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RESTORATION AS A FEDERAL REMEDY FOR ILLEGAL DREDGING AND FILLING OPERATIONS

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This article presents the federal remedies available to ameliorate the damage done to the environment by illegal dredge and fill operations. The author examines statutory and case law, and concludes that the federal agencies and courts have the power to order developers to restore wetlands which have been dredged and filled without authorization, and that restoration can be an effective tool for protecting our nation's wetland areas.

I. INTRODUCTION

The wetland areas\(^1\) of our nation are becoming increasingly scarce and vital commodities. In fact, it has been estimated that by the late 1950's nearly one half of the wetlands in the United States had been destroyed.\(^2\) The plight that has befallen many of our nation's wetlands was best portrayed by Judge William Mehrtens of the United States District Court, Southern District of Florida, in a case involving the destruction of a mangrove tract in the Florida Keys:

> This property in its natural state, that is before this development was begun, had been a nesting and feeding sanctuary for a num-

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1. "Wetlands are those land and water areas subject to regular inundation by tidal, riverine, or lacustrine flowage. Generally included are inland and coastal shallows, marshes, mudflats, estuaries, swamps, and similar areas in coastal and inland navigable waters." 33 C.F.R. § 209.120(g)(3)(i) (1976).

The number of species of wading and shore birds. . . . The bay in this area was very productive in producing numerous game and commercial species of fish . . . . The shoreline was lined with mangrove plants . . . . The bay bottom was composed of an organic peaty substance which had accumulated through sedimentation caused by the wide variety of plant and animal organisms natural to this area . . . .

The immediate result of the development in this area was the complete removal and destruction of all living mangrove plants. With the loss of the mangroves . . . went all wading and shore birds previously found in this area. The excavation of the access channels and canals by the defendants removed the peat natural to the bottom and exposed the underlining sand or rock.

. . . In this area, the mangrove plants and the organic peaty bottom are absolutely essential to sustain an energy flow and a healthy marine ecosystem . . . . The mangrove plant supported by the peaty bottom is an essential element in the life cycle and the base of the pyramid upon which all higher forms of life in the bay areas rest . . . .

. . . The defendants' extensive dredging of canals done without protective measures being taken, released large amounts of silt . . . . This act(ed) to suffocate the peat and other living vegetable forms. Further, as all plants require sunlight to carry out the process of photosynthesis, the clouding of the water by silt through the dredging operations blocked off sunlight, which impede(d) and injure(d) the growth of the plant life in the bay.5

This total destruction of a wetlands area resulted from dredging and filling operations4 that were illegal since done without governmental authorization.5 As a result of these illegal activities, the developer could have been subject to criminal sanctions.4 Criminal sanctions, however, would have afforded no relief for the injuries

4. Dredging is the removal of material such as rock, sand, gravel, and mud from the bottom of a body of water. Fill operations include the addition of materials such as rock, sand, gravel, and mud to a body of water in order to create a dry land area within the water body or an elevation of land beneath the body of water.
5. At the federal level the defendant was required to obtain a permit from the United States Army Corps of Engineers prior to performance of its dredge and fill operations. 33 U.S.C. § 403 (1970).
6. The developer, a corporation, was subject to a potential fine of $500 to $2500. 33 U.S.C. § 406 (1970). Under legislation enacted subsequently, actions similar to the developer's would have been subject to a fine of up to $10,000 per day per violation and $2,500 to $25,000 per day per violation if the violating actions had been willful or negligent. 33 U.S.C. § 1319(c)(1), (d) (Supp. V 1975).
that the developer had caused to the public rights in the mangrove area. Thus, the trial court, in entering final judgment in a suit that was brought against the developer, attempted to have undone as much of the damage as possible by ordering the removal of fill that the developer had placed in the water, the filling of canals that had been connected to the water, and the replanting of mangroves along the water's edge.\(^7\)

Developers in the past have dredged and filled in wetland areas on numerous occasions without the requisite governmental authorization.\(^8\) Their actions have often resulted from a lack of knowledge of applicable laws, a belief that such laws did not apply to them, or a knowledge that even if governmental authorization were not obtained it could be obtained by means of an after-the-fact procedure.\(^9\) Since the early 1970's, however, the after-the-fact permit procedure has been severely restricted,\(^10\) and legislation has been passed at the federal\(^11\) and state\(^12\) levels to help control development in wetlands areas and to protect these areas against unregulated dredging and filling activities. Even the United States Army Corps of Engineers, much criticized in the past as a supporter of dredging and filling projects,\(^13\) has recognized the importance of protection of wetlands from such unregulated activities: "As environmentally vital areas, . . . [wetlands] constitute a productive and valuable resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest."\(^14\)

At present, legislation is available to protect wetlands areas

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8. As an example, it was estimated in 1971 for Puget Sound in the State of Washington, that possibly up to eighty percent of the works present in the navigable waters of the Sound had been constructed without an Army Corps of Engineers permit. Hearings on Protecting the Nation's Estuaries: Puget Sound and the Straits of Georgia and Juan de Fuca Before the Subcomm. on Conservation and Natural Resources of the House Comm. on Government Operations, 92d Cong., 1st Sess. 421 (1971).
and to insure that even minor dredging and filling projects are subject to close governmental scrutiny. Where the avenues for governmental authorization are bypassed, however, and illegal dredging and filling damages or destroys a wetlands area, there are no surplus wetlands available for substitution and the finite quantity of such parts of the public domain is reduced. Criminal and civil monetary penalties provide little recompense for the loss of such areas. Some method must be available to salvage these illegally altered areas and to help to restore them as functioning environmental units of the public domain. Judicially imposed restoration as a remedy for illegal dredging and filling activity is available as a tool to help to replenish the dwindling supply of wetlands areas. Such restoration is not capable of returning a damaged water environment to pristine condition, but it can put the water area in a condition more susceptible to rapid natural restoration.

This article examines federal16 restorative remedies for illegal dredging and filling operations. Emphasis is focused in the first instance on the power sources available for imposition of the remedy. Secondarily, each power source is considered in terms of jurisdictional requirements, the type of restorative relief available, and the factors to be weighed in determining the degree of relief warranted.

II. Substantive Powers Creating Restorative Remedies

A. Federal Common Law

In England in the late 1700's and early 1800's there was recognized judicially a power in the sovereign to sue in equity for the abatement or removal of obstructions to the public right of navigation, such obstructions being termed public nuisances.17 In the United States, state courts recognized this same right as a matter of common law, and state attorneys general possessed the power to sue to protect state navigable waters.18 When first presented with

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15. "Although a particular alteration of wetlands may constitute a minor change, the cumulative effect of numerous such piecemeal changes often results in a major impairment of the wetlands resources." 33 C.F.R. § 209.120(g)(3)(iii) (1976).

