

PRELIMINARY INJUNCTIONS, AND STAYS  
PENDING APPEAL IN ENVIRONMENTAL LITIGATION

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## 1. Introduction

Interlocutory injunctive relief is an important and integral aspect of environmental litigation.<sup>2</sup> Historically, injunctive relief has been used primarily in governmental enforcement efforts<sup>3</sup> and by environmental groups. Although a review of the reported cases indicates that governmental efforts are currently less frequent than they have been in the past, injunctive relief still remains an important enforcement mechanism. Moreover, members of the regulated community are attempting to utilize this interlocutory remedy to frustrate governmental action with a fair degree of frequency.<sup>4</sup>

The examination of interlocutory injunctive relief in a course in environmental litigation is also appropriate because certain of the procedural elements of this remedy receive unique treatment in the environmental context. Perhaps a reason for this treatment is that interlocutory relief touches a fundamental aspect of environmental law, the tension between procedural fairness and the protection of the public from unreasonable risks.<sup>5</sup> Furthermore, recent environmental cases have tended to examine applications for final injunctive relief under criteria most frequently used in adjudications involving interlocutory relief. This phenomenon, which ultimately may impair interlocutory practice, may also signal a hesitation to allow environmental statutes to overshadow other public issues which are regarded, at least in the context of current litigation, as having greater public importance.<sup>6</sup>

## 2. Rules Governing Interlocutory Injunctive Relief

The law relating to interlocutory relief is primarily judge-made common law superimposed on meager procedural rules. For the purpose of instruction, the Federal Rules of Civil Procedure are used. State procedural rules normally either adhere to, or mirror, federal procedures.

Applications for grants of injunctive relief prior to a final judgment are governed by Rule 65 of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."). Stays or injunctions pending appeal are governed initially by Rule 62, Fed.R.Civ.P., and Rule 8, Federal Rules of Appellate Procedure. Rule 65 in pertinent part provides:

## (a) PRELIMINARY INJUNCTION.

- (1) NOTICE. No preliminary injunction shall be issued without notice to the adverse party.
- (2) CONSOLIDATION OF HEARING WITH TRIAL ON MERITS. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury....

The granting of a temporary restraining order or preliminary injunction pursuant to Rule 65 typically rests in the sound discretion of the trial court.<sup>7</sup> Rule 65 is procedural in nature, and district judges are guided by traditional equity doctrines and by the statutes upon which plaintiffs' claims are grounded.<sup>8</sup>

Rule 18, Federal Rules of Appellate Procedure, "Stays Pending Review," regulates stays of agency orders during the review of agency decisions. Similar provisions exist for appeals to the Supreme Court. See, e.g., Rule 27, Rules of the Supreme Court of the United States, "Stays Pending Review on Certiorari."

3. Preliminary Injunctions

A preliminary injunction is intended to preserve the status quo and prevent irreparable injury to the plaintiff during the course of litigation.<sup>9</sup>

(a) Standards For Granting Relief

The courts have traditionally considered four factors in determining whether a preliminary injunction should be granted:

- (i) The probability of plaintiff's success on the merits;<sup>10</sup>
- (ii) Irreparable nature of harm to the plaintiff;
- (iii) The balance of hardships between the parties;<sup>11</sup> and
- (iv) Where appropriate, as in environmental cases, the public interest.

Traditional analysis has required the movant to demonstrate a substantial likelihood of success on the merits, a substantial threat that he will suffer irreparable harm unless the preliminary injunction is granted, that the threatened injury if the injunctive relief is denied outweighs the possible harm to defendants if relief is granted, and that issuance of injunctive relief will serve the public interest.<sup>12</sup> Indeed this is still the law being applied by many courts.<sup>13</sup> The Second and Ninth Circuits, however, have spearheaded a rearticulation of the standards for obtaining preliminary injunctions.<sup>14</sup>

The revised standards for granting a preliminary injunction in the Second Circuit are:

a showing of (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief. The rule thus recognizes two tests; as we have previously observed however, "[b]oth require a showing of irreparable harm." Under the first test, the movant may succeed if he shows irreparable harm, plus a likelihood of success on the merits. Under the second test, the movant may succeed if he shows irreparable harm, plus sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardship tipping decidedly toward the movant.<sup>15</sup>

The Second Circuit has further held that "the more lenient standard of 'serious questions going to the merits and a balance of hardships,' instead of the 'likelihood of success on the merits' standard [will not be applied] when the preliminary injunction is sought by a government agency," Resolution Trust Corp. v. Elman,<sup>16</sup> or "where the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory regulatory scheme . . ." Plaza Health Laboratories, Inc. v. Perales.<sup>17</sup>

The Ninth Circuit's test is articulated as follows:

In order to obtain a preliminary injunction, a party must demonstrate either (1) a likelihood of success on the merits and a possibility of irreparable injury, or (2) the existence of serious questions on the merits and a balance of hardships tipping in its favor. [citation omitted] These two legal standards are not distinct, but rather extremes of a single continuum. Id. In cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff.<sup>18</sup>

Nonetheless, even in the Ninth Circuit, "[a] showing of irreparable harm is a prerequisite for the issuance of a preliminary injunction in any case." Earth Island Institute v. Mosbacher.<sup>19</sup>

The movant, therefore, whatever nuance is interjected into the various tests supplied by the circuits, has a heavy burden of showing some likelihood of success on the merits and of demonstrating irreparable harm.<sup>20</sup>

A Seventh Circuit case, Cronin v. United States Dep't of Agriculture ("Cronin"),<sup>21</sup> is particularly instructive on preliminary injunctions in environmental litigation. Judge Posner's opinion in Cronin is a succinct precis on the availability and procedure for preliminary injunctions in cases involving judicial review of agency action. Judge Posner initially notes: "[w]hen persons harmed by administrative action bring a suit for injunction . . . it is not because they want, or are entitled to, a trial."<sup>22</sup> Judge Posner then observes that reviewing courts do not generally take evidence. An evidentiary hearing "may be necessary to reconstruct the agency's action or the grounds thereof, if the action and its grounds were not set forth in a written decision . . . though an even better response might be to stay the judicial review proceeding until the agency completed the record."<sup>23</sup> However, Judge Posner's further qualification really goes to the heart of interlocutory practice:

[O]nly in an emergency should a reviewing court, whether a district court or any other federal court, conduct its own evidentiary hearing.<sup>24</sup>

The Cronin court then sets forth the general preliminary injunction standard. However, Judge Posner observes:

But all this assumes that the decision whether to grant or deny the preliminary injunction is preliminary to a full hearing on the plaintiff's claim. If it is not . . . then considerations of irreparable harm are out the window and the only question is whether the plaintiff is entitled to an injunction, period.<sup>25</sup>

Thus the court appears to tie entitlement to a preliminary injunction to an entitlement to a plenary trial. Concluding that because evidentiary trials are inappropriate in a review of agency action, the court states that a preliminary injunction would only be available in the following limited circumstances:

- (i) If the administrative record is so vast or complicated that the district judge cannot analyze it and make his final decision in time to avert harm to the plaintiff due to delay;
- (ii) If the record is incomplete when suit is filed and if "time is pressing"; or
- (iii) If an evidentiary hearing is necessary in order to reconstruct the grounds or contents of the agency's decision and the alternative of staying a review proceeding or further administrative action is infeasible because timing is critical.<sup>26</sup>

Presumably, the Seventh Circuit would have litigants move only for summary judgment to prevent or restrain agency action.<sup>27</sup> However, this would appear to be wrong as quite often a litigant must seek interlocutory relief long before the agency answers the complaint and/or certifies the administrative record.

(b) The Nature of Irreparable Injury

The plaintiff has a heavy burden in demonstrating the sine qua non of interlocutory relief: irreparable harm.<sup>28</sup> Speculation on the prospect of injury is insufficient; there must be a likelihood that irreparable harm will occur.<sup>29</sup> As one court stated, "mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough."<sup>30</sup>

In New York v. Nuclear Regulatory Commission, the court declared that the "alleged threats of irreparable harm" must be "actual and imminent, [and] not remote or speculative."<sup>31</sup>

Applying this principle to the facts in that case, the court found that "appellant . . . failed to establish that there is any but the most remote of possibilities that an accidental crash of an airplane transporting [nuclear material] will occur and that, even if it did occur, the crash would result in the various catastrophic consequences appellant prophesies [sic]."<sup>32</sup>

Irreparable injury is characterized as a harm that, at the conclusion of a trial on the merits, cannot be adequately compensated by a monetary award or other forms of recovery available at law.<sup>33</sup> Courts have found the threat of irreparable injury to exist in a variety of contexts. As one leading commentator noted:

A preliminary injunction has been issued to prevent harm to the environment, as, for example, enjoining dredging operations in living coral reefs that were about to be declared a national monument. Irreparable harm also has been found in the loss by an athletic team of the services of a star athlete, suspension of a boxing license of the World Heavyweight Champion, and the payment of an allegedly unconstitutional tax when state law did not provide a remedy for its return should the statute ultimately be adjudged invalid.<sup>34</sup>

In New York v. NRC, the Court indicated two bases for determining irreparable harm:

- (1) [T]he action sought to be enjoined would have produced an irreversible and irretrievable commitment of resources that would have made it virtually certain that a missing . . . [environmental impact statement], even if eventually completed, would never serve the purpose it was intended to serve . . .
- (2) [T]he action sought to be enjoined necessarily would have caused immediate, demonstrable and irreparable damage to the environment.<sup>35</sup>

Accordingly, we can assume that a preliminary injunction will be granted as long as the other requirements of the various tests are satisfied and it is demonstrated that irreparable injuries such as the cutting down of a forest, the digging up of a natural area, or even the discharge of deadly poisons into the environment will occur.

Two district court cases highlight the difficulties the movant may face in proving irreparable

harm in a particular situation. The two cases split on whether government killing of wildlife causes irreparable harm to users of recreational lands. The District of Utah found no irreparable harm while the D.C. District found that the loss of aesthetics due to the "sight, or even contemplation" of such killing constituted irreparable harm.<sup>36</sup>

The magnitude of the harm and its likely duration are also factors which enter into the determination of irreparable harm.<sup>37</sup> The harm may be considered insignificant where short-term violations are proposed,<sup>38</sup> or where the threatened damage will be minimal and retrievable.<sup>39</sup>

Other distinctive issues considered in determining irreparable harm are (1) incremental investments in environmentally harmful projects, (2) cumulative harm, and (3) latent and uncertain injuries.<sup>40</sup>

In Wisconsin v. Weinberger,<sup>41</sup> the Seventh Circuit, on review of the lower court's grant of an injunction, found no basis for concluding that irreparable damage would be avoided by the granting of an order for interlocutory relief. The 1984 case involved litigation over whether a supplemental environmental impact statement ("SEIS") was a prerequisite under NEPA before the Navy reactivated and expanded a low frequency submarine communication facility. An environmental impact statement ("EIS") had been prepared in 1977 when the project was first begun. The action arose when the Navy decided to expand its facility after new information had emerged regarding the biological effects of low frequency electromagnetic radiation.

After a trial on the merits, the district court enjoined the Navy from further construction on the facility until an SEIS was prepared. The district court's decision rested on a finding that the Navy abused its discretion. It posited that the Navy was predisposed in favor of the project by virtue of its investment. This, according to the court, frustrated NEPA policy because NEPA requires consideration of environmental factors.

The Seventh Circuit reversed, holding that:

this interest will be only marginally served by the injunction in an ongoing project such as this one . . . This commitment, largely in terms of research and development dollars, was well established by the time plaintiffs got around to filing their lawsuit in mid-1983. By contrast, the commitment entailed by the remaining construction effort in Wisconsin and Michigan is relatively small, and thus the injunction's service to NEPA in preserving unbiased decision-making would be slight.

\* \* \*

The risk the district court found from resource commitment, the only designated basis for the injunction, is wholly inadequate to enjoin this project.<sup>42</sup>

The Seventh Circuit opinion in Wisconsin v. Weinberger illustrates the nature of irreparable harm required to invoke the equitable powers of the court. Moreover, viewed from the opposite

angle, it demonstrates the latitude of a court's discretion to refrain from issuing an injunction when the balance favors other interests. The Sixth Circuit also illustrated its interpretation of irreparable harm in City of Mount Clemens v. EPA,<sup>43</sup> where the city constructed a wastewater treatment plant with local funds and later sought sequestration of federal funds. The court found that no irreparable injury would occur because the city sought merely an alternative source of funds.<sup>44</sup>

(1) Proof Of Irreparable Harm

In a significant decision, Manufacturing Chemists Association v. Costle,<sup>45</sup> the court granted chemical industry plaintiffs a preliminary injunction against the implementation of EPA's hazardous substance effluent regulations promulgated under the Federal Water Pollution Control Act ("FWPCA" or "Clean Water Act"). Finding that immediate implementation would result in irreparable harm, the court stated:

[S]hould the new regulations be implemented immediately, many chemical manufacturers would be subject to severe penalties for violating the new standards. Two courses are therefore available to them. They would be forced either to cease operations completely or to spend millions of dollars (over an extended period of time) to purchase and install the new control systems necessary to bring facilities into compliance with the regulations, even before a final determination on the actual validity of the regulations has been rendered.<sup>46</sup>

In finding that a preliminary injunction "would not result in significant injury to the defendants," the court stated that:

The languor that has characterized the entire process of developing the challenged regulations indicates that immediate implementation is by no means essential to protection of the environment or the public interest . . . [T]he court need only find that the public will not be materially harmed if the regulations are not implemented until a decision on the merits is rendered. The controlling considerations are clear and conclusive in the case at bar:

Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable, if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable . . . the injunction usually will be granted.' Ohio Oil v. Conway, 279 U.S. 813, 815 (1929).<sup>47</sup>

The relevance of delay suggested by the court in Manufacturing Chemists Association has also been applied in evaluating plaintiff's claims of irreparable injury. In Quincy Orchard Valley Citizens Association, Inc. v. Hodel,<sup>48</sup> the circuit court upheld the district court's denial of plaintiffs' motion for preliminary injunction enjoining construction of a highway through a park. Observing that plaintiffs had waited nine months after the final EIS had been issued and at least six months

after the necessary federal approvals had been granted before filing the suit and requesting a preliminary injunction, the court of appeals found that the district court properly concluded that much of plaintiffs' potential harm was a product of their own delay.<sup>49</sup> Recognizing that laches is not a favored defense in environmental cases, the court stated: " 'Although a particular period of delay may not rise to the level of laches and thereby bar a permanent injunction, it may still indicate an absence of the kind of irreparable harm required to support a preliminary injunction.'"<sup>50</sup>

Even when the moving party has shown probable success on the merits and irreparable harm, preliminary relief may be denied if the balancing of hardships or public interest tips the scales in the opposite direction. In East 63rd Street Association v. Coleman,<sup>51</sup> the court, in denying a preliminary injunction, found that the primary public interest lay with rapid completion of a subway. In 1000 Friends of Oregon v. Kreps,<sup>52</sup> the Court found that the balance of hardships weighed against enjoining a federal grant for a storm sewer.<sup>53</sup>

## (2) Failure To Prove Irreparable Harm

The equitable basis of a court's power to issue an injunction is perhaps most apparent in the heavy burden imposed upon a party seeking interlocutory relief to show irreparable harm. A decision by a lower court in the Third Circuit illustrates the exacting standards applied to motions for a preliminary injunction. In Industrial Park Development Co. v. EPA,<sup>54</sup> a property owner sought a preliminary injunction to prevent EPA access to his land to remove hazardous waste material. The Court denied the property owner's prayer for relief despite a finding in favor of movant's likelihood of success on the merits: "There was no showing of irreparable injury in the absence of injunctive relief . . . [A]ny unwarranted or unconstitutional trespass [could] be adequately compensated by a monetary award."<sup>55</sup>

## (3) Balancing Public Interest

Because environmental cases by their nature have a significant public interest component, courts necessarily place particular emphasis on this factor in deciding whether to issue a preliminary injunction. Hence, in addition to demonstrating probable success on the merits and irreparable harm, the moving party must also show that the public interest favors granting the interlocutory relief.

In Massachusetts v. Clark,<sup>56</sup> the court issued a preliminary injunction prohibiting the Secretary of the Interior from conducting Part I of the Outer Continental Shelf Lease Sales based on violation of NEPA. The court, having found in favor of the movants as to probable success on the merits, irreparable harm, and balance of equities, went on to weigh the public interest factor in the following terms:

[p]laintiffs must also prove that the public interest will not be harmed by the issuance of the injunction. Clearly two different but perhaps equally important public interests are at stake here. This conflict or perhaps uncertainty is best evidenced in the conflicting mandates sent from the United States Congress to the Secretary of the Interior; on the one hand he is required to establish an orderly program of off-shore

resource development; on the other, he is specifically forbidden to lease areas of great environmental sensitivity . . . .

