
NATURAL RESOURCES JOURNAL

Volume 23
Issue 2 *Spring 1983*

Spring 1983

Environmental Water Law

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COMMENTS

ENVIRONMENTAL WATER LAW

ENVIRONMENTAL LAW—FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972: The equitable discretion of federal courts to curtail violations of federal acts through the use of the injunction. *Weinberger v. Romero-Barcelo,* 102 S. Ct. 1798 (1982).

INTRODUCTION

On March 1, 1978, the Governor of Puerto Rico filed suit in the Federal District Court to enjoin the United States Navy from using Vieques Island as an air-to-ground weapons training ground.[1] The Navy had begun using the Island of Vieques and the surrounding area for extensive weapons training in the early 1970s. As a result, bombing and shelling ordnance was discharged into the water surrounding Vieques on a regular basis.[2]

The Governor claimed that the bombing violated numerous federal environmental statutes including the Federal Water Pollution Control Act (FWPCA).[3] The district court found that the Navy violated the FWPCA by failing to obtain an NPDES permit[4] which would have allowed the discharge of ordnance into the waters surrounding Vieques Island.[5]

The NPDES permit system is the method by which Congress controls water quality.[6] The permit process allows discharge of pollutants only after the Environmental Protection Agency (EPA) has approved the discharge as meeting legally established water pollution control standards.[7]

1. Barcelo v. Brown, 478 F. Supp. 646, 651 (D.P.R. 1979), *rev'd sub nom,* Romero-Barcelo v.Brown, 643 F.2d 835 (1st Cir. 1981), *rev'd sub nom,* Weinberger v. Romero-Barcelo, 102 S. Ct. 1798 (1982).

2. Brief for Respondents at 5, Weinberger v. Romero-Barcelo, 102 S. Ct. 1798 (1982).

3. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, 33 U.S.C. §§ 1251–1376 (1976) (hereinafter referred to as FWPCA).

4. NPDES permit is a commonly used acronym for a National Pollution Discharge Elimination System permit, provided for in 33 U.S.C. § 1342 (1976).

5. Barcelo v. Brown, 478 F. Supp. at 705.

6. "There can be no doubt that the most effective control mechanism for point source of discharge is one which will provide for the establishment of conditions of effluent control for each source of discharge. A permit or equivalent program . . . should provide for the most expeditious water pollution elimination program." S. Rep. No. 414, 92d Cong. 1st Sess. 72 (1971). With the 1972 amendments as to the FWPCA, the permit system replaced water quality as the measure for pollution control. "Water quality will be a measure of program effectiveness and performance, not a means of elimination and enforcement." *Id.* at 8.

7. 33 U.S.C. §§ 1311, 1342 (1976).

By defining pollutants broadly and giving EPA review over the discharge of pollutants, all sources of possible harmful pollution are monitored. Since the whole pollution control scheme depends on the permit process under the FWPCA, no discharge of pollutants are allowed without an NPDES permit.[8]

According to the clear language of the statute, the Navy was discharging pollutants without an NPDES permit.[9] However, the district court did not enjoin the Navy from its continued use of the Island as a weapons training ground but ordered the Navy to apply for an NPDES permit "with all deliberate speed."[10] The court found that compliance with the act could be accomplished by its order to apply for a permit, without issuing an injunction in the interim. The injunction would have curtailed the Navy's training activity until the permit was obtained.

In deciding not to issue an injunction, the district court concluded that under a traditional balancing of equities, the public interest in the training activities and the national security it produced outweighed the slight environmental impact that the bombing had on the ecology surrounding the Island.[11] Thus, an injunction was not appropriate in this situation, although under the clear mandate of the FWPCA a permit was required to continue operations.[12]

On appeal, the First Circuit reversed and remanded to the district court to enter an order insuring that the Navy would stop discharging ordnance into the coastal waters of Vieques until they either obtained an NPDES permit or a presidential exemption from the NPDES requirements.[13] In so holding, the First Circuit found that the district court was incorrect in applying a traditional balancing approach when faced with a clear, continuing violation of a federal statute. Instead, under *Tennessee Valley Authority v. Hill* (TVA),[14] Congress' prohibition against discharging pollutants without a permit should have been the controlling factor in shaping relief and should have mandated an immediate abatement, in the form of an injunction, of any continuing violation.[15]

The Supreme Court granted certiorari in order to address the question of whether the FWPCA curtails the federal courts' traditional equitable functions when they are designing relief from violations of the statute.[16]

8. 33 U.S.C. § 1311 (1976).

