal, the dumping of munitions by the Navy did not quite fit within the intent of this prohibition.[287] The *Romero-Barcelo* Court effectively interpreted the CWA to exclude the Navy's target practice from its provisions.

Similarly, in *Amoco Production Co. v. Village of Gambell, Alaska*,[288] the Court found the Secretary of the Interior's actions to be within the spirit of those required by ANILCA, though not within the actual procedures of ANILCA.[289] Because the Secretary had complied with the intent of the statute, no substantive violation of ANILCA had occurred. Equitable discretion, and an injunction requiring the Secretary to comply with the procedures, would be unnecessary.

Finally, though *TVA* was to the contrary, the Court could have used reasoning similar to that of *Romero-Barcelo* and *Amoco* to allow the dam to be completed. While the text of the ESA flatly prohibited the destruction of an endangered species' habitat, the statute could have been interpreted to allow for the completion of the project. By following Justice Powell's arguments in dissent, the Court could have found that Congress had not intended the ESA to apply retroactively

---

of harm to be remedied or prevented by statute determines restrictions on courts' equitable discretion).

[285] *See* Amoco Prod. Co. v. Village of Gambell, Alaska, 480 U.S. 531, 544 (1987); Weinberger v. Romero-Barcelo, 456 U.S. 305, 314–15 (1982); *cf. supra* note 266.

[286] *See Romero-Barcelo*, 456 U.S. at 314–15.

[287] The Court indicated that, if a permit were not being pursued, then the equities would have to be rebalanced. *Id.* at 315 n.9. The Court, however, did not say what would be the likely result of this rebalancing. The Court went on to note that the Navy's pursuit of a permit was being blocked by further litigation. *Id.* Because it could know neither the length of this litigation nor the outcome, the Court in effect was giving the Navy permission to continue the munitions discharges indefinitely. This permission belies the Court's assertion that it merely was shaping a temporary remedy and reinforces the argument that the Court interpreted the CWA not to include the munition discharges.

[288] 480 U.S. 531 (1987).

[289] *Id.* at 544.

to projects already begun.[290] Similarly, the Court could have found that Congress had not intended the ESA to apply to species listed as endangered after a project had already begun. Lastly, the Court could have found that Congress had modified the ESA by appropriating funds for the project while aware of the possible extermination of a species by the project.[291]

In each instance, the Court would have been using what it would term equitable discretion, that is the power to withhold an injunction when Congress's intent is unclear. The statute would have been interpreted to exclude the particular circumstances of the project and, because there then would have been no violation of statute, an injunction would have been unnecessary. The project could go forward and the law would be intact.

The Supreme Court should acknowledge equitable discretion to be nothing more than a process of statutory interpretation. The law, then, would be more predictable. Lower court decisions would be less contradictory, and the task of making a decision in any single case would be simpler. The courts, via statutory interpretation, would decide if Congress meant to prohibit the conduct in question. If Congress did not prohibit the action, then no injunction would issue. If, however, Congress meant to prohibit the conduct in question, then an injunction would be required.

Harm to one party or the other is almost inevitable when statutory law is enforced. The courts, however, must place these harms within the context of the statute. These harms then become an element of statutory interpretation, whereas under the process of equitable discretion these harms are balanced in a vacuum beyond the limits of statute. While absurd results are possible when statutes are interpreted closely, the potential for harm from equitable discretion is greater.

One potential harm, especially acute in the context of preliminary injunctions, would be decisions made by the courts based upon insufficient information. For example, the harms to the reproductive cycle of giant sequoias from the clear cutting of undergrowth might not be fully represented to a court. The court would then balance the harms on an insufficient record and likely disallow an injunction. The harm prohibited by Congress—avoidable damage to the environment—would then occur.[292] Conversely, if a court examined the

---

[290] *See* TVA v. Hill, 437 U.S. 153, 201–02, 205–06, 210 (1978) (Powell, J., dissenting).

[291] *Cf. id.* at 189–93.

[292] *See* Sierra Club v. United States Forest Service, 843 F.2d 1190, 1194–96 (9th Cir. 1988)

possible harms in light of the statute, an injunction would likely issue.

Statutory interpretation is the province of the courts.[293] Equitable discretion cuts too close to legislative prerogative. Elected officials have the responsibility to choose socially significant policies: to weigh the value of a water project against the value of an endangered species, or the value of clean water against national security, or the value of oil exploration against aboriginal subsistence. The courts are not equipped to decide these social issues, and the practical impact of the Supreme Court's attempts to balance the equities is that of prolonged litigation.[294] Conversely, when the Court interprets the law and does not balance the equities, litigation usually ends and the legislature, if necessary, makes adjustments to the law.[295]

When Congress enacts a statute that includes procedures or requirements, Congress is doing more than evincing its intent. Sta-

---

(harms from clear cutting in sequoia groves not apparent until damage done); *supra* notes 136–40, 237 and accompanying text.