16. Federal but not state remedies are discussed in this article for several reasons. Traditionally, the federal interest has been dominant over state interests for navigable waters. Also, while extensive federal legislation which allows restoration has been enacted, there has been a paucity of such legislation at the state level. Finally, the vast majority of cases in which restoration has been ordered have been brought pursuant to federal law.


the opportunity to recognize a federal common law prohibition against public nuisances in the form of obstructions to navigable waters, however, the Supreme Court of the United States refused to do so.\textsuperscript{19} The Court did note that since the body of water involved was a navigable water of the United States,\textsuperscript{20} Congress had the power to enact legislation regulating obstructions in the water body. Since Congress had passed no such law, the Court concluded that the body of water was solely under the control of the law of the state in which it was located.\textsuperscript{21}

Nine years later the Supreme Court stated, in dictum, that a court proceeding in equity could take jurisdiction, upon an information filed by an attorney general, over a case involving the creation of a public nuisance by the obstruction of a navigable river.\textsuperscript{22} Although the Court did not indicate whether it was referring to state attorneys general or the Attorney General of the United States, it did cite extensively to the filing of such suits under English law. Thus, the Court apparently was referring to the Attorney General of the United States since his position was analogous to that of the Attorney General of England. Even if the Attorney General did have the power to bring such an information,\textsuperscript{23} the law being applied in the suit in question was not federal common law, but the common law of the District of Columbia, from whence the appeal came.\textsuperscript{24}

A subsequent Supreme Court decision, \textit{Pennsylvania v. Wheeling & Belmont Bridge Co.},\textsuperscript{25} was the earliest case to state conclusively that federal common law prohibited obstructions in navigable rivers as public nuisances. In the \textit{Wheeling} case the state of Penn-

\textsuperscript{19} Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829). In \textit{Willson} the Court was faced with a challenge to a state law which had permitted erection of a dam across a navigable creek. Although the Court phrased the challenge to the state act solely in terms of a possible conflict with the power of the government to regulate interstate commerce, the parties challenging the act argued that it was against the principles of the common law to obstruct the river in question. \textit{Id.} at 247. \textit{ Accord}, Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 719-20 (1865).

\textsuperscript{20} The body of water was a small creek subject to the ebb and flow of the tide; thus, under the test recognized at that time it was a navigable water of the United States. \textit{See} The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825).


\textsuperscript{22} Mayor of Georgetown v. Alexandria Canal Co., 37 U.S. (12 Pet.) 91, 97-98 (1838).

\textsuperscript{23} \textit{See} United States v. San Jacinto Tin Co., 125 U.S. 273, 279-85 (1888) in which the Court held that the Attorney General of the United States had the power to bring a suit in equity to set aside a fraudulently obtained federal land patent because the government had an interest to protect, notwithstanding the lack of specific statutory authority to bring such an action in the name of the government.

\textsuperscript{24} 37 U.S. (12 Pet.) at 91.

\textsuperscript{25} 54 U.S. (13 How.) 518 (1851).
Pennsylvania sued in equity under the original jurisdiction of the Supreme Court to have abated as a public nuisance a bridge erected across the Ohio River in Virginia at such a height as allegedly to obstruct waterborne traffic. The defendants were private bridge builders who had been authorized to construct the bridge by an act of the Virginia legislature. The Supreme Court concluded that the bridge was a nuisance in fact and that Pennsylvania was entitled to the relief it sought.\(^{26}\)

The court based its decision on several grounds. First, in answer to an attempt by the defendants to plead authorization by the Virginia legislature as a defense, the Court noted that Congress had licensed vessels, established ports of entry, and imposed duties on officers on boats on the Ohio River. Such acts evidenced a congressional intent to regulate navigation on the river; furthermore, an interstate compact signed by Virginia stated that the river was to be free for common navigation and use. These factors were sufficient to give federal courts jurisdiction over an obstruction constituting a common law public nuisance on the river.

Second, the Court stated that

the courts of the Union are not limited by the chancery system adopted by the State . . . . The usages of the High Court of Chancery in England, wherever the jurisdiction is exercised, govern the proceedings. This may be said to be the common law of chancery . . . .

Under this system, where relief can be given by the English chancery, similar relief may be given by the courts of the Union.\(^{27}\)

The Court thus recognized a federal common law of nuisance in equity prohibiting obstructions in navigable waters in the United States, on the ground that such a common law principle was present in the chancery court of England.\(^{28}\) Based on these common law principles, the Wheeling Court concluded that Pennsylvania was entitled to abatement of the bridge because it had shown that there was a nuisance in fact and that Pennsylvania had suffered a special injury from the nuisance.

The 1851 Wheeling decision was not followed by the Supreme Court over the next forty years, even though it was argued as applicable in four cases which involved state-authorized obstructions.

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26. The Court stayed execution of the abatement order to give the defendants an opportunity either to install draws in the bridge or raise its clearance.
27. 54 U.S. (13 How.) at 563-64.
28. See note 17 supra.
in navigable waters. The Court in these cases either ignored the *Wheeling* decision entirely, or distinguished it by concluding that it relied solely on the interstate compact and congressional intent to regulate navigation.

The Court made no mention of a federal common law prohibiting obstructions until 1888 in the last of the four decisions, *Willamette Iron Bridge Co. v. Hatch.* In *Willamette*, two individuals had filed suit to enjoin the construction of a bridge across the Willamette River in Oregon. The defendants were working pursuant to an act of the Oregon legislature. The plaintiffs contended that erection of the bridge would produce a public nuisance in the form of an obstruction to the river in contravention of the laws of the United States. The Court held that since there was no diversity of citizenship between the parties and since the case did not arise under any law of the United States, there was no jurisdiction for the case in the federal courts. Further, in considering the public nuisance issue the court stated:

[T]here is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, unless it be the maritime law . . . . No precedent, however, exists for the enforcement of any such law . . . . There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the States.

The *Willamette* Court distinguished the *Wheeling* decision by the Congressional intent to regulate navigation, by the interstate compact, and by the type of navigable waters involved in *Wheeling*. The Court pointed to the fact that the Willamette River, although navigable, was located wholly within the state of Oregon and was


32. 125 U.S. 1 (1888).

33. Not only a federal statute directly prohibiting some act of obstruction but also a statute creating some federal interest can be judicially enforced. *E.g.*, *United States v. Republic Steel Corp.*, 362 U.S. 482, 492 (1960).

34. 125 U.S. at 8.
therefore closely tied to local concerns. In contrast, the Ohio River crossed several states and thus was subject to strong federal interests. The Court cited several other cases involving intrastate waters to support this distinction, but the waters in those cases were links in a chain\textsuperscript{35} of continuous channels for commerce among the states.