9. Munitions are explicitly included in the definition of pollutant. 33 U.S.C. § 1362(6) (1976).

10. Barcelo v. Brown, 478 F. Supp. at 708.

11. *Id.* at 706–708.

12. *Id.* at 708.

13. Romero-Barcelo v. Brown, 643 F.2d 835, 862 (1st Cir. 1981), *rev'd sub nom,* Weinberger v. Romero-Barcelo, 102 S. Ct. 1798 (1982). 33 U.S.C. § 1323(a) (Supp. III 1979) allows the President to exempt governmental agencies from compliance with the NPDES permit process upon finding that it is of "paramount interest to the United States to do so."

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

15. Romero-Barcelo v. Brown, 643 F.2d at 861–62.

16. Weinberger v. Romero-Barcelo, 102 S. Ct. at 1800 (1982).

The Court concluded that absent a clear congressional manifestation of intent to alter the federal courts' discretion in shaping equitable remedies, the courts may balance. The Supreme Court found no such intent in the FWPCA. Therefore, the district court was correct in balancing the equities when granting relief from continuing violations of the act.[17]

BACKGROUND

The injunction is an equitable remedy which has been traditionally used to curtail an activity which threatens immediate and irreparable harm to the person seeking relief.[18] In granting this type of prohibitory relief, a doctrine of weighing equities has arisen in which the court balances the countervailing hardships which may be suffered by one or the other parties in the granting or denying of an injunction.[19]

The injunction, in modern times, is not only used as a method of solving private disputes, but is also utilized as a means to immediately curtail illegal activity. A conflict arises when the injunction is used in a statutory context. The court is faced with an absolute duty of enforcing a legislative mandate with a judicial tool which in theory depends on a discretionary balancing of equities. Thus a court may have a duty to stop a continuing violation of a statute while finding that to do so would be more detrimental than allowing the violation to continue.

Arguably, the abatement of statutory violations by injunction calls for a different balancing approach than that taken in a private action.[20] This theory presumes that a legislative body balances the equities before declaring that a certain activity is a statutory violation. Thus priorities of behavior are set according to legislative balancing of public interests and hardships.[21] The court's duty is not to reweigh the hardships but to enforce the statute in the most effective manner. A court does not have equitable discretion in setting priorities of behavior but retains discretion in deciding how best to enforce the policies set by the statute.[22] Thus the court still has equitable discretion in granting an injunction. But, that discretion is limited to deciding whether an injunction is necessary to stop further violations of the act.

Until *Weinberger v. Romero-Barcelo*[23] the Supreme Court had never explicitly decided what part congressional enactments play in shaping the

17. *Id.* at 1807.

18. 4 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1338 (5th ed. 1941).

19. Yakus v. U.S., 321 U.S. 414, 440 (1944); H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 144 (2d ed. 1948).

20. Plater, *Statutory Violations and Equitable Discretion,* 70 CALIF. L. REV. 524 (1982).

21. *See* Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 601–10 (1952) (Frankfurter, J., concurring).

22. *See* Plater, *supra* note 20. Steven's dissent in Weinberger v. Romero-Barcelo follows this line of reasoning in upholding the Court of Appeals decision.

23. 102 S. Ct. 1798 (1982).

federal courts' equitable discretion. In *Hecht Co. v. Bowles*[24] the Supreme Court in highly ambiguous language recognized that congressional acts prohibiting certain activities have some sort of impact on equitable discretion.[25] What that impact is has remained unclear. Some decisions have suggested that congressional enactments merely represent a stated public policy to be given consideration in a traditional balancing of equities.[26] Others have recognized that legislation restricts the discretion of the courts to deciding only what remedy will best effectuate Congress' stated policy.[27] In any event, no Supreme Court decision under any theory has allowed a violation of a statute to continue until *Romero-Barcelo*.

