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RESTORATION OF WETLANDS UNDER SECTION 404 OF THE CLEAN WATER ACT: AN ANALYTICAL SYNTHESIS OF STATUTORY AND CASE LAW PRINCIPLES

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I. INTRODUCTION

Since the passage of the Federal Water Pollution Control Act Amendments (FWPCAA)\(^1\) in 1972, the federal government has come to appreciate wetlands as important natural resources that deserve

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\(^1\) Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified at 33 U.S.C. §§ 1251-1376). When Congress adopted new amendments in 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977), the legislative body referred to the statute by its more popularly known name, the Clean Water Act ("CWA" or "the Act"). This Comment will refer to the water pollution control statute as the CWA or the Act, except where specific reference to the 1972 FWPCAA is required. For more on the legislative history of the Act, see infra, text accompanying notes 41-82.

preservation and protection. This appreciation stems from the government’s and the general public’s growing awareness that wetlands play a vital role in the nation’s ecosystem. The Army Corps of Engineers (ACOE), the federal agency charged with protecting the nation’s wetlands, defines wetlands as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.” Among their many significant environmental functions, wetlands are an essential link in the food chain, purify and store storm and flood waters, and serve as a general habitat for aquatic and land species, many of which are endangered. Additionally, wetlands also contribute significantly to the nation’s economy. The nation’s annual commercial harvest of wetland-dependent fish species has an approximate worth of seven to eight billion dollars. Recreationally, wetlands generate for the economy hundreds of millions of dollars each year from the purchases of hunters and trappers. Wetlands also save the public from making certain expenditures. For example, wetlands store storm waters, thereby preventing flood damage in the amount of several thousand dollars per wetland acre. Because wetlands constitute a “productive

33 C.F.R. § 328.3 (a)(7)(b) (1987). The Supreme Court has recently upheld the constitutionality of the definition. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 139 (1985). In reversing the Sixth Circuit Court of Appeals, a unanimous Court in Riverside determined that a narrow interpretation of the definition was not necessary so as to prevent the occurrence of an unconstitutional taking. Id. at 128. Equally important, however, the Court found that Congress in 1977 had rejected attempts to curb the scope of the ACOE’s jurisdiction over wetlands under the Clean Water Act by redefining the term navigable waters. Id. at 135–37. Congress apparently was concerned that a narrower definition of waters of the United States would not protect wetlands adequately. Id. at 137.

Wetlands also function as sanctuaries for environmental study; affect current patterns, salinity distribution, and flushing characteristics; shield other areas from erosion or storm damage; and act as prime natural recharge areas, locations where surface and groundwater have a direct connection. 33 C.F.R. § 320.4(b)(ii–iv), (vi) (1987).


Id. at 22–28.


Id. at 1335.

Id. at 1338.
and valuable public resource," the government’s policy holds that their “unnecessary alteration or destruction . . . should be discouraged as contrary to the public interest.”10 This policy creates a rebuttable presumption in favor of wetlands protection which those who want to alter wetlands must overcome before developing a wetlands area.11

The government’s and public’s appreciation, however, developed while human activity destroyed approximately fifty-four percent of the country’s original wetland area.12 In addition to their important environmental features, wetlands also possess characteristics that make them attractive areas for commercial and residential development. For example, farmers frequently convert wetlands into agricultural land because of the rich, fertile soil wetlands contain.13 In fact, approximately eighty percent of wetlands losses result from agricultural conversion.14 Real estate developers also value wetlands because the marketplace frequently underprices them relative to dry land as building sites.15 Additionally, because wetlands are often located near other bodies of water, the waterview enhances the scenic value of residences built there.16 The tension created by the