The \textit{Willamette} decision is open to two interpretations. The first is that the decision stated explicitly that "there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers."\textsuperscript{38} The second interpretation is that the Court, by distinguishing the \textit{Wheeling} decision rather than overruling it and by emphasizing the intrastate nature of the Willamette River, may have intended to retain a federal common law prohibiting obstructions and nuisances in interstate navigable rivers based on \textit{Wheeling}.

The uncertainty concerning the status of the federal common law raised by the \textit{Wheeling} and \textit{Willamette} cases was not resolved. Subsequent courts either ignored \textit{Wheeling} and followed \textit{Willamette} by finding that there was no federal common law for obstructions,\textsuperscript{37} or ignored \textit{Willamette} and followed \textit{Wheeling} by allowing enforcement of such a law.\textsuperscript{38}

The Supreme Court eventually acknowledged the complexity of the issue in a case in which federal common law had been pleaded to establish the prohibition of an obstruction in a navigable body of water as a public nuisance.\textsuperscript{39} The Court declined to resolve the issue.\textsuperscript{40}

\begin{footnotesize}

36. 125 U.S. at 8.


40. Nor, finally, do we decide whether nonstatutory public nuisance law may
\end{footnotesize}
In *Illinois v. City of Milwaukee,* the Court ignored the *Wheeling* and *Willamette* decisions entirely and considered anew the question of federal law for public nuisances. The *Illinois* case involved a suit under federal common law by the state of Illinois under the original jurisdiction of the Supreme Court for the abatement of pollution being dumped into Lake Michigan by four cities. The Court held that there was a federal common law prohibiting pollution as a public nuisance in interstate waters. The Court based its recognition of such a federal common law on several grounds. First, the Court noted that numerous federal laws had been passed to protect interstate waters. Such laws established an area of federal interest or concern. Second, although the federal statutes did not provide the remedy Illinois was seeking, federal courts in the past had fashioned federal common law where federal interests were concerned, where federal policies were expressed, and where such federal common law was not inconsistent with the statutory scheme. Third, since each state at the time of the formation of the Union had surrendered to the federal government its sovereign rights to the forceful abatement of a nuisance located outside its boundaries, each state should be able to call in the federal government to protect it from such nuisances. Fourth, apart from the character of the parties to a controversy, rights in interstate waters had been held to present federal common law issues. Fifth, water pollution had been previously thought of as a public nuisance, and it was conceivable that an act creating water pollution in one state might impact another state by spreading the pollution over interstate waters.

Illegal dredge and fill operations which release pollutants into the water fall squarely within the proscriptions of the *Illinois* decision if the pollutants travel interstate. This generally would not be

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42. *Id.* at 101.
43. *Id.* at 103 n.5.
44. *Id.* at 104-05.
45. *Id.* at 105-06. The Court noted with reference to this factor that Lake Michigan borders on four states. *Id.* at 105 n.6.
46. *Id.* at 107.
the case for most of the heavier particulate matter from such operations, since these substances often settle out of the water in the vicinity of the project or are restricted to the immediate area by the use of turbidity screens, impoundments, and the like. Fine particulate matter in solution, however, can travel great distances. The potential for the creation of an interstate public nuisance is great, especially where these particles contain toxic substances or where toxic substances are in solution after leaching out of fill material. If transportation of such noxious substances were to occur as a result of dredging and filling operations, the downstream affected state would have a valid cause of action under federal common law for abatement of the nuisance on the basis of the Illinois decision. This abatement would logically be accomplished through a prohibitory injunction against further dredge and fill operations and, if necessary, a mandatory injunction requiring removal of the fill as the source of pollution.

Aside from the pollution-creating aspects of an illegal dredge and fill operation, the probability of such an operation having an interstate effect is small. Conceivably an obstruction in an interstate river could be created by illegal dredging and filling. In such a case, if the obstruction were significant enough the flow of the river might be decreased in the downstream state. Under the rationale of the Illinois decision, an action would probably lie for abatement under federal common law.

Although the Supreme Court in the Illinois case referred to the pollution of "interstate or navigable waters" as a public nuisance, only one court has subsequently applied the Illinois Court's recogni-
tion of federal common law to pollution in an intrastate navigable body of water. All other federal courts, when faced with the issue, have concluded that the Illinois decision dictates that this federal common law apply only to interstate bodies of water where pollution has been carried interstate. Supportive of this conclusion is the fact that all of the pertinent cases cited by the Court in the Illinois decision dealt solely with interstate waters.

The Court noted, however, that in the past it had been willing to fashion federal common law "where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism . . . ." In the Illinois case, the Court concluded that both of these interests were present because Lake Michigan is bounded by four states. These interests might also support application of federal common law to intrastate navigable bodies of water where there is present a federal need for uniformity or a basic interest of federalism such as the promotion and maintenance of peace and harmony among the states. Neither rationale is applicable to illegal dredge and fill operations in intrastate waters because there is seldom a substantial effect on interstate activity. Thus, the Illinois decision does not appear to provide a sufficient basis for imposing an abatement order or restorative remedy for such activities.

Since neither Willamette nor Wheeling were explicitly overruled or supported in the Illinois decision, the two cases can still be argued. Thus, Wheeling may provide substantive authority for the abatement or removal of obstructions within intrastate and interstate waters. In addition, while evidence of interstate effect is re-

53. Committee for the Consideration of the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006 (4th Cir. 1976) (en banc); Reserve Mining Co. v. EPA, 514 F.2d 492, 520-21 (8th Cir 1975) (en banc); Board of Supervisors v. United States, 408 F. Supp. 556, 562 (E.D. Va. 1976); see Michie v. Great Lakes Steel Div., Nat'l Steel Corp., 495 F.2d 213, 216 n.2 (6th Cir.) (dictum), cert. denied, 419 U.S. 997 (1974). The Fourth Circuit in Jones Falls speculated without deciding that the federal common law recognized by the Illinois court prohibiting pollution as a public nuisance, if applicable to intrastate waters, may well be pre-empted by the Federal Water Pollution Control Act Amendments of 1972. 539 F.2d at 1009 & n.7.
54. 406 U.S. at 103-07.
55. Id. at 105 n.6.
56. Id.
57. Only one court, however, has cited the older line of decisions for more than historical value. United States v. Stoeco Homes, Inc., 359 F. Supp. 672, 679 (D.N.J. 1973), vacated on other grounds, 498 F.2d 597 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975). The body of water involved in Stoeco was located wholly within the state of New Jersey so it is conceivable that the older line of cases were cited as support for extending the rationale of the Illinois decision to intrastate waters.
quired for activity on interstate waters under Illinois, no such evidence is required by the Wheeling decision. On the other hand, the Willamette decision seems to overrule part of the Wheeling decision, since it stated that there is no federal common law prohibiting intrastate obstructions.