\* \* \*

Because I find that the risk to an enormous and important tract of the Atlantic Ocean bed is of relatively greater risk to the public interest than a delay in the hasty leasing of those lands in the absence of any indication that any, let alone large quantities, of non-renewable resources will be there, I find that the public interest will not be harmed by the granting of the injunction.<sup>57</sup>

The court in American Motorcyclist Association v. Watt,<sup>58</sup> denied preliminary injunctive relief, concluding that it would not serve the interests of the public, nor the policies underlying the Federal Land Policy and Management Act (FLPMA) and NEPA. Litigation arose over the Interior Department's "Desert Conservation Area Land Management Plan," which allegedly violated FLPMA and NEPA. Despite the district court's finding of a strong likelihood that the Association and state planning agency would prevail on the merits, a balancing of public interest factors supported denial of the motion. This decision rested on the conclusion that enjoining implementation of the Interior Department's Plan would leave desert resources vulnerable to permanent damage.<sup>59</sup> Hence, a balancing of public interest factors may overcome the presumption favoring an injunction for violations of FLPMA and NEPA.<sup>60</sup>

Similarly, the Eleventh Circuit in Sierra Club v. Georgia Power Co.<sup>61</sup> affirmed the district court's decision to deny preliminary injunctive relief where it had found that the imposition of the injunction would not be in the public interest. There, the plaintiff had sued to enjoin the defendant from discharging heated waste water into a lake to avoid killing fish.<sup>62</sup> Pointing out that the only way for the defendant to discharge water at lower temperatures was to decrease the amount of power the defendant generated, the district court found that the preliminary injunction was not in the public interest.<sup>63</sup> The district court concluded that the impact to the public of reducing the amount of power the defendant generated outweighed the harm to lakeside residents, especially in light of evidence showing that fish kills resulting from warm lake temperatures were temporary, insignificant, and would not hurt the health of the lake in general.<sup>64</sup>

Public interest factors and concerns can also support the granting of a preliminary injunction. In People ex rel. Van De Kamp v. Tahoe Regional Planning Agency,<sup>65</sup> it was held that the Court has "greater power to fashion equitable relief in defense of the public interest than it has when only private interests are involved."<sup>66</sup> Thus, public interest factors can tip the scales in favor of granting a preliminary injunction just as they may in favor of denying interlocutory injunctive relief.<sup>67</sup>

(4) Problems In Demonstrating Irreparable Injury In Air And Water Cases

Where discharges of wastewater and airborne pollutants have been ongoing for many years and the plaintiff cannot demonstrate an imminent health hazard, it is more difficult to obtain a preliminary injunction.<sup>68</sup> The difficulty in obtaining injunctive relief increases when the penalty is tantamount to shutting down an industrial polluter.<sup>69</sup> Thus, in Sierra Club v. Larson, the court did not enjoin further construction of a harbor tunnel project despite violation of permit procedures leading to violations of the Clean Air Act.<sup>70</sup> On the other hand, where the plaintiff seeks to obtain speedy compliance with a permit for a state implementation plan which does not require the drastic economic dislocations associated with the shutting down of industrial facilities, the plaintiff will have an easier time in demonstrating irreparable injury.<sup>71</sup>

The plaintiff normally will be expected to demonstrate irreparable injury, and is permitted to do so through sophisticated expert testimony. Thus, experts may be able to demonstrate that the added contaminants introduced by unlawful discharges may result in irreversible adverse increments to health.<sup>72</sup> This type of demonstration must be sufficiently clear to overcome defendant's argument that the plaintiff cannot point to any illnesses directly related to the contaminants issuing from the defendant's plant.

#### (5) NEPA Cases

While irreparable injury has been found in NEPA cases where governmental agencies would have made "irreversible commitments of resources,"<sup>73</sup> not all governmental action constitutes irreparable injury. Thus, Mr. Justice Marshall refused to enjoin the opening of bids in the outer continental shelf oil and gas lease litigation, stating:

Nor is it necessary for me to act in this case "to preserve the rights of the parties pending the final determination of the cause." The Court of Appeals concluded that plaintiffs would not be irreparably injured if the Secretary were permitted to open the bids. I cannot say that the court abused its discretion. It is axiomatic that if the Government, without preparing an adequate impact statement, were to make an "irreversible commitment of resources," a citizen's right to have environmental factors taken into account by the decisionmaker would be irreparably impaired. For this reason, the lower courts repeatedly have enjoined the Government from making such resource commitments without first preparing adequate impact statements.<sup>74</sup>

Commentators and some courts have suggested that the mere violation of NEPA constitutes irreparable injury:

The National Environmental Policy Act of 1969 guarantees citizens the right to have environmental factors taken into account by government decision makers. Therefore, an 'irreversible commitment of resources' without the preparation of an adequate environmental impact statement constitutes irreparable injury.<sup>75</sup>

This contention, however, has been rejected in some circuits and considerable doubt has been cast upon this doctrine by the Supreme Court's decision in Village of Gambell.<sup>76</sup> In that case, the Second Circuit stated:

It is true . . . that appellant has pointed out cases which do appear to support appellant's position that any NEPA violation constitutes, per se, irreparable harm so as to require the issuance of preliminary injunctive relief, see, e.g., Environmental Defense Fund v. Tennessee Valley Authority, 468 F.2d 1164, 1184 (6th Cir. 1972); Scherr v. Volpe, 466 F.2d 1027, 1034 (7th Cir. 1972); Izaak Walton League v. Schlesinger, 337 F. Supp. 287, 295 (D.D.C. 1971), but, . . . the law in this circuit is clear on this issue and directly contrary to the position appellant would have us adopt. In Conservation Society of Transportation, 508 F.2d 927 (2d Cir. 1974), vacated on other grounds and remanded, 423 U.S. 809, 96 S. Ct. 19, 46 L.Ed. 2d 29 (1975), we were confronted with the precise argument appellant advances here and we responded as follows:

Although the procedural requirements of NEPA must be followed scrupulously and cost or delay will not alone justify noncompliance with the Act, where the equities require, it remains within the sound discretion of a district court to decline an injunction, even where deviations from prescribed NEPA procedures have occurred.<sup>77</sup>

The Ninth Circuit has also held that "in the context of environmental injury, irreparable damage is not presumed . . ." <sup>78</sup> As indicated, though, the Second Circuit's evaluation of the need to show specific irreparable injury independent of a statutory violation in NEPA cases is not universal. In Environmental Defense Fund v. Tennessee Valley Authority,<sup>79</sup> the Sixth Circuit noted that plaintiffs would suffer irreparable harm if a preliminary injunction was not granted, and in the final analysis based its decision to affirm the issuance of the preliminary injunction on appellee's violation of NEPA:

Finally, the preliminary injunction . . . is the vehicle by which a declared congressional policy can be effectuated. Sufficient irreparable harm, even apart from the considerations discussed above, can be found in the continuing denial by applicant of appellee's right under NEPA . . . and this is enough to justify issuing the injunction.<sup>80</sup>

In Sierra Club v. Marsh,<sup>81</sup> the First Circuit vacated the decision of the district court, which held that a violation of National Environmental Policy Act, without more, does not raise presumption of irreparable injury. The First Circuit held: "the harm at stake in a NEPA violation is a harm to the environment, not merely to a legalistic procedure," nor, for that matter, merely to psychological well-being.<sup>82</sup>

(c) Avoiding The Burden Of Proving Irreparable Injury

(1) General Rule

Because irreparable injury, the key factor in prayers for interlocutory relief, is either difficult or extremely costly to prove, government agencies and private litigants have attempted to avoid the burden by arguing that it can be dispensed with where the activity sought to be restrained is statutorily proscribed and interlocutory relief is specifically provided for by statute.<sup>83</sup>

(2) Analysis Of Supreme Court Authority

Any analysis of a movant's ability to dispense with proof of irreparable harm must start with two Supreme Court decisions. Although restricted, attempts to avoid the burden of proving irreparable harm have not been entirely eliminated by the Supreme Court's decisions in Weinberger v. Romero-Barcelo,<sup>84</sup> and in Amoco Production Co. v. Village of Gambell.<sup>85</sup> In the former case, the Court overturned the First Circuit's adoption of a per se rule that a violation of the FWPCA mandates the granting of an injunction. A commentator writes:

The importance of the Court's opinion may lie in the analysis it followed in rejecting the per se rule. As it had in TVA v. Hill [437 U.S. 153], the Court looked to the statutory scheme as a whole to see if Congress intended to require an automatic injunction.<sup>86</sup>

Perhaps more to the point of this discussion of interlocutory relief, the Court observed that it had "repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies."<sup>87</sup>

Romero-Barcelo deserves special consideration in light of the Court's recent decision in Village of Gambell. The earlier case arose from an effort to enjoin the Navy from intentionally discharging ordnance into the water surrounding an island in the Commonwealth of Puerto Rico, on the grounds that the Clean Water Act required the Navy to apply for a NPDES permit and be granted the same in order to conduct those activities. The district court found that the Navy had violated the terms of the Clean Water Act, but declined to enjoin future violations on the ground that the Navy was only technically violating the Act and that its violations were causing no appreciable harm to the environment.<sup>88</sup> The district court further declared that the balancing of harms favored the Navy and that the general welfare of the nation would be impaired if an injunction were issued. Accordingly, it required only that the Navy comply with the Act and apply for a NPDES permit.

The court of appeals vacated this order and remanded with instructions that the district court enjoin future discharges of ordnance until the Navy was in full compliance with the Act.<sup>89</sup> In 1982, writing for a divided Court, Mr. Justice White delivered an opinion reversing the Court of Appeals decision. Although the Supreme Court did not discuss certain of the standards set forth above, namely, the probability of success on the merits, the Court did consider other elements relevant to preliminary injunctions such as the balance of hardships, the nature of irreparable injury and the public interest.

The Court initially declared that an injunction is an exceptional remedy issued not as of

course, but only in extreme circumstances. A second point emphasized by the Court was that an injunction arises from the doctrine of equity, that it should be utilized flexibly to arrive at a reconciliation or compromise between competing interests. The Court also proclaimed that courts of equity must pay particular regard to the public consequences of their decisions in employing "the extraordinary remedy of injunction."<sup>90</sup> The Court's most significant ruling was that though Congress may intervene and explicitly direct the courts' discretion, Congress must be imputed a knowledge of these previously listed, historically established principles of equity. Thus, in TVA v. Hill, 437 U.S. 153 (1978), the Court held that Congress, in the Endangered Species Act, required the courts to enjoin any action which would threaten the habitat of any endangered species, in that case the completion of a dam which would have endangered the habitat of the snail darter. In Mr. Justice White's words, Congress had explicitly "chosen the snail darter over the dam."<sup>91</sup>

Here, the Court concluded that Congress had not been so explicit: Congress, imputed a knowledge of the courts' discretion in equity, left the final balancing of interests to the courts; the courts are not required to automatically issue an injunction but rather are required to weigh the equities. The Court reasoned, in its footnote 7, that the Clean Water Act is similar in some respects to nuisance suits, wherein the courts are allowed to use their ingenuity in fashioning equitable remedies: the "integrity of the Nation's waters," the Court observed, "not the permit process," is the purpose of the Clean Water Act.<sup>92</sup> The Supreme Court concluded that the district court had determined that the discharge of ordnance was not causing harm to the waters. Thus, it concluded that the district court was correct to strike the balance that it did: it was likely that a permit eventually would be issued,<sup>93</sup> and the public interest favored the Navy's continued testing of its ordnance.

Village of Gambell arose from a Ninth Circuit decision wherein the plaintiff sought to preliminarily enjoin all activity in connection with the leasing of certain off-shore lands to oil companies on the grounds that the Secretary of the Interior had failed to comply with certain sections of the Alaska National Interest Lands Conservation Act ("ANILCA"). ANILCA requires the Secretary to evaluate the effect of the use of such lands and to determine that such use is necessary, will involve the minimal possible amount of public lands, and that reasonable steps will be taken to minimize adverse impacts. The district court denied plaintiff's motion on the grounds that ANILCA did not apply to the off-shore lands in question.

The court of appeals reversed this ruling and remanded the issue relating to whether the Secretary had substantially complied with ANILCA in the course of complying with other environmental statutes. Plaintiff moved again for a preliminary injunction, but despite its finding that the Secretary had failed to comply with ANILCA, the district court denied plaintiff's motion on the grounds that the likelihood of irreparable harm did not favor the plaintiff, that the public interest<sup>94</sup> favored continued oil exploration and that such exploration would not cause the type of harm ANILCA was designed to prevent. The court of appeals reversed the district court again and granted plaintiff a preliminary injunction, on the grounds that the district court had not properly balanced irreparable harm or properly evaluated public interest, that plaintiff had established a strong likelihood of success on the merits by demonstrating that the Secretary had failed to comply with ANILCA, and that such a failure was tantamount to irreparable injury.<sup>95</sup> Mr. Justice White,

again writing for the Court, delivered an opinion reversing the ruling of the Court of Appeals.

The thrust of the Supreme Court's opinion is that Village of Gambell cannot be distinguished from Romero-Barcelo. The Court reasoned that a judge sitting in equity must balance competing claims and fashion an equitable remedy; he is not obligated to mechanically grant an injunction for every violation of law; injunction is an exceptional remedy, and should not be issued as of course. Just as in Romero-Barcelo, Mr. Justice White declared, the court of appeals had made the mistake of focusing upon the integrity of the permit or evaluation process rather than upon the integrity of the environment. If there is no appreciable harm threatened to the environment, then the violation of a statute designed to protect the environment is not necessarily an irreparable injury.

The district court had determined that exploration activities would not adversely affect the uses of the lands ANILCA was designed to protect. Nevertheless, the court of appeals found irreparable injury on the grounds that such injury is presumed when an agency fails to thoroughly evaluate the environmental impact of its proposed actions as required by the statute. This assertion, and the doctrine arising from similar cases was dealt a severe blow by Village of Gambell.

This presumption is contrary to traditional equitable principles and has no basis in ANILCA. Moreover, the environment can be fully protected without this presumption, . . . If [injury to the environment] is sufficiently likely . . . the balance of harms will usually favor the issuance of an injunction to protect the environment. Here, however, injury . . . from exploration was not at all probable. And on the other side of the balance of harms was the fact that the oil company . . . had committed approximately \$70 million . . .<sup>96</sup>

Furthermore, Mr. Justice White concludes, the Circuit Court erred in finding that the "public interest . . . served by federal environmental statutes, such as ANILCA, supersede[s] all other interests that might be at stake."<sup>97</sup>

The effect of Village of Gambell on the movant's burden of proving irreparable harm turns on the interpretation by lower courts of the standard established in Gambell. There appears to be complete agreement in cases decided after Gambell that a bare assertion of violation of an environmental statute does not satisfy the requirement of showing irreparable harm.<sup>98</sup> However, no other clear rule on what constitutes irreparable harm has emerged from the post-Gambell cases, and as a consequence the burden faced by a movant in these cases varies greatly across courts. Two approaches to the Gambell treatment of irreparable harm can be identified. Both profess to follow the "traditional balancing of the equities"<sup>99</sup> mandated by Gambell.

One approach appears to hold that as long as serious environmental injury is reasonably foreseeable the equities favor the issuance of an injunction on the ground that there is a presumption that environmental injury is irreparable.<sup>100</sup> This interpretation of the Gambell standard derives its authority from the statement that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often of permanent or at least of long duration, *i.e.*, irreparable,"<sup>101</sup> and from the Court's conclusion that when environmental harm is "sufficiently

likely, the balance of harms will usually favor the issuance of an injunction to protect the environment."<sup>102</sup> Since this interpretation finds in Gambell a presumption that environmental injury is irreparable, the movant's burden is not substantially heavier than in pre-Gambell cases.

The other interpretation of the Gambell irreparable injury standard views the balance of equities as involving an equal weighing of the harm to both parties. Environmental injury is not weighted more heavily. Movants faced with this standard consequently bear a heavy burden. The incremental and non-monetary nature of the harm they allege works against them when compared with the large dollar figure losses cited by their opponents.<sup>103</sup>

Authority for this interpretation is found in the concept of performing a balance of "the competing claims of injury"<sup>104</sup> which seems to implicate an equal weighing. Buttrressing this interpretation is the observation in Gambell that the public interest encompasses more than just protection of the environment and that the impact of economic losses on the public interest may be considerable.

### (3) Statutory Basis

The First Circuit has addressed the effect of Village of Gambell on its earlier decisions concerning evaluation of irreparable injury where plaintiffs seek to enjoin action that allegedly violates NEPA. In a leading case, Sierra Club v. Marsh,<sup>105</sup> the First Circuit reversed the district court's denial of the Sierra Club's request for a preliminary injunction based on the trial court's conclusion that Gambell "severely undercut" previous First Circuit precedent.<sup>106</sup>

In Marsh, the Sierra Club sought to preliminarily enjoin construction of a causeway and other facilities in connection with a proposed cargo terminal on Sears Island on the Maine Coast. The Sierra Club's primary claims concerned alleged inadequacies in the project's final EIS. The district court denied the Sierra Club's request for a preliminary injunction based primarily on its reading of Gambell as requiring the plaintiffs to show the likelihood of irreparable environmental harm in addition to, and independent of, a showing of a likely violation of NEPA procedure.<sup>107</sup> Because the district court found that actions that would be undertaken absent a preliminary injunction would not likely cause irreparable environmental injury,<sup>108</sup> the court denied the request.