10 33 C.F.R. § 320.4(b) (1987) (ACOE’s general policies for evaluating permit applications to discharge dredge or fill materials into waters of the United States).
11 See also 40 C.F.R. § 230.10(a) (1987) (EPA § 404(b)(1) guidelines for permit issuance) (except as provided in § 404(b)(2), no discharge shall be permitted if there is practicable alternative which would have less environmentally adverse impact); Parish & Morgan, History, Practice and Emerging Problems of Wetlands Regulation: Reconsidering Section 404 of the Clean Water Act, 17 LAND AND WATER L. REV. 43, 63 (1982). The ACOE has not been unnecessarily aggressive in promoting the national policy, however. Of the 10,000 permit applications it received in 1981, the ACOE denied only three percent. The ACOE approved one-third of the permits subject to conditions requiring the applicant to reduce the negative effect of the project on the wetlands. CONGRESSIONAL OFFICE OF TECHNOLOGY ASSESSMENT, WETLANDS: THEIR USE AND REGULATION at 143–44 (1984) reprinted in CONGRESSIONAL INFORMATION SERVICE 143–44 (microfiche no. J952-15) (1984) [hereinafter OTA REPORT]. For criticism of the ACOE’s role, or lack of it, in wetlands protection, see Note, Wetlands Protection and the Neglected Child of the Clean Water Act: A Proposal for Shared Custody of Section 404, 5 VA. J. NAT. RESOURCES L. 227 (1985) [hereinafter Note, Wetlands Protection]; Power, The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers, 63 VA. L. REV. 503 (1977).
12 U.S. FISH AND WILDLIFE SERVICE STUDY, WETLANDS OF THE UNITED STATES: CURRENT STATUS AND TRENDS vii (1984). The United States continues to lose wetlands at a rate of approximately 300,000 acres per year. OTA REPORT, supra note 11, at 11.
13 OTA REPORT, supra note 11, at 87.
14 Id. at 7.
16 OTA REPORT, supra note 11, at 8.
competing values associated with the protection and preservation of wetlands and their development raises important questions about the government’s wetlands policy and its enforcement.

The primary vehicle by which the federal government protects wetlands areas is section 40417 of the Clean Water Act.18 This section holds that the Secretary of the Army, acting through the Chief of Engineers, may, in his discretion, issue permits for “the discharge of dredged or fill materials into the navigable waters at specified disposal sites.”19 With few exceptions, the Act as a whole and section 404 in particular flatly prohibit permitless discharges of pollutants20 into the navigable waters.21 The Act also authorizes the Administrator of the Environmental Protection Agency to deny or restrict the use of any defined area as a disposal site if such a discharge will have an “unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.”22

To enforce section 404, the government frequently requests that courts order violators—those people who have discharged dredged or fill materials without first obtaining a permit or who have discharged such materials in violation of a permit’s limitations or conditions23—to restore wetlands to their pre-violation condition.24

17 Pub. L. No. 92-500, § 404, 86 Stat. 884 (1972) (codified as amended at 33 U.S.C.A. § 1344(a)-(t) (West Supp. 1987)). Congress probably did not intend § 404 to act as a wetlands protector when it passed the FWPCA in 1972. For more on the congressional intent and legislative history of § 404, see infra, text accompanying notes 41-82.


20 The Act broadly defines pollutant as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. § 1362(6) (1982).

21 33 U.S.C. § 1311(a) (1982). Activities which fall under the narrowly construed exemptions to § 404 are not required to have permits. 33 U.S.C. § 1344(f) (1982).

22 33 U.S.C. § 1344(c) (1982). The statute in this way contemplates that the Administrator of the Environmental Protection Agency will retain veto power over the actions of the ACOE, which is responsible for the initial evaluation of permits. Such veto action rarely occurs, however. Note, Wetlands Protection, supra note 11, at 247–48.


24 The government has obtained restoration orders in numerous cases. See, e.g., United States v. Ciampitti, 615 F. Supp. 116 (D.N.J. 1984), aff’d mem. 772 F.2d 893 (3rd Cir. 1985), cert. denied 475 U.S. 1014 (1986) (defendants ordered to submit restoration plan in accordance with government guidelines; implementation of plan and civil penalties stayed pending appli-
The Act’s enforcement provisions, while not specifically mentioning restoration as a possible remedy, do allow courts to issue a permanent or temporary injunction in civil actions when government attorneys request that relief. The enforcement section of the Act relies upon the federal courts’ powers in equity to restrain violations and to require compliance with the law.