Since actions based upon the Illinois and Wheeling decisions would be brought pursuant to federal common law in equity, the judicially recognized prerequisites for such equitable relief would be applicable. Thus, in order to prevail at trial, the party bringing suit would have to demonstrate that he had a likelihood of success if the cause were to come to trial on the merits, that there was a danger of irreparable harm to him, that he had no adequate remedy at law, and that the equities were balanced in his favor.

B. Federal Legislative Enactments

1. Appropriations for Structures or Improvements to Navigation

Prior to the promulgation of specific federal legislation for the protection of navigable waters, certain federal courts granted relief by ordering abatement of activities or obstructions in navigable waters where there was a potential or actual interference with an identifiable federal interest.58 Sufficient to be recognized as such federal interests were congressional appropriations for general improvements to the navigation of a specific body of water and appropriations for erection of a structure in or over the water.59 In addition, the judiciary was willing to enjoin a work by a private contractor for the federal government, if the work were not being built in compliance with legislative requirements and if the work were going to obstruct a navigable river.60

2. A Self-Effectuating Commerce Clause

Courts in several early cases indicated that navigable waters, as highways of interstate commerce, could be protected from ob-


59. See cases note 58 supra.

structions at the request of the federal government solely on the basis of the commerce clause as a self-effectuating power.\textsuperscript{61} The courts based their power to provide this remedy on the fact that the federal government, within the limits of the Constitution, has all the attributes of sovereignty and that the Constitution assigned the power over interstate commerce to the federal government.\textsuperscript{62} The possibility of such a power having any practical application as a basis for restoration, however, is remote since the issue was moot at the time these cases were decided and is moot at present because of the extensive legislation that has been enacted to protect both interstate commerce and navigable waters.

When Congress first began promulgating legislation significantly regulating commerce in the late nineteenth century, the judiciary recognized that in spite of the fact that legislation had not been enacted to protect commerce, Congress had, by regulating commerce, created an interest which could be protected. In \textit{In re Debs}\textsuperscript{63} the government sued for an injunction against striking railroad workers. There had been no federal statutes enacted prohibiting such strikes, but Congress had passed numerous statutes under the commerce clause regulating the railroad industry. The Court affirmed the grant of an injunction against the striking workers and noted:

The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control.\textsuperscript{64}

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\item Sanitary Dist. v. United States, 266 U.S. 405, 425 (1925); \textit{In re Debs}, 158 U.S. 564 (1895); see, e.g., Comment, Substantive and Remedial Problems in Preventing Interferences with Navigation, 59 Colum. L. Rev. 1065, 1082 n.125 (1959).
\item Justice Harlan, dissenting in United States v. Republic Steel Corp., 362 U.S. 482, 509 (1960), equated this power with the \textit{Wheeling} decision federal common law power to abate public nuisances. There is a distinction, however. The \textit{Wheeling} type of power is a power inherent in all sovereigns under an English common law system to abate public nuisances in areas of the public domain. In contrast, the self-effectuating commerce clause power arises because of the specific delegation of the power over interstate commerce to a sovereign.
\item 158 U.S. 564 (1895).
\item Id. at 586. See also Sanitary Dist. v. United States, 266 U.S. 405 (1925); North Bloomfield Gravel Min. Co. v. United States, 88 F. 664 (9th Cir. 1898). In \textit{North Bloomfield} Congress had passed an act prohibiting any hydraulic mining which directly or indirectly damaged two rivers in California. The act provided only criminal penalties. In spite of the lack of an appropriate provision, the court affirmed the grant of an injunction against further dredging by a hydraulic mining company because the interests of the federal government in interstate commerce as expressed in the statute were entitled to greater protection than the statute provided.
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Thus, in effect, the Congressional legislation had created an interest which the courts could protect.

By analogy, if an illegal dredge and fill operation were shown to be causing an obstruction to or interference with interstate commerce over navigable waters where Congress has assumed some identifiable statutory control over the commerce or the navigable waters, a federal court would have the power to abate that activity or remove its effects.\(^6\)

3. THE RIVERS AND HARBORS ACT

Congress first assumed statutory control over the nation's navigable waters by passage of section 10 of the Rivers and Harbors Act in 1890.\(^6^6\) It is generally accepted\(^6^7\) that section 10 was enacted specifically to fill the void created by the holding of the Supreme Court in *Willamette Iron Bridge Co. v. Hatch* that "there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers."\(^6^8\)

In its present form this section provides in three clauses:

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.\(^6^9\)

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\(^{66}\) Act of September 19, 1890, ch. 907, 26 Stat. 426. Section 10 and other existing laws relating to navigable waters were revised, compiled and re-enacted as the Rivers and Harbors Appropriation Act of 1899. 33 U.S.C. § 401 (1970).


\(^{68}\) 125 U.S. 1, 8 (1888).

Section 406 of the Rivers and Harbors Act provides for criminal penalties for violation of section 403. In addition, section 406 provides that the federal government may sue for an injunction for "the removal of any structures or parts of structures erected in violation" of section 403.

The provision for injunctive relief is by its language much narrower than the prohibitions of section 403. Specifically, it appears that the section 406 injunctive provision applies only to the removal of structures prohibited by the second clause of section 403, and not to the other clauses of section 403. The Supreme Court, in the case of United States v. Republic Steel Corp., confirmed this limited scope for section 406. Certain lower federal courts, however, have not followed the direction of the Supreme Court and have concluded that all of the activities prohibited by section 403 are subject to the injunctive provisions of section 406. The difference between ap-
proaches may appear to be purely academic in light of the fact that the Republic Steel Court still granted injunctive relief against an obstruction which was not a structure by using the In Re Debs federal interest implied relief approach; however, the difference is significant since the statutorily designated relief is obtained more easily than the federal interest implied type of relief. For example, where injunctive relief is specifically provided as a remedy for violation of a statute, the only showing courts have required as a prerequisite to relief is evidence that the statute has been violated. Where injunctive relief is not provided by the statute and must be judicially implied to protect a statutory interest, certain federal courts have required a showing at least of irreparable harm in addition to proof of a violation of the statute. Thus, if an illegal dredge and fill activity were treated as automatically invoking section 406, whether a structure was involved or not, the only prerequisite for injunctive relief would be proof of a violation of section 403. Conversely, if illegal dredge and fill activity were treated as not creating a structure but as creating some other type of obstruction, alteration, or modification, certain courts would require both a showing of a violation of the statute and irreparable damage.