In reversing the district court, the First Circuit first explained that its pre-Gambell precedent at issue, Massachusetts v. Watt,<sup>109</sup> did not stand for the principle that upon plaintiffs showing a likely violation of NEPA procedure, irreparable injury supporting a preliminary injunction automatically follows from the "procedural" harm to the environmentally informed decisionmaking process that NEPA mandates.<sup>110</sup> Rather the court wrote:

the harm at stake [in a NEPA violation] is a harm to the environment, but the harm consists of the added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment. NEPA's object is to minimize . . . the risk of uninformed choice, a risk that arises in

part from the practical fact that bureaucratic decisionmakers (when the law permits) are less likely to tear down a nearly completed project than a barely started project. In Watt we simply held that the district court should take account of the potentially irreparable nature of this decisionmaking risk to the environment when considering a request for preliminary injunction.<sup>111</sup>

In reaching its conclusion that Watt was not inconsistent with Gambell, the First Circuit reasoned that an important distinction could be drawn between the statutes at issue in those cases. While ANILCA and NEPA are both "procedural" statutes in the sense that both set forth procedures that governmental decisionmakers must follow before taking an action that might harm the environment (NEPA) or harm subsistence uses (ANILCA), the court stated that NEPA, unlike ANILCA, is purely procedural.<sup>112</sup> The court stressed that ANILCA substantively curtails the range of permissible choices but NEPA does not. The court explained the importance of that distinction to issuance of preliminary injunctions.

Insofar as a procedural failure leads to an improper choice, a court, under ANILCA but not under NEPA, may require the decisionmaker to choose a new action; and this fact may make the ANILCA failure "reparable, harm" . . . [A] court, under NEPA, normally can do no more than require the agency to produce and consider a proper EIS...Given the realities, the further along the initially chosen path the agency has trod, the more likely it becomes that any later effort to bring about a new choice, simply by asking the agency administrator to read some new document, will prove an exercise in futility.<sup>113</sup>

Finally, the court observed, Watt created no special "presumption" in favor of injunctions in NEPA cases, but rather merely directed the district courts to consider the difficulty of "stopping a bureaucratic steam roller" in assessing the risk of real environmental harm from improperly informed governmental decisionmaking.<sup>114</sup> On remand, the district court found that if a preliminary injunction did not issue, the agency decisionmakers might be more inclined to adhere to their earlier uninformed decision and enjoined further construction pending compliance with NEPA.<sup>115</sup>

In International Union v. Amerace Corp.,<sup>116</sup> the district court held that wastewater discharges in violation of the Clean Water Act were irreparable injury because they constituted exactly the activity Congress sought to prohibit. This substantive violation of Congressional intent was distinguished from the procedural violations addressed by the Supreme Court in Romero-Barcelo<sup>117</sup> and Village of Gambell.<sup>118</sup> Similarly, in Earth Island Institute v. Mosbacher,<sup>119</sup> a preliminary injunction was granted to cease importation of yellow fin tuna caught in purse seine nets in the Pacific Ocean because the Secretary of Commerce had not demonstrated that the incidental takings of foreign fishermen were "comparable" with those of domestic fishermen in violation of the Marine Mammal Protection Act. This violation of the Act in direct contradiction of Congressional intent led to a finding of irreparable harm.

In United States v. Barr Laboratories, Inc.,<sup>120</sup> a district court recently held that enforcement of a federal statute reflecting the public interest implicated a different standard than the traditional

injunction test. In such a situation, a "showing of probable cause to believe that the statute is being violated may be considered a substitute for a finding of irreparable harm."<sup>121</sup> The court specifically found that an injunction based on a violation of Section 331 of the Federal Food, Drug and Cosmetic Act did not require a showing of irreparable harm.<sup>122</sup>

Motions for preliminary injunctions sought for violations of the Endangered Species Act may not be analysed under the traditional four point analysis.<sup>123</sup> In ESA cases, "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."<sup>124</sup> Thus, "a plaintiff is required to show only a 'possibility' of irreparable harm to the listed species to obtain an injunction under the ESA."<sup>125</sup>

#### (4) Imminent Endangerment Provisions

Another method government litigators and citizens<sup>126</sup> have attempted to use to circumvent the need to prove irreparable injury is the invocation of the emergency powers provisions appearing in various environmental statutes.<sup>127</sup> Four principal environmental statutes authorize the Administrator of the Environmental Protection Agency to bring suit to "immediately restrain" certain violations.<sup>128</sup> The Department of Justice has urged that these "emergency" powers lessen the burden upon the applicant for interlocutory relief.<sup>129</sup> To place this argument in context, the provisions of the applicable statutes should be examined.

The Clean Air Act, at 42 U.S.C. § 7603, provides that when the Administrator receives evidence that a pollution source is presenting an "imminent and substantial endangerment to the health of persons" he may bring suit in district court to restrain the polluter, provided that state and local authorities have failed to abate the emissions. Similarly, the Safe Drinking Water Act, 42 U.S.C. § 300(i), enables the Administrator, upon the receipt of "information" (not as stringent as the 'evidence' requirement of the Clean Air Act) of imminent and substantial endangerment, to institute a civil suit for the purposes of obtaining a preliminary injunction or TRO against the further pollution of a public water system.<sup>130</sup> The Administrator may also issue orders for the protection of the public. The FWPCA of 1972, at 33 U.S.C. § 1364(a), like the Clean Air Act, requires receipt of evidence of an imminent and substantial endangerment to health of persons before the emergency powers may be invoked. But the FWPCA also allows for such invocation where the imminent endangerment is to the welfare (i.e., livelihood) of persons.

The Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973, also provides for immediate civil action by the administrator upon receipt of evidence of an imminent and substantial endangerment to health. RCRA, however, also allows for an action where there is imminent endangerment to the environment.<sup>131</sup>

In Dague v. City of Burlington<sup>132</sup>, the Second Circuit held that the term "imminent and substantial endangerment is to be read very broadly:

Significantly, congress used the word 'may' to preface the standard of

liability: 'present an imminent and substantial endangerment to health or the environment.' This is 'expansive language,' which is 'intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risk posed by toxic wastes.'

The statute is 'basically a prospective act designed to prevent improper disposal of hazardous wastes in the future.' It is not specifically limited to emergency-type situations. A finding of 'imminency' does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present: 'An 'imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm to the public.' Imminence refers 'to the nature of the threat rather than identification of the time when the endangerment initially arose.'

In addition, a finding that an activity may present an imminent and substantial endangerment does not require actual harm.<sup>133</sup>

Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") authorizing all relief "necessary to abate" a danger or threat of release<sup>134</sup> of a hazardous substance has been found broad enough to authorize issuance of an injunction to prevent the operator of a hazardous waste facility from interfering with an EPA-approved remedy without a showing of irreparable harm.<sup>135</sup> Similarly, Section 104(e)(5)(B) of CERCLA has been found to be a sufficient basis to require a court to issue a preliminary injunction preventing interference with EPA's entry upon a demonstration that EPA has information relating to a release.<sup>136</sup>

The definition of imminent and substantial endangerment takes on great importance because of the possibility that it may obviate the need to prove irreparable injury.<sup>137</sup> Plaintiffs argue that since the imminent hazard statute allows a plaintiff to act against a potential threat without showing actual harm, there is no need to show that harm would actually result in the absence of a preliminary injunction.<sup>138</sup> As with the CERCLA cases below, many courts have agreed with this argument.<sup>139</sup>

Some courts have applied the traditional four-point test for preliminary injunctions irrespective of the fact that the administrator invokes the statutory emergency powers. Such courts find that "imminent and substantial" endangerment, though statutorily specified, is not the standard for granting a preliminary injunction or a TRO but merely the threshold that must be satisfied before the administrator can institute an "emergency" suit.<sup>140</sup> Thus, in Arkansas Peace Center v. Arkansas Department of Pollution Control and Ecology,<sup>141</sup> the court applied the four part preliminary injunction test to determine whether a preliminary injunction should issue pursuant to RCRA, 42 U.S.C. § 6972(a), to enjoin the operation of an incineration facility. In analyzing whether the injunction should issue, the Court held that "plaintiffs' probability of success is tied to their showing of potential irreparable harm. 'Imminent and substantial endangerment' is, in this Court's opinion, closely akin to irreparable harm."<sup>142</sup> The Court then issued a preliminary injunction as it found that

incineration may cause irreparable harm to neighboring residents.

However, at least three courts have held that, under CERCLA, the statutory standard is also the standard for determining whether a preliminary injunction should issue.<sup>143</sup>

In a recent CERCLA case, United States v. Ottati & Goss, Inc.,<sup>144</sup> the Justice Department argued that in entering an injunction under the first sentence of Section 106(a) of CERCLA, 42 U.S.C. §9606(a),<sup>145</sup> a district court must simply grant the EPA's requested injunctive relief unless the court determines that the requested relief is arbitrary, capricious or otherwise not in accordance with law. In Ottati, the EPA had conducted an administrative proceeding for approximately two years, compiling a 17 volume administrative record concerning an appropriate cleanup remedy for a hazardous waste site.

At the beginning of its analysis rejecting the Government's argument, the First Circuit emphasized that the EPA had not issued an administrative order pursuant to the second sentence of Section 106(a) of CERCLA. Rather, the government had sought a judicial injunction requiring the defendant to implement the cleanup remedy selected by the EPA at the end of its administrative proceeding. Analyzing the language of CERCLA Section 106(a) and the statute's various liability and enforcement mechanisms, the court concluded that the injunctive relief authorized by the first sentence of Section 106(a) was court-selected equitable relief, not relief selected in the first instance by the EPA and enforced by the district court unless arbitrary or unlawful. While the EPA's findings were certainly relevant to what relief the "public interest and the equities of the case may require," the Circuit Court soundly rejected the sharp limitation of the district court's remedial discretion advanced by the Government.

(d) Innovative Applications Of Injunction  
In The Environmental Context

In view of the ever changing field of environmental law, practitioners have adapted traditional techniques to meet the rapid pace of the law. For example, in Resolution Trust Corp. v. Polmar Realty, Inc. ("Resolution Trust"),<sup>146</sup> the court granted a preliminary injunction requiring the defendant mortgagor/owners and tenants of property to allow the Resolution Trust Company, prior to foreclosing on the property, to enter the property to conduct Phase II environmental assessment field studies. The court held that in light of United States v. Fleet Factors,<sup>147</sup> "not allowing the RTC to enter the property to perform environmental studies could force it to incur serious potential liability for environmental cleanup or else forego foreclosing on the property altogether."<sup>148</sup> The court further held that "[i]n such a situation the RTC would be unable to protect itself against the possibility of serious liability and would, accordingly, suffer irreparable harm."<sup>149</sup> The effect of Resolution Trust is that lenders will seek the relief of courts, prior to foreclosing, to enable them to enter on to property to engage in environmental testing.

In Chambers Development Company, Inc. v. Steven I. Waszen and Florence Waszen<sup>150</sup>, plaintiffs moved for a preliminary injunction to prevent defendants from dissipating assets traceable to the proceeds of the sale of contaminated property. Shortly after purchasing property, plaintiffs

learned that 125 drums of toxic waste had been buried on the site during the tenure of defendants ownership. The court held:

To obtain preliminary injunction, the moving party must show: (1) a likelihood of success on the merits and (2) a probability of irreparable harm if relief is not granted. In addition, the court must consider, where relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction and (4) the public interest.<sup>151</sup>

As to the likelihood of success on the merits, the court held that it appeared defendants had knowledge of their breach of warranties and would be liable for the environmental cleanup. As to irreparable injury, the court held that "[t]he inability to satisfy a money judgment can constitute irreparable injury."<sup>152</sup>

The court reasoned that the cost of the cleanup may exceed \$10 million dollars. It further found that over \$3.6 million of the approximate \$5 million sales price had not been transferred. Nevertheless, the court held that there was a danger of irreparable harm because defendants may transfer more money. As to the harm to the defendants, the court held that since defendants did not presently need the money they would not be harmed. As to the public interest, the court found that "[t]he public certainly has an interest in environmental matters, and in ensuring that responsible parties pay for the harm they cause to the environment."<sup>153</sup>

(e) Injunctions Against Regulatory Agencies

Members of the regulated communities have frequently sought to restrain the government from taking action. Despite a plethora of recent environmental cases which indicate that district courts lack jurisdiction to review agency action prior to the agency's attempt at judicial enforcement,<sup>154</sup> district courts may have jurisdiction to restrain agency action in instances where that agency clearly acts beyond its jurisdiction.

Under Leedom v. Kyne,<sup>155</sup> the district court may have jurisdiction when an agency action is "manifestly beyond the realm of its delegated authority."<sup>156</sup> In such a case, the federal courts would "not hesitate to intervene in pre-enforcement activity."<sup>157</sup>

Plaintiffs seeking review of agency actions based on alleged violations of environmental law have also sought preliminary relief staying implementation of the offending action pending judicial review. Such a strategy can present procedural complications where the agency has an administrative appeals process that must first be exhausted. For example, in *Nuclear Energy Institute, Inc. v. EPA*<sup>158</sup>, the state of Nevada challenged an EPA groundwater protection standard for radiation on the basis that it would fail to adequately protect human health and the environment from the dangers posed by a proposed nuclear waste repository. Nevada moved for a preliminary injunction staying application of the standard. The D.C. Circuit denied the motion because Nevada had not first sought the stay through EPA's administrative appeals process.

#### 4. Procedures For Obtaining A Preliminary Injunction

Rule 65(a)(1) Fed.R.Civ.P. specifically provides that "[n]o preliminary injunction shall be issued without notice to the adverse party." There is little other instruction in Rule 65 on the procedures for obtaining a preliminary injunction. Nevertheless, it is clear that a preliminary injunction is obtained by motion pursuant to Rule 7(b), and it is often sought through the process of an order to show cause or some other form of accelerated motion practice.

##### (a) Timing

Motions seeking preliminary injunctions may be filed at the time that the summons and complaint are filed and the only timing requirements are the requirements of Rule 6(d) and the particular district's local rules.<sup>159</sup> The usual requirements on the timeliness of motions may be circumvented when there are grounds for utilizing orders to show cause. Orders to show cause essentially shorten the period in which a motion may be brought, and can also be used to accelerate the service of process.<sup>160</sup>

##### (b) Required Documents

The basic components of an application for a preliminary injunction are (i) a notice of motion specifying time and place for the hearing of the motion for preliminary injunction, and (ii) any number of affidavits specifying the need for preliminary injunction. However, many districts also require the movant to file a memorandum of law with the moving papers. Because Rule 52(a) Fed.R.Civ.P. requires the Court to make Findings of Fact and Conclusions of Law, it may be appropriate as well to submit proposed Findings of Fact and Conclusions of Law and a Proposed Order with the moving papers.

Although motions for preliminary injunctions may be made at any time, they are usually made at the commencement of a proceeding. Indeed, the complaint may be filed at the same time that the motion papers are filed. The papers that may be needed in such situations are as follows:

- (i) Notice of Motion or Order to Show Cause bringing on a motion for Preliminary Injunction, Exhibit "A";
- (ii) Where application is sought by motion, a formal motion in districts requiring such a document;
- (iii) Summons and complaint if not filed previously;
- (iv) Supporting affidavits and exhibits;
- (v) Memorandum of Law;

- (vi) Proposed Findings of Fact and Conclusion of Law; and
- (vii) Proposed Order granting injunctive relief.
- (c) Affidavits

Not only are affidavits appropriate on motions for preliminary injunctions, typically they will be offered by all parties.

The movant must pay careful attention to specify the facts supporting his application for a preliminary injunction and to avoid conclusory allegations in his affidavits. However, it is fairly clear that the affidavits need not conform to the stringent standards of Rule 56(a), Fed.R.Civ.P.<sup>161</sup> The general rule is that, although hearsay evidence may, by itself or together with other evidence, support a preliminary injunction, such orders will not be issued where the moving papers substantiate factual allegations on "information and belief" alone.<sup>162</sup>

Where opposing affidavits demonstrate that material facts are contested, the court may order a hearing. The general rule is that, where the facts appear to be in dispute, an application supported only by affidavits will be denied.<sup>163</sup> The courts, however, have observed that in special circumstances an affidavit may be so inherently credible that it can outweigh opposing affidavits and justify ruling on a preliminary injunction even without oral testimony.<sup>164</sup>

Perhaps a note on drafting is appropriate. The movant's affidavit should eschew verbose or complex passages; it must quickly and succinctly set forth the facts supporting the elements needed to sustain a preliminary injunction.

- (d) Other Supporting Material

Preliminary injunctions may also be obtained on written material other than affidavits. Thus the courts have accepted, and indeed look favorably upon, depositions.<sup>165</sup> Similarly, transcripts of a prior hearing have been accepted.<sup>166</sup> Indeed preliminary injunctions have been granted on the basis of verified or sworn complaints and exhibits.<sup>167</sup>

There is no doubt that data gathered by EPA enforcement officers from defendants prior to the commencement of suit, if properly authenticated by affidavits, can be used to support applications for a preliminary injunction. Similarly, admissions or concessions made by attorneys, officers or agents of a defendant can be used on a motion for preliminary injunction. And finally, transcripts of enforcement conferences or other conferences containing probative evidence can be used to support the motion.