This Comment will examine the various considerations that the courts weigh in determining whether to order restoration as a remedy for violations of section 404. In general, courts have followed a traditional equitable balancing process in deciding whether a restoration order should issue. More specifically, many courts have...
adopted the three broad standards articulated by the district court in *United States v. Weisman.*28 In *Weisman,* the court held that restoration should be ordered if the proposed plan: 1) confers maximum environmental benefits; 2) is achievable as a practical matter; and 3) bears an equitable relationship to the degree and kind of wrong that the restoration plan intends to remedy.29 These three considerations allow courts great leeway in deciding whether a restoration injunction is appropriate.

This Comment proposes that the traditional equitable balancing process exemplified by the *Weisman* test is insufficient to effectuate the purposes of and promote the public interest embodied in the Clean Water Act. The purposes and interests of the Clean Water Act include not only the prevention of the unauthorized discharge of pollutants into the waters of the United States,30 but also, and equally important, the restoration of these waters to their natural chemical, physical and biological state.31 In light of the Act's intent, a court's decision whether to order restoration for section 404 violations should give the greatest weight to statutory purposes and environmental considerations, not to other issues that may serve to undermine those purposes and considerations.32

Part II of this Comment describes the legislative history of the Clean Water Act and section 404.33 This section will demonstrate the importance Congress places upon section 404 as the statutory mechanism for the protection of wetlands from unnecessary destruction. As explained in this part of the Comment, the legislative determination in favor of wetlands lends significant support for, and indeed, virtually compels the use of restoration to remedy section 404 violations. Part III examines the genesis of the federal courts'
authority to order restoration under the Act, as well as the development of the Weisman guidelines. Part IV assesses both the environmental shortcomings and benefits of the Weisman test, and demonstrates through an analysis of the case law its inadequacy to promote the purposes of the Act. Part V of this Comment examines the importance of vindicating congressional schemes and purposes when conducting equitable balancing in section 404 enforcement actions. Finally, Part VI provides a synthesis from prior case law of those factors which should be featured prominently in section 404 remedial balancing so as to promote the environmental objectives of the CWA. These factors are to: 1) defer, preliminarily, to the agency decision to prosecute by deciding the restoration issue, rather than remanding to the ACOE for further administrative action; 2) confer maximum environmental benefits; 3) view the violation in light of the statutory and public interests represented in the Act; 4) design a remedy that takes into account the concept of deterring future violators.

II. THE LEGISLATIVE BACKGROUND OF SECTION 404

When Congress passed the FWPCA in 1972, Congress substantially rewrote the nation's water pollution control laws. Giving
the federal government an expanded role in abating water pollution, these amendments shifted governmental policy from one that unsuccessfully sought to improve water quality through state-established water quality standards to one that regulates the discharge of pollutants from its source by means of a permit system.43 The statute flatly prohibits discharges of pollutants unless the discharger first obtains a National Pollution Discharge Elimination System (NPDES) permit from the Environmental Protection Agency (EPA).44 The granting of a permit alone, however, does not end the government's involvement. The FWPCAA contemplated a phased-in application of pollution control technology—first by applying the best practicable control technology and thereafter by applying best available technology economically feasible—that would ultimately lead to the elimination of all pollutant discharges into the nation's waters.45

The FWPCAA establishes a directed national water pollution control agenda and intends to accomplish far-reaching objectives. As stated in the congressional declaration of goals and policy, "[t]he objective of this chapter is to restore and maintain the chemical, physical and biological integrity of the Nation's waters."46 The statute thereafter set forth such optimistic goals as completely eliminating the discharge of pollutants into the navigable waters by 1985, establishing an interim goal of water quality that protects and allows for the propagation of wildlife and that provides for recreational use of water, and providing a major research and demonstration effort to develop technology to help the nation reach its goals.47 Congress devised the permit program in 1972 and set high standards for water quality to ensure that resources would be applied "to develop the means necessary to achieve an environmentally and ecologically sound" water supply.48