For this latter view the meaning of "structure" under the second clause of section 403 has great importance. The creation of a bulkhead prior to the commencement of a dredge and fill project would be the creation of a structure. The subsequent dredging and placing of fill inside the bulkhead, however, would not as obviously be the creation of a structure. The fact that the processes of excavating and filling are included within the third clause prohibition of section 403 would seem to militate against their inclusion as creating a structure under the second clause. On the other hand, most

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75. 158 U.S. 564 (1895). See text accompanying notes 63-64 supra.
78. See Tripp & Hall, Federal Enforcement Under the Refuse Act of 1899, 35 ALBANY L. REV. 60, 80 (1970) for an argument that the government should seek precedents relieving the necessity of showing irreparable injury as a matter of law.
dredge and fill projects are associated with creation of a bulkhead and contemplate the creation of a fixed unit of land.

In United States v. Joseph G. Moretti, Inc., the Fifth Circuit concluded that landfills in navigable waters, whether resulting from intentional or accidental actions, are structures within the meaning of section 406 and section 403. Such a conclusion is not in accordance with the decisions of the United States Supreme Court on the subject. For example, in Republic Steel the Court concluded that the deposit of solids from an industrial outfall into a navigable river created an obstruction under section 403, but did not create a structure under section 406. The Court in its analysis refuted the argument that the term “obstruction” in the first clause of section 403 meant only structures, an argument that, if true, would have barred relief. The Court considered the term “obstruction” to be broad enough to reach more than just structures in navigable waters, and in fact broad enough to reach sedimentation clogging a navigable channel. Other courts have likewise reached the same conclusion that the mere creation of a fill in navigable waters is not necessarily the creation of a structure within the meaning of section 406 and section 403.

The broad conclusion of the Fifth Circuit, in addition to being in opposition to decisions of the Supreme Court, results in an illogical interpretation of section 403. Based upon the rationale of the Fifth Circuit, every fill, no matter by what means accomplished, would be a structure within the second clause of section 403 even though the second clause is specifically restricted to structures that are built. In addition, the broad conclusion would render the third clause of section 403 redundant in regard to its provision for filling operations, since every fill would be a structure under the second clause.

80. Id. at 429.
81. 362 U.S. 482 (1960).
82. Id. at 489. See Wyandotte Transp. Co. v. United States, 389 U.S. 191, 203 (1967) in which the Court stated:
That case [Republic Steel] concerned the deposit of industrial solids which, we believed, created an “obstruction . . . to the navigable capacity” of a waterway of the United States, within the meaning of § 10 of the Act . . . . We concluded that the authorization of injunctive relief in § 12, which is applicable only to a limited category of § 10 obstructions (structures), should not be read to exclude injunctions to compel removal of other types of § 10 obstructions.

Amazingly, the Fifth Circuit stated that “[i]n Republic Steel the Supreme Court held that accidental sedimentation which caused the filling of a navigable water constituted a structure within the meaning of § 406.” 478 F.2d at 429.

Despite the overbreadth of the Fifth Circuit's conclusion regarding various kinds of fills, it appears that the court's conclusion that the specific land fill involved in the case was a structure was justified. The landfill in the case had been created by the erection of a bulkhead line of large rocks in a bay and by the placement of fill dredged from the seaward side of the bulkhead into the water on the landward side of the line to create dry land. The dry land was to be used for a trailer park. The fill and bulkhead thus were intended to be one unit designed for a specific purpose. The distinction made by the Third Circuit in an earlier case involving a negligently created fill in a navigable river applies well to the creation of dry land in this case: "To us that phrase [building or erecting a structure] connotes the purposeful creation of something formulated or designed, construction work in the conventional sense." The elements of purposeful creation for a specific use plus inclusion of a bulkhead line as a part of the project (specifically recognized by section 403 as a structure) provide sufficient basis for treating the bulkhead and the fill together as a single structure and thus subject to injunctive relief under section 406.

Construction of an upland canal connected to a navigable body of water is another type of dredge and fill activity which has engendered differences of opinion as to whether or not its creation is the building of a structure in navigable waters. There is no doubt that construction of a canal involves creation of a structure within the terms of the second clause of section 403. The problem arises, however, in determining whether a newly constructed canal was a structure built in navigable waters as the statute requires.

The Act [33 U.S.C. § 403 (1970)] covers both building of structures and excavating and filling in navigable waters. . . . The Act itself does not put any restrictions on denial of a permit or the reasons why the Secretary may refuse to grant a permit to one seeking to build structures on or dredge and fill his own property.

Id. at 207 (emphasis added).

87. See also United States v. Frank Keevan & Son, Inc., 7 E.R.C. (BNA) 1527, 1528 (S.D. Fla. 1974). In Keevan, the court determined that a roadway built seaward of the mean high tide line around an island, between the island and the mainland, and along the shore of the mainland was a structure subject to removal under section 406.
90. See United States v. Republic Steel Corp., 362 U.S. 482, 485-86 (1960), for the emphasis the Supreme Court placed on the word "in."
ILLEGAL DREDGING

cally, canals are dredged from the landward side toward a pre-existing body of water until a narrow plug of land remains between the canal and the body of water. The plug is then pulled, connecting the canal to the body of water. Thus, the actual construction of the canal does not take place in navigable waters. Courts have supported this proposition by finding that a canal constructed without a permit was illegal under section 403, not because of the construction of the total canal, but because connection of the canal to the pre-existing body of water altered and modified the course of that body.

Section 406 provides for mandatory injunctive relief in the form of removal of illegally erected structures, but provides for no other types of injunctive sanctions against the structure. In contrast, implied injunctive relief, as recognized by the Court in Republic Steel to protect interests declared by section 403, has available the full scope of prohibitory and mandatory injunctive remedies within the equitable powers of a court. Courts have not followed these distinctions, however, and have concluded that both illegal structures and other activities prohibited by section 403 could be remedied by the full scope of injunctive relief.

Mandatory injunctive relief, as ordered by the courts, has ranged from the simple removal of a bulkhead line to extensive restoration designed to insure maximum environmental and navigational benefits. The former relief would come under section 406, the latter only as an implied remedy to protect the interests of section 403.

To determine what interests of section 403 are to be protected from illegal dredge and fill activities by the imposition of injunctive relief the Supreme Court has outlined these general principles: (1) "[t]he Rivers and Harbors Act of 1899 . . . was obviously intended to prevent obstructions in the Nation's waterways;" (2) the Act was "a comprehensive law enacted in 1899 to codify pre-existing statutes designed to protect and preserve our Nation's navigable

95. United States v. Sunset Cove, Inc., 514 F.2d 1089, 1090 (9th Cir. 1975).
waterways;" 88 (3) "[w]e read the 1899 Act charitably in light of the purpose to be served. The philosophy of the statement of Mr. Justice Holmes . . . that 'A river is more than an amenity, it is a treasure,' forbids a narrow cramped reading either of § 13 or § 10." 89

Specifically, the interests to be protected under section 403 are the navigable capacity of waters of the United States against obstructions (clause one), navigable waters against the erection of structures therein (clause two), and the course, location, condition, and capacity of navigable waters against excavations, fills, alterations, and modifications (clause three).