(e) Live Testimony

As noted, most circuits require factual hearings where the written evidence is disputed.<sup>168</sup> Moreover, live testimony is often desirable to illuminate a particularly complex or dry case. Indeed, the "threat" of putting on live testimony by witnesses sitting in the courtroom to resolve contentions of disputed fact is also often effective. Of course, weaknesses can also be highlighted by poorly prepared, inadequate or missing witnesses.<sup>169</sup>

(f) Use Of Discovery

As indicated, evidence obtained through the use of ongoing discovery can be used on motions for a preliminary injunction. Often overlooked is the opportunity to combine applications for accelerated discovery with applications for injunctive relief. In addition, the parties, upon the commencement of the motion, may stipulate to the maintenance of the status quo and proceed with discovery on an accelerated basis with a view to an early hearing on the motion, or a consolidated hearing and trial.<sup>170</sup>

(g) Consolidated Or Accelerated Proceedings

Rule 65(a)(2) Fed.R.Civ.P. provides, "[b]efore or after the commencement of the hearing of an application for preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application."<sup>171</sup> Thus, Rule 65 provides for a consolidation of any hearing of a motion for a preliminary injunction with any hearing required for trial. Indeed, it has long been recognized that an accelerated trial is appropriate when a preliminary injunction has been requested or granted. The ability to advance or consolidate hearings and trials appears to rest in the sound discretion of the trial court. As Rule 65(a) provides, the consolidation may be ordered "[b]efore or after the commencement of the hearing." The District Judge may transform a preliminary injunction hearing into a consolidation hearing at any time during the actual hearing.<sup>172</sup>

5. Strategy On Motions For A Preliminary Injunction

(a) Movant's Tactical Advantages

The advantages of surprise and preparation to a movant making a well-documented motion

for a preliminary injunction cannot be over emphasized. Indeed, the tactical advantages gained by advanced preparation and surprise may be so great as to be the movant's undoing. The respondent's tactic will often be to seek delays based upon his surprise and/or his inability to analyze the case and marshal evidence. Reasonable notice will go a long way to vitiating those tactics. Thus, except in cases of great emergency, care should be taken to give the defendant reasonable notice even where the proceedings are commenced by an Order to Show Cause that seeks interlocutory relief.

(b) Ascertaining The Necessity Of A Hearing

The movant must ascertain whether there is a probability that he will need to support his motion with testimony. If there is, he must prepare witnesses who can introduce testimony that will prove the contested elements. Most courts will be reluctant to interrupt their busy trial calendars to hold unplanned hearings for a temporary restraining order or preliminary injunction. Accordingly, the movant should, at an early stage of the proceedings, bring the necessity for a hearing to the attention of the court so that he will not be handicapped by a court unwilling to hear needed testimony.

(c) Movant's Preparation

Thorough preparation for all contingencies is critical, because the movant usually cannot know what factual concessions the defendant will make or how the court will view the moving papers. The movant should document the case thoroughly with affidavits and exhibits, and should have witnesses ready to testify, at least to the critical aspects of the motion.

Witnesses, including defendants, may be subpoenaed pursuant to Rule 45(e) Fed.R.Civ.P. Friendly witnesses should be prepared as they would be if they were going to testify at a plenary trial. Needless to say, the movant should also be prepared to cross-examine the defendant's witnesses in appropriate instances.

(d) Beating The Trial Calendar

Plaintiffs are often frustrated by inordinate delay in reaching judgment. Delay is caused by judges who have their own agenda, overloaded calendars, and dilatory defense tactics. However, the sting of losing a preliminary injunction motion may be ameliorated by obtaining an accelerated discovery schedule and trial.

(e) Respondent's Tactics

The critical issue in interlocutory practice may be to determine whose side time is on. A preliminary injunction obtained several months after the motion is brought may be a very hollow victory. Moreover, the passage of time without disastrous environmental consequences will vitiate the application. Generally, time is on the side of the respondent, if for no other reason than because it gives him precious time to prepare his defense.

## 6. Temporary Restraining Orders

In contrast to the relatively limited text on preliminary injunctions, Rule 65(b), relating to the issuance of a Temporary Restraining Order ("TRO"), provides considerable detail.

Temporary Restraining Orders; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move for its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.<sup>173</sup>

### (a) Nature Of Temporary Restraining Order

Under Rule 65(b) of the Fed.R.Civ.P., a TRO may be granted when there is a factual showing that "immediate and irreparable injury, loss, or damage will result" before there can be any hearing. A TRO is a type of preliminary injunction.<sup>174</sup> The features that distinguish a TRO from a normal preliminary injunction are its immediacy, its limited duration, and its possible availability ex parte. Since it is a type of preliminary injunction a request for a TRO is required to meet the traditional four point test for interlocutory injunctive relief.<sup>175</sup> The movant for a TRO must also overcome an extra hurdle – showing that immediate, not just irreparable, injury will result.<sup>176</sup> If the applicant will suffer irreparable injury before notice can be given to the adverse party, a TRO may issue without notice.<sup>177</sup>

Applications for TRO's are often brought before courts by the filing of orders to show cause. Orders to show cause, of course, are used to shorten the time period for a respondent to respond to a motion. Thus, the plaintiff can serve the defendant with orders to show cause which provide for a temporary restraint, and can accelerate motions for a preliminary injunction.<sup>178</sup>

The general teaching on TRO's may be summed up as follows:

Applicants for injunctive relief occasionally are faced with the possibility that irreparable injury will occur before the hearing for a preliminary injunction required by Rule 65(a) can be held. In that event a temporary restraining order may be available under Rule 65(b). The order is designated to preserve the status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction and may be issued with or without notice to the adverse party.<sup>179</sup>

The litigation over the issuance and scope of a TRO can overshadow the subsequent dispute relating to the issuance of a preliminary injunction.<sup>180</sup>

In federal court, the issuance of TROs is controlled by Rule 65. TROs can also issue in state courts, based on state law of civil procedure. But some state environmental laws have their own provisions for granting TROs that differ from the state's background procedural rules.<sup>181</sup>

(b) Ex Parte Grants Of TRO

Perhaps the most extraordinary of legal proceedings is an ex parte application for a TRO. As Rule 65(b) provides, "[a] temporary restraining order may be granted without written or oral notice of the adverse party or his attorney . . ." under certain limited circumstances. Those limited circumstances are:

(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required.

It should be noted that courts are reluctant to impose ex parte restraints. Most courts will require that significant efforts be made to put the defendant on notice that an application for a temporary restraining order is going to be made. Many judges, in fact, will not entertain an application for an ex parte restraining order against federal or state environmental agencies, because their officers and lawyers are usually readily available.

The circumstances in which an ex parte grant of a TRO would be appropriate in the context of an enforcement action are limited. Although, under Rule 65(b) of the Fed.R.Civ.P., a TRO may be granted when there is a factual showing that "immediate and irreparable injury, loss, or damage"

will result before there can be any hearing, the Supreme Court has instructed that:

The stringent requirements imposed by Rule 65, on the availability of ex parte temporary restraining orders reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute. Ex parte temporary restraining orders are no doubt necessary in certain circumstances . . . but under federal law they should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.<sup>182</sup>

The key aspect to an ex parte order is the demonstration in the affidavit or verified complaint that the applicant not only faces immediate and irreparable harm, but that giving notice is problematic.<sup>183</sup> Applications for an ex parte TRO generally fall into one of two categories: (1) giving notice in time to avert the harm is impossible because the other party is unknown or cannot be found, or (2) the act of giving notice to the other party may defeat the very purpose of the order by altering the status quo and irreparably harming the party that is asking for a TRO.<sup>184</sup>

(c) Protection Against Ex Parte Grants

Rule 65(b) Fed.R.Civ.P. provides that "[e]very temporary restraining order granted without notice . . . shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order for good cause shown, is extended for a life period or unless the party against whom the order is directed consents that it may be extended for a longer period."<sup>185</sup> Thus, the party who obtains a TRO has at most 20 days to prepare himself to put on his case for a preliminary injunction. Rule 65(b) further provides:

that [i]n case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for a hearing at the earliest possible time and takes precedence over all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order.<sup>186</sup>

Rule 65(b) also provides that the defendant may move to dissolve or modify the restraining order "[o]n two days' notice to [the] party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe . . . ." The Supreme Court has made it clear that this last provision "does not place upon the party against whom a temporary restraining order has issued the burden of coming forward and presenting its case against [a] preliminary injunction."<sup>187</sup>

The Supreme Court has also stated that "[w]here a hearing on a preliminary injunction has been held after issuance of a temporary restraining order, and where the district court decides to

grant the preliminary injunction, the appropriate procedure is not simply to continue in effect the temporary restraining order, but rather to issue a preliminary injunction accompanied by the necessary findings of fact and conclusions of law."<sup>188</sup>

(d) Emergency Nature Of The TRO

The emergency nature of the TRO is demonstrated in Wyoming Outdoor Coordinating Council v. Butz,<sup>189</sup> where a temporary restraining order was granted against road building which would have destroyed the character of an alleged wilderness area. Similarly, in Save the Courthouse Committee v. Lynn,<sup>190</sup> a temporary restraining order was granted against the demolition of a historic courthouse in White Plains, New York.

7. Other Aspects Of Preliminary Injunctions  
And Temporary Restraining Orders

(a) Findings And Conclusions

Rule 52(a) Fed.R.Civ.P., provides that, "in granting or refusing interlocutory injunctions, the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action...."<sup>191</sup>

The district court will usually ask both sides to submit proposed findings of fact and conclusions of law. Indeed, courts have been criticized for "mechanically" adopting the findings of the prevailing party.<sup>192</sup>

Proposed findings and conclusions can also be submitted with the moving papers where a hearing is not anticipated; these can be quite simple. The best practice is to have the post hearing proposed findings and conclusions supported by reference to the record. Of course, the court need not require the parties to submit proposed findings and conclusions, but may simply include them in its opinion.<sup>193</sup>

(b) Orders

Proposed orders may be submitted with the moving papers, but a more conventional practice is to settle a proposed order on notice after the court has ruled.

The form and scope of proposed orders are specified by Rule 65(d):

(d) Form and Scope of Injunction or Restraining Order.

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents,

servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."<sup>194</sup>

Of course, preliminary injunction orders can be prohibitive as well as mandatory.<sup>195</sup>

(c) Security For Preliminary Injunction

Under Rule 65(c) Fed.R.Civ.P., "no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."<sup>196</sup>

Because of the very attenuated procedure used to issue preliminary injunctions, there is a greater chance that these orders may be wrong.<sup>197</sup> A bond is therefore considered to be of importance by courts since, as the Supreme Court has said, "a party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond."<sup>198</sup> However, as stated in the Federal Rules of Civil Procedure, the size of the bond is in the court's discretion. It is common for courts in environmental cases brought by environmental groups or individuals with limited means, particularly in NEPA cases, to require little or no security.<sup>199</sup> Not only do many courts waive the bond requirement for public interest groups, in some state courts requiring a large bond from a not for profit corporation can be an abuse of discretion reversible on appeal.<sup>200</sup> The logic behind a light bond is that a bond requirement could block plaintiffs from pursuing important federal rights arising out of federal health and welfare laws, and pursuing actions in the public interest.<sup>201</sup> A bond may also be waived where there will be no harm suffered by the party enjoined, or where their harm is completely speculative.<sup>202</sup>

However, this is not the law in all areas. The size, and in some jurisdictions the necessity, of a bond is within the courts equitable discretion, and thus should not be taken for granted by either party. It is important that a defendant, when objecting to the issuance of a preliminary injunction against her, substantiate any claim of injury in support of a request that a bond be posted.<sup>203</sup> Similarly, environmental groups should not presume that no bond will be required, but rather should make a showing of hardship to the group if forced to post such a bond.<sup>204</sup>

Furthermore, Rule 65(c) Fed.R.Civ.P. specifically exempts the federal government: "No such security shall be required of the United States or of an officer or agency thereof."<sup>205</sup> State governments are not exempted by law<sup>206</sup>. Interestingly, although not exempted from bond requirements by law, local governments acting in the public interest may also be able to obtain a preliminary injunction in environmental cases to enjoin the action of higher levels of government without posting a bond.<sup>207</sup>

## 8. Motions For Stays Pending Appeal

And Scope Of Appellate Review

Title 28 U.S.C. § 1292 specifically permits appeals from district court decisions granting or refusing injunctions:

(a) The court of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

As a general rule, orders granting, denying, or dissolving temporary restraining orders are not injunctions within the meaning of Section 1292(a)(1).<sup>208</sup> However, there appear to be numerous exceptions to this rule, and the court will look beyond the label of the injunction order.<sup>209</sup>

Thus, when preliminary injunctive relief is sought, a litigant may find himself in the court of appeals within days of the district court's decision. An illustrative example of this accelerated process is the initial litigation in Society For Animal Rights, Inc. v. Schlesinger.<sup>210</sup> There the court of appeals noted and ruled:

PER CURIAM: Appellants filed suit on February 3, 1975, seeking to halt the planned destruction of blackbirds on two military bases and in three counties of Kentucky and Tennessee. The project was originally scheduled for the night of February 3, but was delayed by order of the district court so that a hearing could be held to determine whether a preliminary injunction should issue.

\* \* \*

The district judge heard evidence and argument on February 7, and on Saturday, February 8, he denied the motion for a preliminary injunction. He granted temporary relief until noon Monday, February 10, to permit appellants to bring the matter to this court under 28 U.S.C. § 1292(a). Appellants timely sought an injunction pending appeal. On February 10, we issued injunctive relief to preserve the status quo pending argument on the motion. That argument was held on February 12, 1975. Today we dissolve the injunction, and thus permit the Defense Department to proceed with its project, although as will appear we express concerns which we presume will be heeded.<sup>211</sup>

The court emphasized what it believed to be its task on review of a denial of a preliminary injunction:

The district court did not purport to make a ruling on the merits. This court also is

not now engaged in a ruling on the merits. Indeed, even if we were now determining the appeal from the denial of the preliminary injunction, we could not reverse unless we were able to identify an error of law, or to conclude on some other basis that the district judge abused his discretion. Cox v. Democratic Central Committee of the District of Columbia, 200 F.2d 356 (1952). This would present a narrow question, and a great burden on appellants. The question is still more narrow, and the burden is still greater for litigants, like appellants, seeking an injunction pending the disposition of the appeal from the denial of the temporary injunction.<sup>212</sup>

Judge Wright, in Foundation on Economic Trends v. Heckler,<sup>213</sup> set forth the standards for appellate review of a district court decision to grant an injunction:

In reviewing [the district court's] exercise of discretion, we must be conscious of whether we are reviewing findings of fact, conclusions of law, or determinations about the balancing of the injunction factors. In all three we are deferential to the District Court's determination about 'what evidence can properly be adduced in the limited time that can be devoted to a preliminary injunction hearing.' Friends for all Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 835 n.32 (D.C. Cir. 1984). We are most deferential to the District Court's balancing of the injunction factors. On questions of fact the usual 'clearly erroneous' standard applies. We are least deferential on questions of law. '[A] greater amplitude of judicial review is called for when the appeal presents a substantial issue that the action of the trial judge was based on a premise as to the pertinent rule of law that was erroneous, . . . [in which case] the appellate court furthers the interest of justice by providing a ruling on the merits to the extent the matter is ripe . . . .' Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 832 (D.C. Cir. 1972).<sup>214</sup>

Other appellate courts have also concluded that their review of preliminary injunctions is "limited and deferential."<sup>215</sup> Echoing Judge Wright's holding in Foundation on Economic Trends v. Heckler, the Ninth Circuit has held that lower courts decision should be reversed only for:

- (1) abuse of discretion
- (2) use of an erroneous legal standard
- (3) clearly erroneous findings of fact<sup>216</sup>

In Warm Springs Dam Task Force v. Gribble,<sup>217</sup> the court outlined certain appellate procedures in denying appellants' motion for a stay pending appeal:

The considerations in determining whether to grant or deny the requested relief are three-fold: (1) Have the movants established a strong likelihood of success on the merits? (2) Does the balance of irreparable harm favor the movants? (3) Does the public interest favor granting the injunction? (Alpine Lakes Protection Society v. Schlapfer, (9th Cir. 1975) 518 F.2d 1089, 1090.) As the Eighth Circuit has pointed out, the latter criteria merge into a single equitable judgment in which the environmental concerns of the movants must be weighed against the societal

interests which will be adversely affected by granting the relief requested (Reserve Mining Co. v. United States, (8th Cir. 1974) 498 F.2d 1073, 1076-77), a process which must be significantly affected by the realities of the situation. (See Friends of the Earth, Inc. v. Coleman (9th Cir. 1975) 518 F.2d 323, 330; Lathan v. Volpe (9th Cir. 1971) 455 F.2d 1111, 1116-17).

We conclude that the public interest can best be served by expediting an appeal of the hearing on the merits and denying the requested interim injunctive relief. We do not believe that appellants have shown that they will suffer significant harm during the pendency of such an expedited hearing on the merits.