ANALYSIS

With *Romero-Barcelo*, nearly thirty years after *Hecht*, the Supreme Court has chosen the direction it will take concerning the weight to be given congressional pronouncements of public policy. The Supreme Court's position is that unless Congress clearly expresses its intention to limit the exercise of judicial discretion, a traditional balancing approach by the federal courts will be followed.[28] According to the Supreme Court's analysis, courts must initially decide when Congress has given a clear indication of intent to limit judicial discretion in deciding what activity shall be curtailed by injunction. The Court gives us a hint of their analysis by distinguishing *TVA v. Hill*[29] from the case at bar.

In *TVA*, the Court found that a "flat ban on the destruction of critical habitats" under the Endangered Species Act[30] foreclosed judicial discretion exercised by the federal courts when granting injunctions.[31] The

24. 321 U.S. 321 (1944).

25. "The Court's . . . discretion . . . must be exercised in light of the larger objectives of the Act. For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases." *Id.* at 331.

26. *See, e.g.*, Porter v. Warner Holding Co., 328 U.S. 395 (1946); Winner, *The Chancellor's Foot and Environmental Law: A Call for Better Reasoned Decisions on Environmental Injunctions*, 9 ENVTL. L. 477, 506–10 (1979).

27. *See, e.g.*, Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978). For a general discussion of the cases between Hecht and Romero-Barcelo *see* Plater, *supra* note 14, at 559–83.

28. 102 S. Ct. 1798, 1803–04 (1982).

29. 437 U.S. 153 (1978). TVA involved the fate of an endangered species of fish called the snail darter. The snail darter's only habitat was in a part of the Little Tennessee River which was to be completely inundated by a reservoir created by the completion of the Tellico Dam. The Tellico Dam was a public works project begun by the TVA in 1967 for a multitude of purposes including generating electricity, and providing recreation and flood control. The completion of the dam would have destroyed the specialized habitat on which the snail darter's survival depended. *Id.* 157–62.

30. Pub. L. No. 93-205, 87 Stat. 884, 16 U.S.C. §§ 1531–1543 (1976). The provision which the Court finds conclusive of Congressional intent to preclude judicial discretion is section 1536. "All other Federal departments and agencies shall . . . insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of (any) endangered species . . . or result in the destruction of habitat of such species which is determined . . . to be critical."

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

district court was precluded from deciding between the public importance of the Tellico Dam and the snail darter. Congress had already balanced the equities. It chose the snail darter over the dam.

In *Romero-Barcelo*, however, the Supreme Court confronted a slightly different statutory approach. The FWPCA does not absolutely bar pollution; it bars pollution without an NPDES permit.[32] The Court found this distinction significant in ascertaining congressional intent. Since Congress did not ban all pollution it has not set fixed priorities of behavior which would foreclose an equitable balancing. The Supreme Court validated the district court's actions by ordering the court of appeals to review the district court's balancing for abuse of discretion.[33] The district court was allowed to measure the public harm that this violator committed by his pollution and balance that harm against the public harm which might result if the injunction were granted.

While distinguishing between the Endangered Species Act and the FWPCA, the Court disregarded the fact that Congress flatly banned the activity engaged in by the Navy—polluting without a permit.[34] The Court has further allowed the violation of a federal environmental act to continue while steps are taken to comply with the statute.[35] The Court suggests that it will allow continuing violations for a short period of time when ordering compliance, if the Court finds that the violation will not "appreciably harm" a public interest (here the environment) and that the compliance will be forthcoming.[36] In fact, the Court is acknowledging the public policy behind the statute, water pollution control, while disregarding the regulatory scheme of the statute, the fact that a violation has and will continue to occur.

Secondly, the Court, in examining the statutory scheme for dealing with water pollution by phased compliance, found Congress' intent to be flexible in regard to water pollution. This is evidenced by the permit process itself and by the discretion allowed the Environmental Protection Agency to shape remedial consent orders.[37] The Court has extended the

32. "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (1976). Section 1342 provides for the issuance of a permit "for the discharge of any pollutant, or combination of pollutants, notwithstanding § 1311(a) . . ."

33. Justice Powell in his concurrence reviewed the District Court's action for abuse of discretion and would have affirmed their decision. Weinberger v. Romero-Barcelo, 50 U.S.L.W. 4434, 4438 (1982) (Powell, J., concurring).

34. "The Amendments established a new system of regulation under which it is illegal for anyone to discharge pollutants into the Nation's water except pursuant to a permit." Milwaukee v. Illinois, 451 U.S. 304, 310–11 (1981).