[293] *See TVA*, 437 U.S. at 194–95; United States v. 9/1kg Containers, 854 F.2d 173, 179 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1118 (1989) ("Judges' role is to decipher and enforce the existing scheme, whatever they think of its wisdom.").

[294] *See, e.g.*, Village of Gambell v. Hodel, 869 F.2d 1273, 1275, 1280 (9th Cir. 1989) (remand of case to district court for factfinding almost two years after Supreme Court decision in *Amoco*); United States v. Puerto Rico, 721 F.2d 832, 833–34 (1st Cir. 1983) (jurisdiction of subsequent suit over NPDES permit process decided a year and a half after Supreme Court decision in *Romero-Barcelo*).

If the Court had found against the Navy in *Romero-Barcelo*, then the Navy would have had to obtain the permit as required by the government of Puerto Rico. If, however, the Navy could not comply with the permit process, then the Secretary of Defense could have applied to the President for an executive order exempting the target practice from the permit requirement. Weinberger v. Romero-Barcelo, 456 U.S. 305, 318–19 (1982). In other words, Congress had allowed the President the power to weigh national security interests against the desirability of clean water.

If the Court had found against the Secretary of the Interior in *Amoco*, the oil exploration would have been postponed while the Secretary held hearings and made inquiries into the impact of the exploration on subsistence uses. Once this inquiry was complete, however, the native Alaskans likely would not have had any need for litigation—their subsistence concerns would have been heard, considered, and met if the procedures of ANILCA were followed. Further, even if the Alaskans wished to litigate, their recourse to the courts would have been limited by the Secretary's adherence to procedure.

[295] No further litigation followed the decision in *TVA*. Congress, however, amended the ESA, creating a committee to study the problem and to issue an ESA exemption to the project, if warranted. *See* 16 U.S.C. § 1536(e) (1988). After a period of inquiry the committee unanimously decided not to grant an exception. Farber, *supra* note 1, at 518 ("The dam, the committee believed, was a dubious venture from the beginning, quite aside from its effect on the snail darter."). Contrary to this decision, Congress voted to allow the project to continue. *Id.* Reports indicate, however, that the snail darter survived the flood and is doing fine. *See More Darters*, 16 NAT. J. 1456 (1984).

tutory procedures are the steps to be taken, the hash marks of progress toward compliance with the intent of the law. If the courts are allowed to use their equitable discretion to enforce the perceived intent of Congress, divorced from the enacted requirements of Congress, then all the minutiae and nuances of legislation will be compromised. The courts might then become not enforcers and interpreters of the law, as is their true role in government, but legislators furthering their sense of judicial self.

IV. Conclusion

The Supreme Court has taken contradictory positions on whether equitable discretion may be used to permit violations of statutes to continue. In one line of cases, the Court decided that Congress had limited equitable discretion via statute. In another line of cases, the Court decided that Congress had not limited equitable discretion. Neither line of cases identified the exact statutory language necessary to limit equitable discretion, and neither line of cases made clear under what circumstances the courts could employ equitable discretion.

Consequently, the lower courts have taken contradictory positions on whether certain statutes limit equitable discretion or not, and under what circumstances equitable discretion may or may not be employed. This contradiction is especially apparent in cases arising under the National Environmental Policy Act: the courts of the First Circuit will issue injunctions based upon harm likely to result from bureaucratic inertia, whereas the courts of the Ninth Circuit will only issue injunctions based upon the likelihood of physical harm to the environment.

Because of these contradictions in lower court decisions, the Supreme Court should avoid the label "equitable discretion." Instead, the Court should acknowledge that the determination as to whether a statute has limited equitable discretion is, in reality, mere statutory interpretation. The Court has stated that the courts have the power under equity to allow violations of statutes to continue. But this power may be limited by Congress via statute. Therefore, because there are no magic words that Congress may use to limit or allow equitable discretion, the statute must be interpreted as to whether or not discretion has been limited in light of the circumstances of each case. If the statute is interpreted to prohibit the actions in question, then an injunction must issue. If, however, the

statute is interpreted not to prohibit the actions in question, then no injunction would be available because there would be no violation of the law.

The courts, therefore, do not have the power to allow violations of statutes to continue. Nevertheless, they do have the power to interpret statutes in light of the circumstances of each individual case. Factors such as the likelihood of harm to the parties, the likelihood of harm to third parties, the likelihood of harm to the public interest, and exigent or exculpatory situations may be considered by the courts during the interpretation of a statute. Foremost in the courts' reasoning should be whether a statute was meant to prohibit the conduct at issue, not whether a statute allows for the exercise of equitable power. Once this question is answered, there is no longer a need for equitable discretion.