The scope of appellate review in this action is extremely narrow. While injunctions will issue under the NEPA if an EIS is inadequate [citations omitted] the district court's finding that the EIS is adequate will be reversed only if based upon an erroneous legal standard or upon clearly erroneous findings of fact.<sup>218</sup>

While finding it inappropriate in that case, the Court in New York v. NRC,<sup>219</sup> reviewed cases in the Second Circuit which held that the appellate court has "broader discretion" and can apply a "stricter standard of review" when a decision granting or denying a preliminary injunction is based solely on a written record.<sup>220</sup> The usual rule for the Second, as well as other circuits, is that, unless there is a clear mistake of law or clearly erroneous findings of fact (Rule 52(a) Fed.R.Civ.P.), the trial court's decision will not be reversed.<sup>221</sup>

## 9. CONCLUSION

Interlocutory injunctive relief practice is where traditional trial skills are most needed to advance environmental causes and to protect the client's interests.

### ENDNOTES:

1. This material has been prepared with the learned assistance of Elizabeth Read and Edan Rotenberg, also of Sive, Paget & Riesel, P.C.
2. Environmental Quality, The Ninth Annual Report of the Council on Environmental Quality, U.S. Government Printing Office (Dec. 1978).
3. Section 309(b) of the Federal Water Pollution Control Act, 33 U.S.C. § 1319(b), P.L. 92-500, § 2, authorizes "[t]he Administrator . . . to commence a civil action for appropriate relief including a permanent or temporary injunction . . ." Similarly, specific authority is provided in the Clean Air Act for civil injunctive actions. Thus, Section 113(b) of the Clean Air Act, 42 U.S.C. § 7413(b), P.L. 91-604, § 4(a), as amended by P.L. 95-95, § 111(b), (c), specifically provides "[t]he Administrator shall . . . and may . . . commence a civil action for a permanent or temporary injunction . . ." The Air and Water Acts also provide for injunctive relief in situations of "imminent and substantial endangerment." See Section 303

of the Air Act and Section 504 of the Water Act.

Federal environmental statutes provide for citizen suits, allowing private individuals, business entities and public interest groups to bring suits against the government or violators of specific statutory provisions. See, e.g., Section 304 of the Clean Air Act, 42 U.S.C. § 7604; Section 505 of the Federal Water Pollution Control Act, 33 U.S.C. § 1365. These provisions have provided a fertile basis for suits which include applications for interlocutory relief against the government as well as private entities. See TVA v. Hill, 437 U.S. 153 (1978); Wuillamey v. Werblin, 364 F. Supp. 237 (D.N.J. 1973); Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972).

4. See, e.g., Industrial Park Dev. v. EPA, 604 F. Supp. 1136 (E.D. Pa. 1985).
5. Compare Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975) (en banc) with United States v. Rielly Tar & Chem. Corp., 546 F. Supp. 1100 (D. Minn. 1982).
6. See Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) and Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531 (1987), discussed infra at Section 3(c)(2).
7. See, e.g., New York Pathological & X-Ray Laboratories, Inc. v. Immigration and Naturalization Service, 523 F.2d 79 (2d Cir. 1978); District 50, United Mine Workers of Am. v. International Union, United Mine Workers of Am., 412 F.2d 165 (D.C. Cir. 1969); Turbo Mach. Co. v. Proctor & Schwartz, Inc., 204 F. Supp. 39 (E.D. Pa. 1962).

A few statutes limit the courts' discretion to issue or deny injunctive relief. See TVA v. Hill, 437 U.S. 153 (1978) (Endangered Species Act); Friends of the Earth v. United States Navy, 841 F.2d 927 (9th Cir. 1988) (National Defense Authorization Act of 1987).

8. See Wilderness Soc'y v. Tyrrel, 701 F. Supp. 1473 (E.D. Cal. 1988); Southern Milk Sales, Inc. v. Martin, 924 F.2d 98 (6th Cir. 1991) (because preliminary injunction is a procedural matter, federal law controls rather than state law).
9. 11 Wright & Miller, Federal Practice and Procedure: Civil § 2947; Union Elec. Co. v. EPA, 450 F. Supp. 805 (E.D. Mo. 1978), rev'd, 593 F.2d 299 (8th Cir. 1979), cert. denied 444 U.S. 839 (1979).
10. Where a preliminary injunction is granted but the passage of time and occurrence of events render the need for a preliminary injunction moot, the underlying issue may still be preserved as a live controversy by the plaintiffs' posting of a bond. University of Tex. v. Camenisch, 451 U.S. 388 (1981).
11. The order in which these factors are addressed varies. Compare Direx Israel Ltd. v. Breakthrough Medical Corp., 952 F.2d 802 (4th Cir. 1991) (balance of harms should be

- resolved before the court determines plaintiff's likelihood of success) with Narragansett Indian Tribe v. Guilbert, 934 F.2d 4 (1st Cir. 1991) (beginning analysis with plaintiff's likelihood of success).
12. 7 Moore's Federal Practice 65.04[1], at 39-44. See also Barrett v. Roberts, 551 F.2d 662 (5th Cir. 1977). See generally Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975); WMATC v. Holiday Tours, 559 F.2d 841, 842-43 (D.C. Cir. 1977); Studebaker Corp. v. Gittlin, 360 F.2d 692 (2d Cir. 1966); Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953); Union Elec. Co., 450 F. Supp. 805; Massachusetts v. Clark, 594 F. Supp. 1373 (D. Mass. 1984).
  13. See, e.g., Narragansett Indian Tribe v. Guilbert, 934 F.2d 4 (1st Cir. 1991); All Care Nursing Service, Inc. v. Bethesda Memorial Hospital, Inc., 887 F.2d 1535 (11th Cir. 1989); Eric v. McGraw-Hill, 809 F.2d 223, 226 (3d Cir. 1987); National Wildlife Fed'n v. Burford, 835 F.2d 305 (D.C. Cir. 1987); Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana, 762 F.2d 464 (5th Cir. 1985); see also Hunt v. Bankers Trust Co., 646 F. Supp. 59 (N.D. Tex. 1986).
  14. See Judge Lay's concurring opinion in American Train Dispatchers Ass'n v. Burlington Northern, Inc., 551 F.2d 749 (8th Cir. 1977); American Motorcyclist Ass'n v. Watt, 714 F. 2d 962 (9th Cir. 1983); National Wildlife Fed'n v. Coston, 773 F.2d 1513 (9th Cir. 1985); City of Tenakee Springs v. Block, 778 F.2d 1402 (9th Cir. 1985); Village of Gambell v. Hodell, 774 F.2d 1414 (9th Cir. 1985) (District Court has discretion to choose between the traditional and revised tests, and the circuit court on appeal must review the findings according to the test chosen).
  15. Sperry International Trade, Inc. v. Government of Israel, 670 F.2d 8 (2d Cir. 1982) (citations omitted).
  16. 949 F.2d 624, 626 (2d Cir. 1991).
  17. 878 F.2d 577, 580 (2d Cir. 1989); see, e.g., Sal Tinnerello & Sons, Inc. v. Town of Stonington, 141 F.3d 46, 52 (2d Cir. 1998) (where defendant was acting in public interest, plaintiff had to establish both irreparable harm and a likelihood of success on the merits and thus meet the court's more rigorous test).
  18. Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992); but see National Wildlife Federation v. Burlington Northern R.R., Inc., 23 F.3d 1508 (9th Cir. Mont. 1994) (Traditional test for preliminary injunctions does not apply under the ESA), *infra* note 78.
  19. 785 F. Supp. 826, 830 (N.D. Cal. 1992), *rev'd on other grounds, vacated and remanded*, 28 F.3d 76 (9th Cir. Cal. 1994) (holding that district court lacked jurisdiction to enter a

preliminary injunction).

20. See Leshy, Interlocutory Injunctive Relief In Environmental Cases: A Primer for the Practitioner, 6 Ecology L.Q. 639, 643 (1977). See also National Wildlife Fed'n v. Coston, 773 F.2d at 1517 (movant must show as irreducible minimum that there is a full chance for success on the merits). Cf. American Petroleum Inst. v. Jorling, 710 F. Supp. 421, 431 (N.D.N.Y. 1989) (regardless of substantial likelihood of success on the merits, the Court must make an explicit finding that plaintiff is likely to suffer irreparable harm); Foremosa Plastics Corp. v. Wilson, 504 A.2d 1083 (Del. 1986) (irreparable injury found, but preliminary injunction denied because of inability to prove reasonable probability of success on the merits); SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096 (10th Cir. 1991) (preliminary injunction factors must weigh "heavily and compelling" in plaintiff's favor if injunction alters status quo, is mandatory rather than prohibitory, and provides plaintiff with complete relief).
21. 919 F.2d 439 (7th Cir. 1990).
22. Id. at 443.
23. 919 F.2d at 444.
24. Id.
25. 919 F.2d at 445.
26. 919 F.2d at 446-47.
27. In Sierra Club v. Robertson, 784 F. Supp. 593 (N.D. Ark. 1991), the district court effectively converted plaintiff's motion for a preliminary injunction into a motion for summary judgment based on the reasoning of Cronin. Id. at 601.
28. New York v. NRC, 550 F.2d 745, 753 (2d Cir. 1977). See also Kaplan v. Board of Educ., 759 F.2d 256 (2d Cir. 1985) (irreparable injury must be shown in both prongs of revised test: movant must establish irreparable harm, and either, (i) probable success on the merits, or (ii) sufficient questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary injunctive relief); Long Island Lighting Co. v. County of Suffolk, 628 F. Supp. 654 (E.D.N.Y. 1986).
29. Puerto Rico Conservation Foundation v. Larson, 797 F. Supp. 1066, 1071 (D. Puerto Rico 1992) ("Irreparable injury is not speculative nor remote, but is actual and imminent."); Crimmins v. American Stock Exch. Inc., 346 F. Supp. 1256 (S.D.N.Y. 1972). See Intermountain Forest Indus. Ass'n v. Lyng, 683 F. Supp. 1330, 1336 (D. Wyo. 1988).
30. Oburn v. Shapp, 521 F.2d 142, 151 (3d Cir. 1975). For a recent application of this standard, see Industrial Park Dev. Co. v. EPA, 604 F. Supp. 1136 (E.D. Pa. 1985). See also Hunt v.

- Bankers Trust Co., 646 F. Supp. 59 (N.D. Tex. 1986).
31. New York v. NRC, 550 F.2d at 755.
  32. Id. at 756.
  33. Compare Clipper Cruise Line, Inc. v. United States, 855 F. Supp. 1 (D.D.C. 1994), and Atlantic Coast Demolition and Recycling, Inc. v. Board of Chosen Freeholders, etc., 893 F. Supp. 301 (D.N.J. 1995).
  34. 11 Wright & Miller, Federal Practice and Procedure: Civil § 2948.
  35. New York v. NRC, 550 F.2d at 754.
  36. Compare Fund for Animals v. Espy, 814 F. Supp. 142, 151 (D.D.C. 1993) (loss of aesthetics and enjoyment of contemplating bison in national park is irreparable harm due to killing of bison) with Southern Utah Wilderness Alliance v. Thompson, 811 F. Supp. 635, 641-42 (D. Utah 1993) (plaintiffs failed to show irreparable harm in loss of enjoyment of recreational land and psychological pain due to killing of coyotes).
  37. Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 575 (5th Cir. 1974); Sierra Club v. Mason, 351 F. Supp. 419 (D. Conn. 1972); Steubing v. Brinegar, 511 F.2d 489 (2d Cir. 1975).
  38. Massachusetts Air Pollution Comm'n v. Brinegar, 499 F.2d 125 (1st Cir. 1974) (noise and emissions from three demonstration flights of SST Concorde perhaps irreparable but not of great magnitude).
  39. United States v. Florida Power & Light Co., 53 F.R.D. 249 (S.D. Fla. 1971) (warm water discharge from power plant).
  40. See Leshy, supra note 20, at 647 et seq. For a discussion of irreparable injury in the context of a permanent injunction, see Sierra Club v. Hennessy, 695 F.2d 643 (2d Cir. 1982).
  41. 745 F.2d 412 (7th Cir. 1984).
  42. Id. at 427 (emphasis added).
  43. 917 F.2d 908 (6th Cir. 1990).
  44. Id. at 917.
  45. 451 F. Supp. 902 (W.D. La. 1978).
  46. Id. at 905.

47. Id. at 906. For other cases where there was a showing of irreparable harm, see Puerto Rico Conservation Foundation v. Carson, 797 F. Supp. 1066 (D. Puerto Rico 1992) (preliminary injunction preventing reconstruction of highway through rain forest without preparation of environmental impact statement under NEPA); Portland Audubon Society v. Lujan, 784 F. Supp. 786 (D. Or. 1992), (preliminary injunction granted to enjoin timber sale where Bureau of Land Management failed to prepare supplemental environmental impact statement), aff'd, 80 F.3d 1401 (9th Cir. Wash. 1996); C&A Carbone, Inc. v. Town of Clarkstown, 770 F. Supp. 848 (S.D.N.Y. 1991) (preliminary injunction prohibiting enforcement of ordinance prohibiting disposal outside of town); Sierra Club v. Lujan, 716 F. Supp. 1289 (D. Ariz. 1989) (preliminary injunction issued prohibiting removal of historic cabins on North Rim of Grand Canyon and constructing a hotel and accessory structures); Wilderness Society v. Tyrell, 701 F. Supp. 1473 (E.D. Cal. 1988) (sale for harvesting burned timber preliminarily enjoined), rev'd, 918 F.2d 813 (9th Cir. Cal. 1990); Parker v. United States, 309 F. Supp. 593 (D. Colo. 1970), aff'd, 448 F.2d 793 (10th Cir. 1971), cert. denied sub nom. Kaibab Indus. v. Parker, 405 U.S. 989 (1972) (cutting of trees, being too final and conclusive, was enjoined pending wilderness review); Thompson v. Fugate, 452 F.2d 57 (4th Cir. 1971) (court enjoined condemnation of historic site for highway construction); Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972) (range of resulting damages from air pollution could well have irreversible effects); Maine v. Fri, 486 F.2d 713 (1st Cir. 1973) (possibility of permanent loss of funds is irreparable harm); Dow Chem., U.S.A. v. Consumer Protection Safety Comm'n, 459 F. Supp. 378 (W.D. La. 1978) (substantial loss of business and adverse publicity is irreparable harm); United States v. Akers, 15 ELR 20243 (E.D. Cal. 1985), aff'd, 785 F.2d 814 (9th Cir.), cert. denied, 479 U.S. 828 (1986) (conversion of wetlands area into farmland is irreparable harm); Long Island Lighting Co. v. County of Suffolk, 628 F. Supp. 654, 661 (E.D.N.Y. 1986) (economic harm of such huge proportions as to threaten the destruction of an on-going business or to threaten harm that cannot be adequately compensated after the fact by money damages is irreparable harm); National Wildlife Fed'n v. Burford, 16 ELR 20422 (D.D.C. 1985), reconsidered, 16 ELR 20427 (D.D.C. 1986) (lifting of protective land restrictions is irreparable harm). See also Valdez v. Applegate, 616 F.2d 570 (10th Cir. 1980) (harm to business resulting from grazing restrictions is irreparable where the business may have to shut down); Monarch Chem. Works v. Exxon, 452 F. Supp. 493 (D.Neb. 1978) (condemnation of movant's property would constitute irreparable injury).
48. 872 F.2d 75 (4th Cir. 1989).
49. Id. at 79.
50. Id. at 80 (quoting Citibank, N.A. v. Citytrust, 756 F.2d 273, 276 (2d Cir. 1985)).
51. 414 F. Supp. 1318 (S.D.N.Y. 1976), aff'd by order, 538 F.2d 309 (2d Cir. 1976).
52. 11 ERC 1098 (D. Or. 1977).