When the Rivers and Harbors Act was first enacted, it was generally believed that the Congressional purpose for the legislation was solely to protect navigation. 100 Recent courts, however, have held that environmental considerations are relevant factors in the exercise by the Corps of Engineers of its permit jurisdiction 101 and that environmental damage alone can bring about an alteration or modification of the condition or capacity of a navigable water under section 403. 102

Early pleadings and decisions involving mandatory injunctive relief for violations of section 403 were framed entirely in terms of removal or abatement of obstructions. 103 Even after the Republic Steel decision established that mandatory relief appropriate to protect the interests described in section 403 could be granted, court decisions and pleadings filed by the government evidenced chiefly a concern to have obstructions removed rather than a concern to

99. United States v. Republic Steel Corp., 362 U.S. 482, 491 (1960). The Supreme Court added a caveat to this pronouncement in United States v. Standard Oil Co., 384 U.S. 224, 225 (1966): "The crisis [pollution in our rivers and lakes] that we face in this respect would not, of course, warrant us in manufacturing offenses where Congress has not acted nor in stretching statutory language in a criminal field to meet strange conditions."
"restore" the course, condition or capacity of the water body. In the early 1970's, however, suits for injunctive relief under section 406 began to reflect a concern for total restoration of the water environment rather than the simple removal of an obstruction. The impetus for this shift in emphasis stemmed from an increased national interest in the environment in the late 1960's, the passage of the National Environmental Policy Act, and a renewed emphasis on the Fish and Wildlife Coordination Act.

104. See United States v. Perma Paving Co., 332 F.2d 754 (2d Cir. 1964); United States v. Town of Brookhaven, 2 E.R.C. (BNA) 1761 (E.D.N.Y. 1971). But see United States v. New York Cent. R.R., 252 F. Supp. 508 (D. Mass. 1965), aff'd, 358 F.2d 747 (1st Cir. 1966), in which the court ordered reimbursement to the government by a bridge owner for costs the government had incurred in restoring a navigable channel after a bridge had collapsed into the channel. The bridge owner had removed the span of the bridge but refused to remove the other remains of the bridge, and the government was forced to do so. The government at trial sought reimbursement for the costs for removal of the bridge piers, trestles and fenders, dredging of the channel, filling of holes where piers were removed, and the provision of sheet metal around the pilings of a nearby bridge for protection. The bridge owner argued that all of these costs were not related to navigation. The court held that the costs were necessary for the restoration of navigability for the river and granted full reimbursement to the government.


The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the federal government, in cooperation with state and local governments, and other concerned public and private organizations to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Id. § 4331(a).


[W]henever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such
Ironically, one of the first cases to consider in detail the possibility of restoration for a navigable body of water that had been illegally dredged and filled began in the Florida Keys in 1971 as simply a suit for a prohibitory injunction against the illegal activity. Five years later, after two appeals and the entry of three final judgments, the developer was ordered to restore the area by removing landfill seaward of the mean high tide line, filling in eleven canals and several channels to designated depths to insure adequate water mixing and optimum biological productivity, and replanting a red mangrove fringe along the mean high tide line. The restorative work was to be accomplished in the least environmentally disruptive method, using turbidity screens and allowing the Army Corps of Engineers access to the area to inspect and observe the procedure. The estimated cost for restoration was $454,000. Although extensive restoration was ordered, total restoration was not deemed warranted by the court because lots in one section of the illegally filled land had been sold to individuals and many had erected homes or trailers there. The court allowed the fill to remain on this land and did not require mangroves to be planted. In addition, instead of compelling the complete refilling of the eleven dredged canals, the court ordered that they be filled to depths varying from 6 to 10 feet.

Final judgments ordering restoration have been entered in several other cases involving illegal dredge and fill activity in the Flor-
ida Keys. In *United States v. Frank Keevan & Son, Inc.*[^13^] the government sought restoration against a landowner who had dredged rock and soil out of a navigable body of water in the Florida Keys and had used the fill to create a roadway along his property below the mean high tide line. The court concluded that the roadway was an illegal structure constructed in navigable waters in violation of section 403. The court ordered the roadway to be removed under section 406 of the Rivers and Harbors Act and ordered the underlying shoreline restored to gradual sloping contours with red mangrove trees planted thereon. Estimated cost for the restoration was $40,000[^14^]. The court made no provisions for replacement of the fill illegally dredged from the water, and the defendant was allowed to retain the fill for his own use[^15^].

In a subsequent case involving illegal dredge and fill activity in the Florida Keys, the trial court ordered the complete filling in of two canals excavated by a developer to provide water access to a subdivision which he was building[^16^]. On appeal, the court of appeals reversed the restoration order for one of the canals because it had been excavated but never connected to a navigable body of water[^17^]. The appeals court vacated the restoration order for the other canal and remanded the case with directions to hold a full evidentiary hearing to determine the degree of restoration warranted; however, a consent judgment was entered between the parties, and no hearing was held[^18^]. The consent judgment provided that the two canals be allowed to remain with each connected to navigable waters, but that they be shallowed to specified depths. In addition, the two canals were to be connected at their landward ends by a third canal, apparently to insure adequate water circulation[^19^].

[^15^]: The amount of fill removed by the defendant from the navigable body of water was between 26,000 (court's estimate) and 50,000 (defendant's estimate) cubic yards. Miami Herald, Oct. 2, 1976, § A, at 18, col. 2. The state of Florida sells fill material from state-owned submerged land in the Florida Keys (Monroe County, Florida) for $1.50 per cubic yard. 38 Minutes of the Trustees of the Internal Improvement Trust Fund (of the state of Florida) at 9 (June 15, 1971). Thus, the illegally dredged fill the defendant obtained was worth from $39,000 to $75,000.
[^17^]: Weiszmann v. District Eng'r, United States Army Corps of Eng'rs, 526 F.2d 1302 (5th Cir. 1976).
[^19^]: *Id.* One other case involving illegal dredge and fill activity in the Florida Keys has
Not all have been pleased with the extent of the restoration plans sanctioned by the courts in the Florida Keys cases. The arguments have been made that something much closer to total restoration should have been ordered. All of these suits, however, were suits for equitable relief, and the exercise of sound discretion by the court is the guiding factor in equitable determinations. Thus, compromise solutions must often be reached because, in the view of the court, such a result best balances the prevailing equities.

In the exercise of discretion in an equitable suit, courts have been willing to go much farther toward giving relief and moulding remedies where the public interest was being benefited. In fact, one circuit has concluded that where injunctive relief is specifically provided by statute, as in section 406, no weighing of equitities is required, apparently because of this expressed public interest.