47 33 U.S.C. § 1251(a)(1), (2), (6) (1982). Congress recognized that implementing and achieving the no-discharge goal would present difficulties. Nevertheless, Congress feared that without setting such a goal neither polluters nor the government would make the necessary commitment to clean up the nation's waters. S. REP. No. 414, 92nd Cong., 2nd Sess. —, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3678.
With these and other purposes in mind, Congress enacted the section 404 permit program to cover the discharge of dredged or fill materials into the waters of the United States. At the time of the FWPCA's enactment, Congress was not principally concerned that section 404 be the main statutory protector of the nation's wetlands. The legislative history does not indicate such a concern on the part of the statute's drafters. Rather, Congress established this separate permit program to cover the discharge of dredged or fill materials largely because of administrative convenience. The ACOE was already administering a permit program under the Rivers and Harbors Act (RHA) of 1899, legislation designed to maintain the navigability of the nation's watercourses. Congress felt that placing the section 404 permit process under the ACOE's auspices would prevent dredged or fill material dischargers from having to obtain two permits from two agencies: one NPDES permit from EPA under the FWPCA, and another one from the ACOE under the RHA. Congress thus gave the ACOE the responsibility for

49 The ACOE regulations define dredged material as any material "that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(c) (1987). Dredged material also classifies as a pollutant under the CWA. 33 U.S.C. § 1362(6) (1982).

50 Fill material means "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody." 33 C.F.R. § 323.2(e) (1987).


52 In fact, the Senate version of the FWPCA did not create a separate dredge and fill permit program under ACOE's auspices but instead included that program in the regular NPDES permit program under EPA's control. The House version of the FWPCA provided for a separate section 404 permit process. In conference, the House bill prevailed and Congress established section 404. H.R. CONF. REP. No. 1465, 92nd Cong., 2nd Sess. __, reprinted in CONGRESSIONAL INFORMATION SERVICE 141-42 (microfiche no. H643-12) (1972). A thorough discussion of the FWPCA's legislative history may be found in Ablard & O'Neil, Wetland Protection and Section 404 of the Federal Water Pollution Control Act Amendments of 1972: A Corps of Engineers Renaissance, 1 VT. L. REV. 51, 61–74 (1976).


54 During the debate on S. 2770, the bill that ultimately passed Congress, Senator Edmund Muskie explained in a report the conferees' decision to adopt a separate § 404 permit provision as follows: "The Conferees were uniquely aware of the process by which dredge and fill permits are presently handled and did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed." SENATE DEBATE ON CONFERENCE
conducting reviews of section 404 permit applications, subject to guidelines developed by EPA and the Secretary of the Army, and subject to the ultimate veto power of the EPA Administrator.

Congress' main concern in passing the original section 404 seemed to be to reduce the environmental harm caused by those parts of dredging and filling operations that affected navigable waters or waters that were susceptible of being made navigable. Based on its interpretation of Congress' apparent intent, the ACOE did not extend section 404 jurisdiction to wetlands that fell outside of these traditional concepts of navigable waters. The ACOE operated in precisely this fashion until a federal court in *Natural Resources Defense Council, Inc. v. Callaway* ordered the ACOE to revise its permit regulations in light of the FWPCAAs' broader definition of navigable waters. After the *Callaway* decision in 1975, the ACOE could no longer (and did not) limit its jurisdiction under section 404 to waters which fit into traditional concepts of navigability.

The FWPCAAs' far-reaching definition of navigable waters required that section 404 evolve into a statutory provision that protects wetlands. The statute defines navigable waters as "waters of the United States, including the territorial seas." Congress did not intend that the term navigable waters be interpreted narrowly. Rather, Congress intended that "the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency interpretations which have been made or may be made for administrative purposes." Applying the broadest possible constitutional interpretation of navigable waters greatly increased

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56 Id. § 1344(c) (1982).
62 Id.
federal jurisdiction under section 404. As a consequence of the expanded coverage under section 404, the ACOE began to protect wetlands more than it had prior to the Callaway decision.

When Congress passed amendments to the FWPCA in 1977, Congress essentially ratified the Callaway court’s decision that the ACOE use section 404 to preserve and protect wetlands. Many factors provide strong evidence of this ratification. The bill that Congress ultimately passed did not restrict the jurisdictional reach of section 404, despite several attempts to accomplish that result. In fact, Congress noted that to limit section 404’s jurisdiction “would cripple efforts to achieve the act’s objective[s]” of restoring the nation’s waters to their natural state. In passing amendments to section 404, Congress wanted to dispel fears that the permitting program was regulating activities that Congress had not intended the section to regulate.