53. See also Union Carbide Corp. v. Train, 73 F.R.D. 620 (S.D.N.Y. 1977) (balance of hardships in favor of denying preliminary injunction). For non-environmental cases in which preliminary relief was denied on the basis of balancing of hardships or public interest, see R.F.D. Group Ltd. v. Rubber Fabricators, Inc., 323 F. Supp. 521 (S.D.N.Y. 1971) (preliminary injunction would put defendant out of business); Northcross v. Board of Educ. of the Memphis City Schools, 444 F.2d 1184 (6th Cir. 1971) (new schools badly needed and location of one new school between existing schools would result in desegregation).
54. 604 F. Supp. 1136 (E.D. Pa. 1985).
55. Id. at 1144. For other cases involving a similar analysis see Citizen's Alliance to Protect Our Wetlands v. Colonel Donald Wynn, 908 F.Supp. 825 (1995) (preliminary injunction and TRO are denied because "plaintiff [had] almost no chance of success on the merits and [presented] minimal evidence of irreparable harm."); New York v. Panex Indus., Inc., 860 F.Supp.977 (W.D.N.Y. 1994) (preliminary injunction which would, in effect, freeze assets of a company which allegedly disposed hazardous wastes in a landfill, in violation of RCRA and State law, is denied because irreparable harm was not shown); Sierra Club v. Larson, 769 F. Supp. 420 (D. Mass. 1991) (no irreparable harm demonstrated to enjoin construction of tunnel project to ensure compliance with Clean Air Act), aff'd, review denied, 2 F.3d 462 (1st Cir. Mass. 1993); Elliott v. United States Fish and Wildlife Service, 747 F. Supp. 1094 (D. Vt. 1990) (no irreparable harm shown that release of lampricides into creek poses significant threat to human health); Government Suppliers Co. v. Bayh, 734 F. Supp. 853 (S.D. Ind. 1990) (preliminary injunction denied to enjoin enforcement of requirements on solid waste land hauler, which had not yet gone into effect and as likelihood of success was slight), cert. denied, 506 U.S. 1053 (1993); Donham v. U.S. Dept. of Agriculture, 725 F. Supp. 985 (S.D. Ill. 1989) (preliminary injunction denied where environmentalist lived over 90 miles away from project he opposed); Warm Springs Task Force v. Gribble, 565 F.2d 549 (9th Cir. 1977) (injunction against work on dam project denied; appellants would not suffer significant harm during pendency of expedited hearing); Adams v. Vance, 570 F.2d 956 (D.C. Cir. 1978) (Eskimos failed to make showing that ban on bowhead whale hunting would cause certain irreparable harm); Fund for Animals v. Frizzell, 530 F.2d 982 (D.C. Cir. 1975) (failure to show that sport hunting of certain bird species is irreparable harm); Wuillamey v. Werbin, 364 F. Supp. 237 (D.N.J. 1973) (estimate of possible air pollution is at best highly speculative; forecloses ability to demonstrate irreparable harm); North Slope Borough v. Andrus, 486 F. Supp. 332 (D.D.C. 1980) (mere sales of oil leases do not constitute irreparable harm); Virginia Sunshine Alliance v. Henrie, 483 F. Supp. 425 (W.D. Va. 1979) (injury to the public resulting from an accident to, or theft of, radioactive waste is too speculative and remote to be irreparable); Union Elect. Co. v. EPA, 450 F. Supp. 805 (E.D. Mo. 1978), rev'd, 593 F.2d 299 (8th Cir. 1979) (penalty for non-compliance with emissions standards is not irreparable injury); U.S. Steel v. Fri, 364 F. Supp. 1013 (N.D. Ind. 1973) (criminal penalties not sufficiently imminent to justify stay of order); City of Highland Park v. Train, 374 F. Supp. 758, aff'd, 519 F.2d 681 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976) (harm entirely in futuro); NRDC v. Schultze, 12 ERC 1737 (D.D.C.

- 1979); Citizens Ass'n of Georgetown v. Washington, 370 F. Supp. 1101 (D.D.C. 1974); Foundation on Economic Trends v. Thomas, 16 ELR 20632, 20633 (D.D.C. 1986) (no irreparable harm where the parties stipulated in open court that no bacteria testing would be conducted under an experimental use permit until the EPA completed its investigation).
56. 594 F. Supp. 1373 (D. Mass. 1984).
57. Id. at 1388-89. See also Stein v. Barton, 740 F. Supp. 743 (D. Alaska 1990) (likelihood of substantial environmental injury outweighs economic harm to loggers, which can be minimized by narrow tailoring of interlocutory relief); United States v. Akers, 15 ELR 20243 (E.D. Cal. 1985) (disruption of the functions of wetlands outweighs speculative financial damage property owner "might" suffer), aff'd, 785 F.2d 814 (9th Cir.), cert. denied, 479 U.S. 828, (1986); United States v. Ciampitti, 583 F. Supp. 483 (D.N.J. 1984) (fill activities at wetlands site posed greater harm to public interest than economic loss to developer), cert. denied, 475 U.S. 1014 (1986); Steubing v. Brinegar, 511 F.2d 489, 497 (2d Cir. 1975) (additional costs and delay in preparing EIS do not outweigh interest in ameliorating environmental harm).
58. 534 F. Supp. 923 (C.D. Cal. 1981), aff'd, 714 F.2d 962 (9th Cir. 1983).
59. American Motorcyclist Ass'n, 714 F.2d at 966.
60. See Section 3(c) infra, "Avoiding The Burden Of Proving Irreparable Injury." For other cases in which preliminary injunctions were denied under public interest balancing standards, see Greenpeace USA v. Stone, 748 F. Supp. 749 (D. Haw. 1990) (harm to German people and environment from halting shipment of chemical weapons en route to Johnston Atoll outweighs harm of shipment); Mulberry Hills Development Corp. v. United States, No. PN-2639 (D. Md. 1990) (public interest in wetlands exceeds economic harm to developer); Union Carbide Agric. Prod. Co. v. Costle, 632 F.2d 1014 (2d Cir. 1980) (motion to enjoin EPA's continued use of one company's insecticide test data for the purpose of registering competitor's insecticides under FIFRA denied; where such action is "in the public interest," more than a "fair ground for litigation" is required), cert. denied, 450 U.S. 996 (1981); Exxon Corp. v. City of New York, 356 F. Supp. 660 (S.D.N.Y. 1973) (preliminary injunction against local lead content regulations denied), 480 F.2d 460 (2d Cir. 1973) (30 day stay granted until trial on the merits); Main-Amherst Business Ass'n v. Adams, 461 F. Supp. 1077 (W.D.N.Y. 1978) (NEPA action; failure to show probable success on merits with regard to irreparable injury); Environmental Defense Fund v. Costle, 439 F. Supp. 980 (E.D.N.Y. 1977) (action based on NEPA and Federal Water Pollution Control Act); Union Carbide v. Train, 73 F.R.D. 620 (S.D.N.Y. 1977) (denial of preliminary injunction forbidding payment of federal money for sewage treatment process on claim of improper EPA bidding procedure; balance of hardships in favor of defendant).
61. 180 F.3d 1309 (11th Cir. 1999).

62. Id. at 1310.
63. Id.
64. Id. at 1310-11.
65. 766 F.2d 1319, amended, 775 F.2d 998 (9th Cir. 1985).
66. Van de Kamp, 766 F.2d at 1324.
67. See Northern Alaska Env'tl. Central v. Hodel, 803 F.2d 466, 471 (9th Cir. 1986); Wyckoff Co. v. EPA, 796 F.2d 1197, 1198 (9th Cir. 1986); United States v. Akers, 785 F.2d 814, 823 (9th Cir., cert. denied, 479 U.S. 828 (1986)); Virginia Ry. Co. v. System Fed'n No. 40, 300 U.S. 515, 552 (1937).
68. Cf. Reserve Mining Co. v. United States, 498 F.2d 1073 (8th Cir. 1975).
69. But see Union Elec. Co. v. EPA, 450 F. Supp. 805 (E.D. Ma. 1978), rev'd, 593 F.2d 299 (8th Cir. 1979), cert. denied, 444 U.S. 839 (1979).
70. 769 F. Supp. 420 (D. Mass. 1991), aff'd, review denied, 2 F.3d 462 (1st Cir. Mass. 1993).
71. See, e.g., United States v. Douglas County, 3 ELR 20727 (D. Nev. 1973).
72. Cf. Reserve Mining Co., 498 F.2d at 1077-82.
73. New York v. Kleppe, 429 U.S. 1307, 1312 (1976). See County of Suffolk v. Secretary of the Interior, 562 F.2d 1268 (2d Cir. 1977).
74. New York v. Kleppe, 429 U.S. at 1312 (1976) (citations omitted).
75. Leshy, supra note 20, at 653; Puerto Rico Conservation Foundation v. Larson, 797 F. Supp. 1066 (D. Puerto Rico 1991); Pilchuck Audubon Soc'y v. MacWilliams, 19 ELR 20529 (W.D. Wash. 1988).
76. 480 U.S. 531 (1987).
77. New York v. NRC, 550 F.2d 745, 753 (2d Cir. 1977) (footnotes omitted). See Town of Huntington v. Marsh, 884 F.2d 648 (2d Cir. 1989). See also Wisconsin v. Weinberger, 745 F.2d 412 (7th Cir. 1984); North Slope Borough v. Andrus, 486 F. Supp. 332 (D.D.C. 1980); New England Power Co. v. Goulding, (NEPA does not require an exhaustive and detailed review of the environmental effects of every conceivable alternative). But see Southern Utah Wilderness Alliance v. Thompson, 811 F. Supp. 635, 641 (D. Utah 1993) (holding that there is a presumption in favor of injunctive relief based on a NEPA violation, particularly

- when the violation is substantive rather than technical); Citizens For Responsible Area Growth v. Adams, 477 F. Supp. 994 (D.N.J. 1979) (if noncompliance with NEPA is "fundamental," and not merely "technical," a lenient standard for defining "irreparable harm" should be applied).
78. Sierra Club v. Penfold, 857 F.2d 1307, 1318 (9th Cir. 1988).
79. 468 F.2d 1164 (6th Cir. 1972).
80. Id. at 1184 (citations omitted). See Village of Gambell v. Hodel, 774 F.2d 1414 (9th Cir. 1985) (an injunction is the appropriate remedy for a substantive procedural violation of an environmental statute), cert. denied, 107 S.Ct. 2274 (1986); Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985); Jones v. District of Columbia Redevelopment Land Agency, 449 F.2d 502 (D.C. Cir. 1974); and the seminal authority for this proposition, Lathan v. Volpe, 455 F.2d 1111, 1116-17 (9th Cir. 1972).
81. 872 F.2d 497 (1st Cir. 1989). See also Puerto Rico Conservation Foundation v. Larson, 797 F. Supp. 1066, 1072 (D. Puerto Rico 1966) ("Thus, a violation of NEPA can itself be considered irreparable injury.").
82. 872 F.2d at 504 (emphasis in original).
83. Environmental cases dealing with this issue are: National Wildlife Federation v. Burlington Northern R.R., Inc., 23 F.3d 1508 (9th Cir. Mont. 1994) (Traditional test for preliminary injunctions does not apply under the ESA. Plaintiffs need not prove irreparable future harm with certainty; rather plaintiffs must demonstrate that a future injury is "sufficiently likely," i.e. a future violation of the ESA); Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 2005 WL 1398223, \*2 (Slip. Op.)(D.Or.)(citing Earth Island Inst. v. U.S. Forest Service, 351 F.3d 1291, 1298 (9th Cir. 2003), aff'd No. 05-35569 (NOTE: THIS PRELIMINARY INJUNCTION WAS AFFIRMED JULY 26, 2005, AND THIS NOTE WAS UPDATED JULY 28<sup>TH</sup>. RIGHT NOW THE CASE IS ONLY AVAILABLE ON 9<sup>TH</sup> CIRCUIT WEBSITE, NOT YET A SLIP OPINION OR IN WESTLAW/LEXIS. PLEASE CHECK THIS CITE. United States v. Akers, 15 ELR 20243 (E.D.Cal. 1985), aff'd, 785 F.2d 814 (9th Cir.), cert. denied, 479 U.S. 828 (1986); United States v. Ciampitti, 583 F. Supp. 483 (D.N.J. 1984), cert. denied, 475 U.S. 1014 (1986); Libby Rod & Gun Club v. Poteat, 457 F. Supp. 1177, (D. Mont. 1978), aff'd in part, rev'd in part, 594 F.2d 742 (9th Cir. 1979); United States v. West Penn Power Co., 460 F. Supp. 1305, (W.D. Pa. 1978). As indicated, this argument had found currency in cases arising under NEPA. Non-environmental case authority for this proposition is readily found. See, e.g., United States v. Odessa Union Warehouse Co-op, 833 F.2d 172 (9th Cir. 1987); Bradford v. SEC, 278 F.2d 566 (9th Cir. 1960); United States v. Kentland - Eikhorn Coal Co., 353 F. Supp. 451 (E.D. Ky. 1973); SEC v. Tax Service, Inc., 357 F.2d 143 (4th Cir. 1966); Studebaker v. Gittlin, 360 F.2d 692 (2d Cir. 1966). See also United States v. City and County of San Francisco, 310 U.S. 16,

- 30-31 (1939), but see Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975).
84. 456 U.S. 305 (1982).
85. 480 U.S. 531 (1987).
86. Supreme Court Declares Injunctions Optional for FWPCA Violations, 12 ELR 10060, 10062.
87. Romero-Barcelo, 456 U.S. at 312.
88. Romero-Barcelo v. Brown, 478 F. Supp. 646 (D.P.R. 1979).
89. Romero-Barcelo v. Brown, 643 F.2d 835 (1st Cir. 1981).
90. Romero-Barcelo, 456 U.S. at 312.
91. Id. at 314.
92. Id.
93. 456 U.S. at 315 n.9, notes, however, that the Navy was actually denied certification of a draft NPDES permit issued by the EPA, by the Environmental Quality Board of the Commonwealth of Puerto Rico, and that the Navy was forced to bring an action to appeal that denial.
94. In the tradition of Romero-Barcelo the Court did not look to the public interest reflected in a statute designed to guide the conduct of the government in pursuing its objectives but remarkably the public interest reflected in those amorphous objectives themselves.
95. "Irreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action." Village of Gambell, 774 F.2d at 1423.
96. Village of Gambell, 480 U.S. at 545, 107 S.Ct. at 1404.
97. Id.
98. An exception is the Endangered Species Act, 16 U.C.C. §§ 1531 et seq. (1982). See Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987). But see National Wildlife Federation v Burlington Northern R.R., Inc., 23 F.3d 1508 (9th Cir. 1994) (Although plaintiffs need not prove future harm with certainty, plaintiffs must make a showing that a violation of the ESA is at least sufficiently likely in the future).
99. See, e.g., National Wildlife Fed'n v. Burford, 835 F.2d 305 (D.C. Cir. 1987).
100. See South Carolina Dep't of Wildlife and Marine Resources v. Marsh, 866 F.2d 97 (4th Cir.

1989); Sierra Club v. United States Forest Serv., 843 F.2d 1190, (9th Cir. 1988); Save the Yaak Comm. v. Block, 840 F.2d 714 (9th Cir. 1988); National Wildlife Fed'n v. Burford, 835 F.2d 305 (D.C. Cir. 1987); League of Wilderness Defenders-Blue Mountains Biodiversity Project v. Forsgren, 184 F.Sypp.2d 1058; Sierra Club v. Espy, 822 F. Supp. 356 (E.D. Tex. 1993), rev'd 18 F.3d 1202 (5th Cir. Tex. 1994); United States v. Tzavah Urban Renewal Corp., 696 F. Supp. 1013 (D.N.J. 1988).

101. 480 U.S. at 545, 107 S. Ct. at 1404.

102. Id.

103. Tribal Village of Akutan v. Hodel, 859 F.2d 662 (9th Cir. 1988) (public interest favors development of oil and gas supplies over protection of environment); Oregon Natural Resources Council v. Marsh, 677 F. Supp. 1072 (D. Or. 1987) (threat of possible flooding outweighs environmental damage from dam construction in importance to public interest), rev'd, 832 F.2d 1489, cert. granted, 108 S.Ct. 2869 (1988); Sierra Club v. Penfold, 664 F. Supp. 1299 (D. Alaska 1987) (allowing mining to continue on ground that though degradation of Wild River would result, economic loss would be greater harm to public interest), aff'd, 857 F.2d 1307 (9th Cir. 1988).

104. Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542, 107 S. Ct. 1396, 1402 (1987).

105. 872 F.2d 497 (1st Cir. 1989).

106. Id. at 499.

107. Sierra Club v. Marsh, 701 F. Supp. 886, 897 (D. Me. 1988), rev'd, 872 F.2d 497 (1st Cir. 1989).

108. Id. at 898-99.

109. 716 F.2d 946 (1st Cir. 1983).

110. Sierra Club v. Marsh, 872 F.2d 497, 500 (1st Cir. 1989).

111. Id. at 501 (emphasis in original).

112. Id. at 502.

113. Id. at 503 (emphasis in original).

114. Id. at 503-04.

115. Sierra Club v. Marsh, 714 F. Supp. 539 (D. Me. 1989).

In Town of Huntington v. Marsh, 884 F.2d 648, 652 n. 1 (2d Cir. 1989), the Second Circuit

observed that whatever the merits of the analysis in Sierra Club v. Marsh, application of that analysis in Huntington would not lead to a different result because in addition to the process mandated by NEPA, that case was governed by the substantive standards set by the Ocean Dumping Act, 33 U.S.C. § 1413(a).

An interesting contrast to the First Circuit's concern for the "bureaucratic steam roller" is the Fourth Circuit's decision in South Carolina Department of Wildlife and Marine Resources v. Marsh, 866 F.2d 97 (4th Cir. 1989). In South Carolina the Circuit Court affirmed the District Court's preliminary injunction to the extent that the injunction prohibited the operation of pumped storage generators about to be installed at the Richard B. Russell Dam pending resolution of plaintiffs' NEPA claim but vacated the injunction to the extent that it prohibited their installation.