Most courts, however, have concluded that whether the requested relief is an implied injunctive remedy or a section 406 remedy, a hearing on restoration must be held so that each side may introduce evidence and attempt to develop fully the equitable factors involved for the court's consideration.

reached final judgment. United States v. D.R. Gaines Constr., Inc., No. 75-753-Civ-WM (S.D. Fla., filed Dec. 10, 1976). In the Gaines case no trial was held and a consent judgment was entered under which the defendant agreed to remove fill placed along a shoreline below the mean high tide line, regrade the shoreline, provide a specified type of slope, and plant approximately 6500 red mangroves.

Additionally, United States v. Sexton Cove Estates, Inc., 526 F.2d 1293 (5th Cir. 1976), is presently on remand from the Fifth Circuit with directions to hold an evidentiary hearing to determine the degree of restoration, if any, warranted for an illegal dredge and fill operation in the Florida Keys.

120. See Miami Herald, Oct. 2, 1976, § A, at 18, cols. 1-3; id., Feb. 26, 1976, § A, at 6, col. 1. In the October article entitled, It Looks Like a Big Slab of Fill, But Shark Key's Been "Restored," a writer commented on the United States v. Frank Keevan & Son, Inc. case:

A decade ago it was a creature of the Florida Keys environment, covered with concentric rings of vegetation — red mangrove on the outer perimeter, black and white mangrove further in and then saltgrass and buttonwood mangrove in the center.

Now tiny Shark Key, 12 miles north of Key West, is a slab of fill pocked with holding ponds, and surrounded by the stubble of recently replanted red mangroves.


In determining the equities involved in a restoration case, courts have considered numerous factors: (1) the nature and extent of the environmental disturbance;\(^{\text{124}}\) (2) the likelihood of success of the restorative remedy, and whether the remedy will cause more harm than the illegal activity;\(^{\text{125}}\) (3) the financial ability of the defendant to effectuate restoration;\(^{\text{126}}\) (4) whether the defendant was acting innocently and in good faith;\(^{\text{127}}\) (5) whether the activity was performed for personal gain or public good;\(^{\text{128}}\) (6) whether third parties possessing property rights or exercising public rights will be harmed by restoration;\(^{\text{129}}\) (7) whether the government has allowed activities of the illegal type to continue for a lengthy period of time, and whether the government has unduly delayed in protecting its rights;\(^{\text{130}}\) and (8) whether development in the area was inevitable.\(^{\text{131}}\)


This factor becomes critical where, as in the Moretti case, it appeared that the stockholder-officers attempted to bleed the defendant corporation of its assets so that at the time restoration was to be ordered, the corporation would be financially unable to perform the restoration. United States v. Joseph G. Moretti, Inc., No. 71-1176-Civ-WM (S.D. Fla., filed Nov. 19, 1976) (memorandum opinion) at 4-5, 7.

Fines imposed under the Rivers and Harbors Act and the Federal Water Pollution Control Act Amendments of 1972 (see note 6 supra) can work at cross purposes with a desire to accomplish full restoration. By the imposition of criminal penalties for illegal activities, a defendant’s financial ability to pay for restoration can be reduced. See McIntosh & Mehta, Federal Restoration Remedies, 51 Fla. B.J. 155, 156 (1977).


Although courts may be willing to consider this factor in determining the extent of restoration to be ordered, they have been reluctant to allow an estoppel to foreclose all relief.
The protection of innocent purchasers of land in a development where the land has been created by illegal dredge and fill operations has proved to be one of the most important factors mitigating against a court's ordering total restoration. Also, the ability of the defendant to pay for restoration has been of critical importance since courts have been unwilling to force a defendant into financial ruin by court-imposed restoration. As an example, both of these factors played controlling roles in the final resolution of the case of United States v. Joseph G. Moretti, Inc.

When the Moretti suit was first filed, none of the land in the development had been sold. By the time final judgment was entered in 1976, all lots in one section of the development, comprising approximately two-thirds of the total land, had been conveyed to individual third parties. Numerous homes, trailers, and other improvements had been erected on the land. In the first judgment entered against the developer (Moretti), the interests of these third party purchasers were not protected by the trial court; all fill placed seaward of the mean high tide line was ordered removed. The Fifth Circuit Court of Appeals vacated the trial court's order so that Moretti might obtain consideration of an application for an after-the-fact permit he had filed. The Fifth Circuit did note, however, that the mandatory injunction ordered by the trial court was "equitably appropriate." On remand, after the application for an after-the-fact permit had been denied, the trial court modified and expanded its prior restoration order.

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Conservation Council v. Costanzo, 398 F. Supp. 653, 675 (E.D.N.C.), aff'd, 528 F.2d 250 (4th Cir. 1975). The court in Costanzo in a remarkably frank opinion concluded that despite the fact that a required environmental impact statement had not been prepared by the Army Corps of Engineers and despite the fact that a Federal Water Pollution Control Act discharge permit had not been obtained, the court would not invalidate a section 403 permit previously obtained and order restoration. The court allowed after-the-fact processing to begin for the impact statement and the permit, believing that development of the area was both inevitable and in the public interest.

See cases cited note 129 supra.

See cases cited note 126 supra.


Id. at 418.

Id. at 421.

This new restoration order affected the third party purchasers only to the limited extent that canals fronting on their lots were ordered to be filled from depths of approximately 16 feet to from 8 to 10 feet. For the section of land where no lots had been sold, the court ordered total filling of canals and planting of red mangroves. The estimated cost for this restoration plan was one million dollars.\textsuperscript{41} The case was again appealed to the Fifth Circuit. That court vacated the restoration order and remanded the case so that a full evidentiary hearing could be held to determine "the feasibility and environmental advisability" of restoration.\textsuperscript{42} On remand, a hearing was held at which the government and Moretti each presented ecological reports.\textsuperscript{43} The court accepted the government's environmental findings and plan for restoration, while distinguishing Moretti's contradictory ecological facts. The court ordered restoration identical to its prior one million dollar plan except that the canals in the uninhabited section of the development were to be filled to designated depths rather than being filled totally. The cost for this final restoration plan was estimated at $454,000. The court noted that this cost was approximately equal to Moretti's current and long term receivables and thus was within the corporation's financial abilities. The corporation was not placed in danger of financial ruin because it had land available for sale which had been appraised at $950,000.