35. "In essence, the District Court's remedy was a judicial permit exempting the Navy's operations in Vieques from the statute until such time as it could obtain a permit . . ." 102 S. Ct. at 1809 (1982) (Stevens, J., dissenting).

36. 102 S. Ct. at 1807 (1982).

37. *Id.* at 1805–06 (1982).

flexibility granted to the Environmental Protection Agency in enforcement to include judicial equitable discretion. The courts are thus given the ability to independently weigh the environmental impact of a pollution source before the Environmental Protection Agency (the agency with the expertise to make such an investigation) has an opportunity to examine the environmental impact. In practical effect, this gives a violator two levels of review, one by the district court in shaping its remedy to insure compliance and one by the Environmental Protection Agency in the NPDES permit process—the review contemplated by Congress.

Finally, the Court effectively disposes of the argument that the presidential exemption provision of the FWPCA is the exclusive method of exemption under the Act.[38] The Supreme Court stated that it was not exempting the violator from compliance but merely allowing the violation to continue temporarily until compliance is achieved.[39] The difference is a matter of semantics. The President may grant an exemption for up to one year with extensions thereafter from the permit process upon a finding of paramount public interest.[40] The courts, after this opinion, can grant a "temporary" exemption while the violator takes steps to comply with the statute. The court need only find that a countervailing public hardship would result if an injunction were granted.[41] Both approaches allow temporary noncompliance. The one significant difference is, if the violator is unsuccessful in gaining a permit from the Environmental Protection Agency under court order, the court will need to reconsider its original decision in granting relief. On the other hand, no further action is necessary once the President has granted an exemption.

IMPLICATIONS AND CONCLUSIONS

Romero-Barcelo has important implications concerning the continued enforcement of the FWPCA as well as all other environmental acts. The decision explicitly allows district courts to perform an equitable balancing under the FWPCA when faced with a continuing violation of the Act. Thus, in a case where the pollution is potentially more hazardous than in *Romero-Barcelo*, the district court is left with the task of finding facts of a technical nature concerning harm to the environment. Until a permit

38. 33 U.S.C. § 1323(a) (1976 and Supp. III 1979).

39. 102 U.S. at 1806 (1982).

40. 33 U.S.C. § 1323(a) (1976 and Supp. III 1979).

41. The irony is that a court's temporary exemption may last longer than a year. That is certainly true in this case. After the Supreme Court decided Romero-Barcelo the Navy filed with EPA for a permit. However, the Commonwealth of Puerto Rico has refused to issue a water quality certificate. Without such a certificate, the EPA will not issue a NPDES permit. The Navy is presently seeking to have the denial of the certificate overturned in U.S. district court. *See* United States v. Commonwealth of Puerto Rico, No. 82-0726, slip op. (D.P.R. Nov. 16, 1982).

is granted or denied by the Environmental Protection Agency, the district court is allowed to substitute its non-expert findings in place of the Environmental Protection Agency's expertise concerning water pollution control. Furthermore, the only review of the district court's decision by an appellate court will be for abuse of its equitable discretion. In effect, a district court's decision allowing continued violations of the FWPCA may, if erroneous, result in devastating harm to the environment until the permit is denied and the pollution is finally curtailed.

The implication of this decision to other environmental acts is also important. The Supreme Court presumes that Congress does not intend to restrict the equitable jurisdiction of the federal courts. The Supreme Court is thus telling Congress that a statute's policy enunciation is only one of many factors courts need consider when weighing equitable considerations. Behavior condemned by Congress may not automatically be enjoined by the judiciary.

Further, it is difficult to predict from *TVA* and *Romero-Barcelo* in what statutory patterns the Supreme Court is likely to find clear congressional intent to curtail equitable discretion. Congress' definite setting of priorities under the Endangered Species Act between the importance of the snail darter's habitat over the Tellico Dam and the extremely flexible phased compliance scheme of water pollution in *Romero-Barcelo* represent two ends of a spectrum. A host of statutory schemes will have to be litigated in order to bring into sharper focus how the Supreme Court will continue congressional intent. After *Romero-Barcelo*, however, the possibility remains that Supreme Court construction of congressional intent in other environmental statutes will depend on the environmental policies of the court making the determination.

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