116. 740 F. Supp. 1072 (D.N.J. 1990).
117. 456 U.S. 305 (1982).
118. 480 U.S. 531 (1987).
119. 746 F. Supp. 964 (N.D. Cal. 1990).
120. 812 F. Supp. 458 (D.N.J. 1993).
121. Id. at 486 (quoting Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 803 (3d Cir. 1989).
122. Id. at 486. See also National Wildlife Federation v. Burlington Northern R.R., Inc. supra note 78.
123. Nat'l Wildlife Fed'n v. Burlington N.R.R., Inc., 23 F.3d 1508, 1510 (9th Cir. 1994).
124. TVA v. Hill, 437 U.S. 153, 194 (1978).
125. Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 2005 WL 1398223, \*2 (Slip. Op.)(D.Or.)(citing Earth Island Inst. v. U.S. Forest Service, 351 F.3d 1291, 1298 (9th Cir. 2003), aff'd No. 05-35569 **(NOTE: THIS PRELIMINARY INJUNCTION WAS AFFIRMED JULY 26, 2005, AND THIS NOTE WAS UPDATED JULY 28<sup>TH</sup>. RIGHT NOW THE CASE IS ONLY AVAILABLE ON 9<sup>TH</sup> CIRCUIT WEBSITE, NOT YET A SLIP OPINION OR IN WESTLAW/LEXIS. PLEASE UPDATE THIS CITE.**)
126. Under RCRA citizen suits may be brought under the imminent hazard provision. See the identical language regarding imminent hazards under RCRA's citizen suit provision, 42 U.S.C. § 6972(a)(1)(B), and RCRA's imminent hazard provision for the EPA, 42 U.S.C. § 6973.

127. Because proof of "irreparable injury" may be greater than the proof of injury or harm that must be shown to obtain a permanent injunction, another approach to lessening the movant's burden is to combine the application for preliminary injunction with an accelerated trial on the merits. See Section 4(g), infra. Although the Department of Justice and the EPA have, from time to time, taken the position that permanent injunctions under the various environmental statutes can be obtained without a demonstration of any harm, it is clear that injunctive relief is based upon the district court's equity jurisdiction and wherever such jurisdiction is invoked the court has broad discretion in fashioning a suitable remedy. 11 Wright & Miller, Federal Practice and Procedures, Civil § 2942. Moreover, the courts may employ the same standard in evaluating whether to issue a permanent injunction as in determining a request for preliminary injunctive relief. See, e.g., Town of Huntington, 884 F.2d 648.
128. See Section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973; Section 504 of the Federal Water Pollution Control Amendments of 1972, 33 U.S.C. § 1364(a); Section 303 of the Clean Air Act, 42 U.S.C. § 7603; Section 1431(a) of the Safe Drinking Water Act ("SDWA") 42 U.S.C. § 300(i). (Section 7 of the Toxic Substance Control Act, 15 U.S.C. § 2606, allows the Administrator to obtain such "temporary . . . relief as may be necessary to protect health or the environment from unreasonable risk associated with" a chemical substance which is "immediately hazardous." 15 U.S.C. §§ 2606(a), (b). Section 106(a) of CERCLA, 42 U.S.C. § 9606(a) empowers the President to require the Attorney General to secure relief as may be necessary to abate such danger or threat to the public health, welfare, or the environment occurring because of an actual or threatened release of a hazardous substance. The Attorney General may act upon the President's determination that there is an "imminent or substantial endangerment" to the public health, welfare, or environment.)
129. See U.S. v. Price, 523 F.Supp. 1055, 1067 (D.N.J. 1981), aff'd 688 F.2d 204 (3d Cir. 1982) (Federal government argues that a showing of irreparable harm is unnecessary because Congress decided that violations of Solid Waste Disposal Act and Resource Conservation and Recovery Act should be enjoined).
130. See, e.g., U.S. v. Midway Heights County Water District, 695 F.Supp. 1072 (E.D. Cal. 1998) (Government's showing that the water district's system was contaminated with organisms which were accepted indicators of potential for spread of serious disease in an untreated water system demonstrated imminent and substantial endangerment to the health of persons required for preventive action under the SDWA).
131. 42 U.S.C. 6973(a).
132. 935 F.2d 1343 (2d Cir. 1991), rev'd in part 505 U.S. 557 (1992) (on issue of attorney's fees).

133. Id. at 1355-56 (citations omitted) (emphasis in original). See also Greenpeace, Inc. v. Waste Technologies Industries, 1993 U.S. Dist. LEXIS 5001, p.42 (N.D. Ohio 1993), rev'd, cause remanded 9 F.3d 1174 (6th Cir. Ohio 1993). Greenpeace was reversed for lack of jurisdiction because Greenpeace's suit was a collateral attack on an EPA permit. The reversing court did not dispute the definition of imminent endangerment; Gache v. Town of Harrison, 813 F. Supp. 1037, 1044 (S.D.N.Y. 1993); Lincoln Properties Ltd. v. Higgins, 36 ERC 1228, 23 ELR 20665, 1993 U.S. Dist. LEXIS 1251, p.41-44 (E.D. Cal. 1993); see also U.S. v. Vertac Chemical Corp., 489 F.Supp. 870, 885 (D.C. Ark. 1980).
134. Confusion has developed in the lower courts and amongst the circuits about the applicability of CERCLA to past acts, based in part on a split amongst the circuits about the same issue under RCRA. See Carson Harbor Village Ltd. V. Unocal Corp., 227 F.3d 1196, 1206 (9th Cir. 2000); Craig May, Taking Action – Rejecting the Passive Disposal Theory of Prior Owner Liability Under CERCLA, 17 Va. Env'tl. L.J. 385, 389-90 (1998).
135. B.F. Goodrich Co. v. Murtha, 697 F. Supp. 89 (D. Conn. 1988).
136. N.J. Dept. of Env. Protection v. Briar Lake Dev., 736 F. Supp. 62, 65 (D.N.J. 1990) (“Plaintiff need not show irreparable harm, however, where Congress has displaced the normal equitable balancing with a statutory standard.”), aff'd, 961 F.2d 210 (3rd Cir. 1992)
137. As noted in Dague v. City of Burlington, 935 F.2d 1343 (2d Cir. 1991), rev'd in part 505 U.S. 557 (1992) (on issue of attorney's fees), courts interpret the phrase “substantial and imminent endangerment” quite broadly, not only in terms of the injury required to meet it, but also with regard to the scope of actions that the imminent hazard provision of RCRA applies to. For example, RCRA applies to inactive dump sites that still pose a threat to health or the environment. Three case, United States v. Diamond Shamrock Corp., 12 ELR 20819 (N.D. Ohio 1981); United States v. Price, 523 F. Supp. 1055, 1071 (D.N.J. 1981), aff'd 688 F.2d 204 (3d Cir. N.J. 1982); and United States v. Solvents Recovery Servs. of New England, 496 F. Supp. 1127 (D. Conn. 1980), hold that "imminent hazards" under Section 7003 of RCRA (42 U.S.C. § 6973(a)) include past acts and do not necessarily require ongoing dumping. Cf. U.S. v. Waste Industs., 556 F.Supp. 1301 (E.D.N.C. 1982) ( § 7003 of RCRA may not apply to inactive or abandoned hazardous waste disposal sites.), rev'd, 734 F.2d 159 (4th Cir. 1984).

RCRA's imminent hazard provision also extends today to non-negligent generators whose actions are wholly past. United States v. Wade, 546 F. Supp. 785, 790 (E.D. Pa. 1982), appeal dismissed, 713 F.2d 49 (3rd. Cir. 1983), rejects this reading, and would not extend § 7003 to confer liability on non-negligent prior off-site generators of hazardous wastes. But see, U.S. v. Northeastern Pharmaceutical & Chem. Co., Inc., 810 F.2d 726 (8th Cir. Mo. 1986), cert. denied 484 U.S. 848 (1987), (stating that past off-site generators and transporters

are within the scope of RCRA § 7003(a), (42 U.S.C. § 6973(a)); RCRA § 7003(a), (42 U.S.C. § 6973(a)) as initially enacted and as clarified in the 1984 amendments, imposes strict liability upon past offsite generators of hazardous waste and upon past transporters of hazardous waste).

The limit of RCRA's imminent hazard provision is only reached where the defendant has been completely passive. Most courts agree that RCRA does not extend to those who have not actively disposed of waste – that is, defendants who have never themselves engaged in generation, transportation, treatment, storage, or disposal, but who may be sued because pollutants are leaking off their land. In Price, the court held that RCRA's imminent endangerment provision applied to imminent threats from passive disposal – that is, from a leaking landfill. United States v. Price, 523 F. Supp. 1055, 1071 (D.N.J. 1981). While other courts have supported Price's logic in holding that a leaking landfill can be an imminent hazard and that past contributors can be held liable (see e.g., United States v. Solvents Recovery Servs. of New England, 496 F. Supp. 1127 (D. Conn. 1980); W.R. Grace & Co. v. U.S. E.P.A., 261 F.3d 330 (3d Cir. 2001), the idea of attaching liability solely because of the existence of leakage in the present has been criticized widely. United States v. Wade, 546 F. Supp. 785, 790 (E.D. Pa. 1982), appeal dismissed, 713 F.2d 49 (3rd Cir. 1983), U.S. v. Waste Indus., 556 F.Supp. 1301 (E.D.N.C. 1982), Conn. Coastal Fishermen's Assoc. v. Remington Arms Co., Inc., 989 F.2d 1305, 1313 (2d Cir. 1993); Interfaith Comm'ty. Org. v. Honeywell Intl., Inc., 263 F.Supp. 2d 796, 843-846 (D.N.J. 2003)(discussing the issue at length)

- 138 See, eg. United States v. Price, 523 F. Supp. 1055, 1071 (D.N.J. 1981). For an example of a citizens action see Lincoln Properties, Ltd. v. Higgins, 1993 WL 217429 (E.D.Cal. 1993) p.15-16 (plaintiff “contends that Congress foreclosed the court's traditional equitable discretion when it specifically authorized injunctive relief to "private attorneys general"” under RCRA).
- 139 City of Toledo v. Beazer Materials and Services, Inc., 1995 WL 770396, p.9 (N.D. Ohio 1995) (finding that an imminent and substantial endangerment justifies a preliminary injunction); U.S. v. Price, 688 F.2d 204 (3d Cir. 1982)(“these provisions have enhanced the courts' traditional equitable powers by authorizing the issuance of injunctions when there is but a risk of harm, a more lenient standard than the traditional requirement of threatened irreparable harm.”); W.R. Grace & Co. v. U.S. E.P.A., 261 F.3d 330, 339-40 (3d Cir. 2001); N.J. Dept. of Env. Protection v. Briar Lake Dev., 736 F.Supp. 62, 65 (D.N.J. 1990)(“Plaintiff need not show irreparable harm, however, where Congress has displaced the normal equitable balancing with a statutory standard.”), affd. 961 F.2d 210 (3rd Cir. 1992).
140. United States v. Midwest Solvent Recovery Inc., 484 F. Supp. 138, 144 (D.D.C. 1980) (“in sum, the court finds that the tests of when preliminary injunctive relief may issue in cases brought under the Act . . . are provided by Federal Rule of Civil Procedure 65 and by the common law); United States v. United States Steel, No. 71-1041 (S.D. Ala., filed Nov. 18,

1981) (ex parte TRO granted pursuant to EPA's action under Clean Air Act), discussed in Skaff, The Emergency Powers in the Environmental Protection Statutes: A Suggestion for a Unified Emergency Provision, 3 Harv. Env. L. Rev. 298 (1979); United States v. FMC Corp., No. 77-3061 (S.D. W.Va., filed March 9, 1977) (TRO granted to restrain company's continued manufacture and discharge of carbon tetrachloride into drinking water pursuant to §504 of the Clean Water Act and §1431(a) of the SDWA); United States v. Solvents Recovery Serv. of New England; 496 F. Supp. 1127, 1143 (D. Conn. 1980) (preliminary injunction granted against continued discharge of chlorinated hydrocarbons into ground water pursuant to § 7003). The court in Solvents Recovery Service of New England relied on United States v. Midwest Solvent Recovery, Inc. for the proposition that RCRA § 7003 provides a jurisdictional basis and an enforcement device for the government in cases where it has reason to believe that wrongful conduct with respect to solid or hazardous wastes presents an imminent threat of harm to health or the environment, and authorizes federal courts to grant equitable relief in such cases. However, Section 7003 does not itself establish standards for determining the lawfulness of the conduct of those sued by the United States. 496 F. Supp. at 1133-34. But cf. United States v. Waste Indust., 734 F.2d 159 (4th Cir. 1984)(reversing district courts conclusion that §7003 was merely jurisdictional); U.S. v. Northeastern Pharmaceutical & Chemical Co. Inc., 810 F.2d 726 (8th Cir. 1986); Jones v. Inmont Corp., 584 F.Supp 1425 (D.C. Ohio 1984)(holding that RCRA provides a substantive standard for injunctions in citizen suits distinct from the traditional four point test, discussing conflicting cases)

141. 1993 WL 95654, 23 Env'tl. L. Rep. 20,807. 999 F.2d 1212 (8th Cir. 1993), cert. denied, 114 S.Ct. 1397 (1994).
142. Id. at 4. rev'd 999 F.2d 1212 (8th Cir. 1993)(reversed for lack of subject matter jurisdiction, the appellate court did not reach the validity of the test for an injunction).
143. United States v. Vertac Chem. Corp., 489 F. Supp. 870, 885 (E.D. Ark. 1980) (discovery of dioxin in local sediment and ground water is a "substantial and imminent endangerment;" preliminary injunction is granted on that basis). Cf. United States v. Waste Indust., 556 F. Supp. 1301, 13 ELR 20,286 (E.D.N.C. 1982). See also Skaff, supra, note 118, citing United States v. Velsicol Chem. Corp., No. 78-2335, (W.D. Tenn. 1978). In Vertac, Judge Woods approved the reasoning of Judge Skelly Wright's dissenting opinion in Ethyl Corporation v. EPA, No. 73-2205 (D.C. Cir. Jan. 28, 1975) (Wright, J. dissenting), rev'd on rehearing, 541 F.2d 1 (D.C. Cir. 1976), cert. denied, 426 U.S. 941 (1975). Judge Wright asserted that endanger means something less than actual harm. When one is endangered, harm is threatened; no actual injury need ever occur.
144. 900 F.2d 429 (1st Cir. 1990); but see U.S. v Akzo Coatings of America, 949 F.2d 1409 (6th Cir. Mich. 1991) (criticizing holding in Ottati).

145. In relevant part, the first sentence of CERCLA Section 106(a) provides:

[W]hen the President [EPA] determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General . . . to secure such relief as may be necessary to abate such danger or threat and the district court . . . shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

42 U.S.C. § 9606(a)

146. 780 F. Supp. 177 (S.D.N.Y. 1991).

147. 901 F.2d 1550 (11th Cir. 1990).

148. 780 F. Supp. at 181.

149. Id.

150. 20 Chem. Waste Lit. Rep. 1039, (D.N.J. 1990).

151. Id.

152. Id. See also Hoxworth v. Blinder, Robinson & Co., Inc., 903 F.2d 186, 197-98 (3d Cir. 1990); but see Mitsubishi Int'l Corp. v. Cardinal Textile Sales, 14 F.3d 1507 (11th Cir. Ga. 1994) (stating that the decision in Hoxworth was premised upon erroneous readings of DeBeers Mines v. United States, 325 U.S. 212 (1945), and federal procedural rules, as well as upon incorrect applications of basic equity jurisprudence).

153. 20 Chem. Waste Lit. Rep. 1039.

154. See, e.g., Rueth v. USEPA, 13 F.3d 227 (7th Cir. 1993); Southern Pines Associates v. United States, 912 F.2d 713 (4th Cir. 1990); Hoffman Group, Inc. v. EPA, 902 F.2d 567 (7th Cir. 1990); Wagner Seed Co. v. Daggett, 800 F.2d 310 (2d Cir. 1986); Lone Pine Steering Committee v. EPA, 777 F.2d 882 (3d Cir. 1985), cert. denied, 476 U.S. 1115 (1986); J.V. Peters & Co. v. Administrator, EPA, 767 F.2d 263 (6th Cir. 1985).

155. 358 U.S. 184 (1958).

156. Southern Ohio Coal Co. v. Interior Department, 38 Env't Rep. Cas (BNA) 1393, 1397 (6th Cir. 1993) (citing Leedom v. Kyne, 358 U.S. 184 (1958)).