In the final analysis, the court appeared to be protecting the third party purchasers of lots to the maximum extent possible by allowing fill to remain in that area seaward of the mean high tide line and allowing the canals providing access to the individuals' properties to remain. The court appeared to be attempting to obtain the maximum degree of restoration possible for the uninhabited section, consonant with the defendant's financial ability to pay. Perhaps the court's final weighing of the equities did not result in the scales of justice coming to rest in a balanced position. As the court noted, Moretti flagrantly violated section 403, refused to do equity, had its two sole stockholder-officers draw salaries of $250,000 over the five years of the lawsuit even though the corporation was inactive, and gained forty-eight waterfront lots for sale in the uninhabited parcel.\textsuperscript{44} In addition, all of the individuals who purchased

\textsuperscript{42} United States v. Joseph G. Moretti, Inc., 526 F. 2d 1306, 1310 (5th Cir. 1976).
\textsuperscript{44} Id. at 1198-99.
land at the Moretti development did so after the government filed suit. Finally, Moretti had assets of $950,000 in the form of salable land over and above the amount the restoration ordered by the court required. All of these factors would seem to indicate that Moretti profited in the long run from its illegal activity at the expense of the natural environment of the area.

4. THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

The objective of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA) was “to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.” Toward that end the FWPCA prohibits, with certain exceptions, “the discharge of any pollutant by any person” into navigable waters. Pollutant is defined to include dredged spoil, rock, gravel, and sand discharged into water. One exception to this general prohibition against discharge of pollutants is that the Army Corps of Engineers “may issue permits . . . for the discharge of dredged or fill material into the navigable waters . . . .” Thus, under the FWPCA, dredge and fill operations, to the extent that they result in the release of dredge or fill material into navigable waters, are illegal unless performed under proper authorization.

Since illegal discharges are prohibited, it is apparent that discharges from illegal dredge and fill activity can be abated judicially. Also, administrative compliance orders can be issued to order abatement of discharge. However, the availability of restoration under the FWPCA as a remedy for illegal dredge and fill operations is not as clear. The enforcement section of the FWPCA provides that the Administrator of the Environmental Protection Agency, whenever he finds the discharge of a pollutant into navigable waters by a person without proper authorization, “shall issue an

146. Id. § 1311(a).
147. Id. § 1362(6).
148. Id. § 1344(a).
149. See Weiszmann v. District Eng’r, United States Army Corps of Eng’rs, 7 E.R.C. (BNA) 1523, 1526 (S.D. Fla. 1975), rev’d in part, vacated in part and aff’d in part, 526 F.2d 1302, 1306 (5th Cir. 1976) (affirmed on FWPCA aspects). But see 33 C.F.R. § 209.120(d)(5) (1976). This regulation defines discharge of dredged material as “any addition of dredged material, in excess of one cubic yard when used in a single or incidental operation, into navigable waters.” (Emphasis added). The term “addition” implies that spillover during the dredging process is not considered a discharge of dredged material. The Corps of Engineers has supported this conclusion. 40 Fed. Reg. 31321 (1975). Under this analysis only fill operations would come under FWPCA jurisdiction.
151. Id. at § 1319(a).
order requiring such person to comply [with the prohibition against pollutant discharges or] shall bring a civil action [against the person].”152 The compliance order can only order the person to comply; it cannot order restoration. The civil action, on the other hand, may be brought “for appropriate relief, including a permanent or temporary injunction . . . .”153 “Appropriate relief” implies relief of a type appropriate to protect navigable waters from the conduct prohibited by the FWPCA — discharge of a pollutant. If the pollutant (here dredged spoil or fill) has been discharged already, however, appropriate relief would imply removal of the pollutant, and thus restoration of the body of water to the condition which was protected by the FWPCA. Courts have supported this construction of the Act and have ordered removal from navigable waters of illegally discharged fill or dredged spoil and restoration of the water areas.154 Restortion under the FWPCA, however, has never been ordered for damage caused by the act of illegal dredging per se. Restoration for such activity has only been ordered pursuant to sections 403 or 406 of the Rivers and Harbors Act.155 The courts have thus created a dichotomy for dredge and fill operations, treating the act of dredging under the Rivers and Harbors Act and the act of discharging from dredging and filling under the FWPCA.156

152. Id. at § 1319(a)(3).
153. Id. at § 1319(b).
154. Power to order a restorative remedy could also be fashioned by using the rationale of United States v. Republic Steel Corp., 362 U.S. 482 (1960), to imply an injunctive remedy to protect an interest created by a statute. See notes 63-64, 74 and accompanying text supra; Ipsen & Raisch, Enforcement Under the Federal Water Pollution Control Act Amendments of 1972, 9 LAND & WATER L. REV. 369, 393 (1974).
156. E.g., Weizmann v. District Eng’r, United States Army Corps of Eng’rs, 7 E.R.C. (BNA) 1523 (S.D. Fla. 1975), rev’d in part, vacated in part and aff’d in part, 526 F.2d 1302 (5th Cir. 1976).
By using the rationale of the Republic Steel decision, that is, implying a remedy to protect a statutorily declared interest, it could be argued that the mere illegal act of dredging, where it degrades the chemical, physical or biological integrity of a navigable water, could justify a restoration order. Such a position does not have support, however, in the language of the specific prohibition sections of the FWPCA. These sections prohibit the discharge of any pollutant into navigable waters without a permit, but do not refer to a permit authority for or a prohibition of the act of dredging. The Corps of Engineers, as the agency charged with jurisdiction over dredge and fill activity, has followed this pattern by confining its FWPCA permit authority solely to discharges of dredge or fill material.

III. Conclusion

Judicially imposed restoration orders can provide an effective tool for mitigating the effects of illegal dredge and fill operations in wetlands areas. In addition, there are some who believe that restoration can turn an irreparably damaged water area into an environment sufficiently receptive to natural restorative processes to allow the area eventually to return to its pristine condition. With nearly fifty percent of the nation’s wetlands filled, drained or diked, and with demand for such areas ever increasing, restoration has become a significant judicial remedy.

Federal common law principles can provide a possible basis for granting restorative relief, especially where an interstate effect from the illegal activity can be shown. Section 403 of the Rivers and Harbors Act also can provide a jurisdictional basis for an order requiring restoration. Relief based on section 403 is available where illegal dredge and fill activity has altered or modified the course, condition, or capacity of navigable waters. Section 406 of the Rivers and Harbors Act provides power for the removal of illegal dredge and fill structures constructed in navigable waters. Finally, the FWPCA establishes a substantive basis for removal of fill or dredged


158. See notes 63-64, 74 and accompanying text supra.

159. This interest is declared by the statement of purpose of the FWPCA. 33 U.S.C. § 1251(a) (Supp. V 1975).

160. Id. at §§ 1311(a), 1344(a), 1362(b).

161. 33 C.F.R. § 209.120(e)(2) (1976).

spoil illegally placed in navigable waters and in turn the restoration of the water environment.

Although the judiciary at present has the power to order total restoration, courts have been reluctant to do so. Appropriately, courts have chosen to weigh the equities involved for each party and, as a result, have usually ordered partial restoration. As the demands on wetlands areas increase, however, their preservation and protection will become a paramount public interest. At such time, orders approaching total restoration for illegal dredge and fill operations will become more desirable and more prevalent.