157. Rueth v. USEPA, 13 F.3d 227, 231 (7th Cir. 1993).

158. D.C. Cir., 01-1258, Dec. 19, 2001.
159. See United States v. Lynch, 301 F.2d 818 (5th Cir. 1962), cert. denied, 371 U.S. 893.
160. See, e.g., Studebaker Corp. v. Gittlin, 360 F.2d 692 (2d Cir. 1966).
161. 11 Wright and Miller, Federal Practice and Procedures: Civil § 2949. See also, Lujan v. National Wildlife Federation, 110 S. Ct. 3177 (1990) (affidavits failed to state with sufficient particularity that members' interests were adversely affected).
162. Marshall Durbin Fars, Inc. v. National Farmers Org., 446 F.2d 353, 357 (5th Cir. 1971).
163. Carter-Wallace Inc. v. David-Edwards Pharmacal Corp., 443 F.2d 867, 872 n.5 (2d Cir. 1971).
164. Pang-Tsu Mow v. Republic of China, 201 F.2d 195 (D.C. Cir. 1952), cert. denied, 356 U.S. 925 (1953).
165. Illinois Migrant Council v. Pilliod, 398 F. Supp. 882, 886 (N.D. Ill. 1975), aff'd, 540 F.2d 1062 (7th Cir. 1976), rehearing en banc, 548 F.2d 715 (7th Cir. 1977).
166. Redac Project 6426 Inc. v. Allstate Ins. Co., 402 F.2d 789 (2d Cir. 1968). Transcripts of non-judicial hearings have also been relied on. International Brotherhood of Elec. Workers Local 1186 v. Eli, 307 F. Supp. 495, 505 (D. Haw. 1969).
167. See, e.g., K-2 Ski Co. v. Head Ski Co., 468 F.2d 1087 (9th Cir. 1972).
168. See, e.g., Detroit & Toledo Shore Line R.R. Co. v. Brotherhood of Locomotive Firemen & Enginemen, 357 F.2d 152, 154 (6th Cir. 1966).
169. See, e.g., United States v. Kentland-Eikhorn Coal Corp., 353 F. Supp. 451 (E.D. Ky. 1973).
170. See, e.g., United States v. GAF Corp., 389 F. Supp. 1379 (S.D. Tex. 1975).
171. See e.g., Krichbaum v. Kelley, 844 F.Supp. 1107 (W.D. Va. 1994), affirmed 61 F.3d 900 (4th Cir. 1995) (a motion for preliminary injunction was combined with hearing on the merits; the court denied the preliminary injunction and granted summary judgment to defendant).
172. See e.g., Krichbaum v. Kelly, 844 F.Supp. 1107 (W.D. Va. 1994), affirmed, 62 F.3d 900 (4th Cir. 1995), where a motion for preliminary injunction was combined with a hearing on the merits.
173. Fed.R.Civ.P. Rule 65(b).

174. *Dilworth v. Riner*, 343 F.2d 226, 229 (5th Cir. 1965)(Noting that a TRO is generally issued ex parte or after a summary hearing, and that where the opposing party has notice of a TRO it is functionally identical to a preliminary injunction.)
175. Of course, the traditional four-prong test of interlocutory injunctive relief must also be satisfied. *Natural Resources Defense Council v. EPA*, 806 F.Supp. 275 (D.D.C. 1992); *Federal Deposit Insurance Corp. v. Cafritz*, 762 F. Supp. 1503 (D.D.C. 1991); *Ecologix, Inc. v. Fansteel, Inc.*, 676 F. Supp. 1374 (N.D. Ill. 1988); *Metro Mobile CTS, Inc. v. Centel Corp.*, 694 F. Supp. 806 (D. Kansas 1988); *Qunicy Cablesystems, Inc. v. Sully's Bav, Inc.*, 640 F. Supp. 1159 (D. Mass 1986). *Green Mountain Grange No. One v. Goldschmidt*, 11 ELR 20079 (D. Vt. 1980) (TRO delaying construction of a federal highway denied because of failure to show probability of success or irreparable harm); cf. *Southern Or. Citizens Against Toxic Sprays, Inc. v. Andrus*, 9 ELR 20715 (D. Or. 1979) (TRO denied where there is no evidence that insecticide will cause health problems and therefore there is no irreparable injury).
176. Rule 65(b) of the Federal Rules of Civil Procedure.
177. See *United States v. Akers*, 15 ELR 20243, 1985 U.S. Dist. LEXIS 23436, p.9 (E.D. Cal. 1985), aff'd, 785 F.2d 814 (9th Cir.), cert. denied, 479 U.S. 828 (1986) (conversion of large wetlands area to farmland through major hydrologic modifications constitutes an irreparable injury to a valuable public resource, prevention of which justifies a TRO); *National Indian Youth Council v. Andrus*, 501 F.2d 623, 694 (10th Cir. 1980) (TRO granted in district court to restrain lease of Indian lands pending disposition of claim for preliminary injunctive relief).
178. Orders to show cause often provide for service of process by the applicant's agents or employees rather than by the United States Marshal, the usual method. See Rules 4(a) and (c), Fed.R.Civ.P.
179. 11 Wright & Miller, *Federal Practice and Procedures*: Civil § 2951 (citing *Flight Engineers Int'l Ass'n, PAA Chapter, AFL-CIO*, 306 F.2d 840 (2d Cir. 1962)).
180. See discussion of district court in *Getty Oil Co. v. Ruckelshaus*, 342 F. Supp. 1006, 1016-17 (D. Del. 1972), and note similarity between application for a TRO and a preliminary injunction.
181. See *People v. Conrail Corp.*, 251 Ill. App.3d 550, 559, 190 Ill. Dec. 619, 625 (App. Ct. Ill. 1993).
182. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 438-39 (1974)
183. See *Cenergy Corp. v. Bryson Oil & Gas P.L.C.*, 657 F. Supp. 867, 869-70 (D. Nev. 1987).
184. See also *American Can Co. v. Mansukhani*, 742 F.2d 314, 322 (7th Cir. 1984); Matter of

- Vuitton et Fils S.A., 606 F.2d 1, 4-5 (2nd Cir. 1979)(Requirement of notice can be waived where the effect of notice would be to allow a seller of counterfeit goods to remove the counterfeit goods from his warehouse thereby altering the status quo).
185. See United States v. Professional Sales Corp., 16 ELR 20474 (N.D. Ill. 1985).
  186. Notice improprieties in the issuance of a TRO, while they may be violations of Rule 65(b), are not grounds for voiding the TRO where a hearing on the motion is granted that remedies the notice impropriety, and where the lack of notice did not prejudice one party. General Motors Corp. v. Buha, 23 F.2d 455, 458-59 (6th Cir. 1980).
  187. Granny Goose, 415 U.S. at 442.
  188. Id. at 443.
  189. 359 F.Supp 1178 (D.Wyo., June 11, 1973) rev'd on other grounds, 484 F.2d 1244 (10th Cir. 1973), overruled on other grounds, Village of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992).
  190. 408 F. Supp. 1323 (S.D.N.Y. 1975).
  191. Courts have held that despite this statutory requirement for an explanation, a TRO without this explanation is not void if the parties have a hearing in which to debate the TRO shortly thereafter (Cenergy p.870, holding that the procedural defect was harmless b/c parties had a hearing on the TRO within six days).
  192. United States v. El Paso Gas Co., 376 U.S. 651, 656-57 (1964).
  193. See United States v. Moretti, 1 ELR 20443 (S.D. Fla. 1971).
  194. For the context of the meaning of the phrase "specific in terms" see cases collected at footnote 11, 7 Moore's Federal Practice, Part 2, § 65-11 (1978). The provisions of the rule that permit the order to run against "those persons in active concert or participation with them . . ." permits the order to reach non-parties in limited circumstances. See, e.g., Regal Knitwear Co. v. N.L.R.B., 324 U.S. 9 (1945).
  195. See order in United States v. West Penn Power Co., No. 77-1142 (W.D. Pa. 1978).
  196. See Scherr v. Volpe, 466 F.2d 1027, 1035 (7th Cir. 1972) (injunction issued against highway construction for NEPA non-compliance).
  197. Waterfront Comm'n of N.Y. Harbor, 928 F.Supp. 1388, 1405 (D.N.J. 1996); Clark v. Kmart, 979 F.2d 965, 968 (3d Cir. 1992); Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 804 (D.N.J. 1989)("An incorrect interlocutory order may harm defendant and a bond

provides a fund to use to compensate incorrectly enjoined defendants”).

198. *W.R. Grace and Co. v. Local Union 759, Intern. Union of United Rubber, Cork, Linoleum, and Plastic Workers of America*, 461 U.S. 757, 770 n.14(1983). But see *Dornan v. Sheet Metal Workers’ Intern. Ass’n.*, 810 F.Supp. 856, 858 (E.D.Mich. 1992)(declining to find that the Supreme Court had intended to foreclose all equitable remedies to compensate for reversed injunctions).
199. In the Second, Sixth, Ninth, and Tenth Circuits appellate courts have found that the trial judge has discretion to waive the bond requirement entirely. See Erin Connors Morton, Note: Security for Interlocutory Injunctions under Rule 65(c): Exceptions to the Rule Gone Awry, 46 *Hastings L.J.* 1863, 1877-78. See *People ex rel. Van de Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319 (9th Cir. 1985) (no bond required for nonprofit environmental citizens group challenging regional planning agency); *Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322 (9th Cir. 1975) (bond reduced from \$4,500,000 to \$1,000 in NEPA suit involving expansion of San Francisco Airport); *Viavant v. Trans-Delta Oil & Gas Co.*, 7 ERC 1423, 1426 (10th Cir. 1974) (\$100 bond in NEPA case); *Alabama v. Corps of Engineers*, 411 F.Supp. 1261,12 ERC 1888 (N.D. Ala. 1976) (security of one dollar); *Wisconsin Heritages, Inc. v. Harris*, (security bond waived in NEPA case); *Libeu v. Johnson*, 195 Cal.3d 517, 240 Cal. Rptr. 776 (1st Dist. Ct. App. 1987) (trial court had power to impose nominal bond in environmental case notwithstanding nonindigency of plaintiff). See also, *McCormack v Township of Clinton*, 872 F.Supp.1320 (D.C.N.J. 1994) (waiver of security requirement for preliminary injunction was appropriate in plaintiff’s challenge to zoning ordinance which restricted time frame for placement of political signs). For a long list of district court cases, see *Leshy*, supra note 20, at 672. See generally, *Henson & Gray, Injunction Bonding In Environmental Litigation*, 19 *Santa Clara L. Rev.* 541 (1979). See also, Note, *Bond Requirements Under Federal Rule of Civil Procedure 65(C): An Emerging Equitable Exemption for Public Interest Litigants*, 13 *B.C. Env’tl. Aff. L. Rev.* 125 (1985).

The cases running against this trend are few and far between. The district court in *Sylvester v. United States Army Corps of Engineers*, 884 F.2d 394, 397 (9th Cir. 1989) required a citizen plaintiff to post a \$100,000 bond as security for a preliminary injunction halting work on a resort complex. But on appeal, the court found that the preliminary injunction was unjustified because the plaintiff had not established a likelihood of success on the merits. They reversed the preliminary injunction on the NEPA claim at issue, remanded to the trial court to consider the other NEPA, CWA, and CAA claims that the plaintiff had made, and ordered that the bond amount be reconsidered if a preliminary injunction was granted on the other claims. *Id.* at 397,401. This point is raised in *Save Our Sonoran, Inc. v. Flowers* (381 F.3d 905, 916 (9th Cir. 2004), where the court notes that *Sylvester* does not stand for the proposition that courts are required to set bonds in the amounts of actual damages, and that the court in *Sylvester* specifically noted that the bond issue was unaddressed because the modification of the injunction required the district court to reconsider the bond. *Id.* A

\$10,000 bond was required in a NEPA case brought by landowners fighting construction of high voltage lines, even though an environmental group joined the action. *Stockslager v. Carroll Elec. Coop. Corp.*, 528 F.2d 949, 951 (8th Cir. 1976). And in *Tribal Village of Akutan v. Hodel*, 16 ELR 20245 (D. Alaska 1986), *aff'd*, 792 F.2d 1376 (9th Cir. 1986), the court recognized that the Village and environmental plaintiffs would be unable to post meaningful security, but required the State of Alaska, co-plaintiff in the suit, to post a bond of \$10,000 as security for costs. This, however, is in keeping with the general rule that public interest groups will not be forced to post a bond while state governments, who do not face hardship and are not exempted from the bond requirement, will typically be required to post.

200. *Save the Prairie Society v. Greene Development Group, Inc.*, 338 Ill. App.3d 800, 804-05; 789 N.E.2d 389, 392-93 (2003) (requiring a \$200,00 bond from a small conservation group was abuse of discretion).
201. *Crowley v. Local No. 82, Furniture and Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, and Packers*, 679 F.2d 978 (1st Cir., 1982); *Temple University v. White*, 941 F.2d 201, 219-20 (3rd Cir., 1991) (adopting the First Circuit's exception to the bond requirement established in *Crowley*). See, e.g. *Natural Resources Defense Council, Inc. V. Morton*, 337 F.Supp. 167 (D.D.C. 1971)(court will order a nominal bond to avoid precluding judicial review by public interest litigants challenging leasing of the Outer Continental Shelf, notwithstanding allegations of substantial loss to the government);
202. See, e.g., *International Controls Corp. v. Vesco*, 490 F.2d 1334, 1356 (2d Cir. 1974).
203. An unsubstantiated damage claim, particularly one for non-monetary damage, will not be recognized as a harm and therefore will not require a bond to be set. In *Cronin v. U.S. Dept. of Agriculture*, Judge Posner held that damage to the Forest Service's reputation as a forest manager from an injunction against a timber sale in a national forest was not adequate to demand a posted bond. (919 F.2d 439, 446 (1990). In that case the Service had put forth no evidence regarding the cumulative impact of these injunctions on the Service's timber cutting program. As such their reputational damage was completely speculative. *Id.*
204. *Save Our Sonoran, Inc. v. Flowers*, 381 F.3d 905 (9th Cir. 2004)(holding that the district court was within its discretion to set a \$50,000 bond where an environmental group did not submit any evidence at hearing to suggest that anything more than a nominal bond would constitute an undue hardship).
205. See e.g., *U.S. O'Brien*, 836 F.Supp.438 (D.C. Ohio 1993).
206. *In re National Credit Management Group, L.L.C.*, 21 F.Supp. 2d 424, 463 (D.N.J. 1998)(holding the FCC exempt from bond requirements as a federal agency, but holding that the State of New Jersey is not).

207. City of South Pasadena v. Slater, 56 F.Supp. 2d 1106, 1108-09 (C.D. Cal. 1999).
208. Sampson v. Murray, 415 U.S. 61 (1974).
209. See Truck Drivers Local Union No. 807 v. Bohack Corp., 541 F.2d 312 (2d Cir. 1976); Spencer Cas. v. Armonk Indust., Inc., 489 F.2d 704 (1st Cir. 1973) (effective denial of a preliminary injunction).
210. 512 F.2d 915 (D.C. Cir. 1975).
211. Id. at 916.
212. Id. at 917. See also Nat'l Wildlife Fed'n v. Natl' Marine Fisheries Serv., No. 05-35569 (9<sup>th</sup> Cir. Decision published July 26, 2005, first paragraph of Section II.(review of a preliminary injunction does not reach the merits of the case, only the temporal rights of the parties until district court decides on the merits) **(NOTE: THIS DECISION AFFIRMING A PRELIMINARY INJUNCTION WAS PUBLISHED JULY 26, 2005, AND THIS NOTE WAS UPDATED JULY 28<sup>TH</sup>. RIGHT NOW THE CASE IS ONLY AVAILABLE ON 9<sup>TH</sup> CIRCUIT WEBSITE, NOT YET A SLIP OPINION OR IN WESTLAW/LEXIS. PLEASE UPDATE THIS CITE.**
213. 756 F.2d 143 (D.C. Cir. 1985).
214. 756 F.2d at 152. See No Spray Coalition, Inc. v. City of New York 252 F.3d 148 (2d Cir. 2001) (reviewing denial of preliminary injunction for abuse of discretion; Southern Ohio Coal Co. v Department of Interior, 24 ELR 20188 (6th Cir. 1993); City of Las Vegas v. Lujan, 891 F.2d 927 (D.C. Cir. 1989); National Wildlife Fed'n v. Burford, 835 F.2d 305, 319 (D.C. Cir. 1987). Accord Oburn v. Shapp, 521 F.2d 142, 147 (3rd Cir. 1975); American Motorcyclist Ass'n v. Watt, 714 F.2d 962, 965 (9th Cir. 1984); F. Mason County Medical Ass'n v. Knebel, 563 F.2d 256, 261 (6th Cir. 1977); Crowther v. Seaborg, 411 F.2d 437 (10th Cir. 1969).
215. Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 918 (9th Cir. 2003)(en banc).
216. United States v. Peninsula Communications, Inc., 287 F.3d 832, 839 (9th Cir. 2002); . Nat'l Wildlife Fed'n v. Natl' Marine Fisheries Serv., No. 05-35569 (9<sup>th</sup> Cir. Decision published July 26, 2005, first paragraph of Section II.(review of a preliminary injunction does not reach the merits of the case, only the temporal rights of the parties until district court decides on the merits) **(NOTE: THIS DECISION AFFIRMING A PRELIMINARY INJUNCTION WAS PUBLISHED JULY 26, 2005, AND THIS NOTE WAS UPDATED JULY 28<sup>TH</sup>. RIGHT NOW THE CASE IS ONLY AVAILABLE ON 9<sup>TH</sup> CIRCUIT WEBSITE, NOT YET A SLIP OPINION OR IN WESTLAW/LEXIS. PLEASE UPDATE THIS CITE.**

217. 565 F.2d 549 (9th Cir. 1977).
218. Id. at 551-52 (footnotes omitted). See also Southern Ohio Coal Co. v. Dept. of Interior, 24 ELR 20189 (6th Cir. 1993).
219. 550 F.2d 745 (2d Cir. 1975).
220. Id. at 751.
221. See Foundation on Economic Trends v. Heckler, 756 F.2d 143 (D.C. Cir. 1975); Warm Springs Dam Task Force v. Gribble, 565 F.2d 549 (9th Cir. 1977); Union Carbide Agricultural Prods. Co. v. Costle, 632 F.2d 1014 (2d Cir. 1980).