Equally important, the congressional debates concerning the passage of the amendments specifically addressed the need for section 404 to protect the nation’s wetlands. In the Senate, Senator Edmund Muskie, a primary sponsor of the 1977 amendments, commented that:

[t]here is no question that the systematic destruction of the Nation’s wetlands is causing serious, permanent ecological damage. The wetlands and bays, estuaries and deltas are the Nation’s most biologically active areas. They represent a principal source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the oceans, and they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife.

The unregulated destruction of these areas is a matter which needs to be corrected and which implementation of Section 404 has attempted to achieve.

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63 For a discussion of the ACOE’s response to the Callaway court’s order to write regulations that account for expanded jurisdiction under § 404, see generally Note, Wetlands’ Reluctant Champion, supra note 1, at 227–38; Caplin, Is Congress Protecting Our Water?, supra note 15, at 449–54; Note, Federal Control of Wetlands: The Effectiveness of Corps’ Regulations under § 404 of the FWPCA, 51 NOTRE DAME LAW. 505, 512–14 (1976).
64 A description of the several legislative attempts to restrict ACOE’s section 404 jurisdiction can be found in Caplin, Is Congress Protecting Our Water?, supra note 15, at 459–80; see also Note, CWA’s Midcourse Corrections, supra note 59, at 1106–08.
66 Id.
The Senator's comments, as well as the passage of the CWA in 1977, demonstrate conclusively that Congress intended for section 404 to protect the nation's wetlands. As the government noted in its brief in *United States v. Riverside Bayview Homes, Inc.*, "whatever doubt may have existed concerning the intended reach of the CWA over wetlands was completely laid to rest by the 1977 Amendments to the statute."68

Despite keeping the broad jurisdictional reach of section 404, Congress added sixteen subsections to that provision.69 Congress added the amendments to section 404 partly out of concern that the section's jurisdictional scope would intrude unnecessarily upon activities that would have only a negligible impact on water quality.70 Among the more significant amendments are the general permit program71 and the exemptions from permit requirements for normal farming, silviculture, and ranching activities.72 Under the general permit program, the ACOE may issue general permits on a state, regional, or nationwide basis if the activities causing the discharges are similar in nature and will cause only minimal, adverse environmental effects, either separately or cumulatively.73 Once the ACOE issues a general permit for a specific activity, the need for an individual permit is obviated if the discharger's dredge and fill activity is the same as that described in the general permit and meets the condition of the permit.74

Similarly, dischargers who wish to perform the agricultural activities described in subsection (f) do not need to obtain permits from


72 Id. § 1344(f).

73 Id. § 1344(e).

74 Id.
the ACOE.\textsuperscript{75} The courts have construed these agricultural exemptions narrowly\textsuperscript{76} due to a limiting paragraph\textsuperscript{77} in the subsection. This limiting paragraph, commonly referred to as the recapture provision, provides that discharges which are incidental to a project converting navigable waters into a use to which they were not subject previously require a permit.\textsuperscript{78} For example, a farmer who wants to convert wetland acreage into additional farmland cannot do so without a permit because the wetland was not previously used for farming.\textsuperscript{79} In contrast, a farmer who discharges dredge or fill materials into a wetland as an incident of on-going farming activities probably does not require a permit.\textsuperscript{80} Congress wisely limited the scope of the

\textsuperscript{75}Id. § 1344(f)(1). The agricultural exemption section provides as follows:

(f)(1) Except as provided in paragraph (2) of this subsection, the discharge of dredge or fill material-

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivation, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, and bridge abutments or approaches, and transportation structure;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;

(E) for the purpose of construction or maintenance of farm roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

(F) resulting from any activity with respect to which a State has an approved program under section 208(b)(4) which meets the requirements of subparagraph (B) and (C) of such section, is not prohibited by or otherwise subject to regulation under this section or section 301(a) or 402 of this Act (except for effluent standards or prohibitions under section 307).

\textsuperscript{76} See, e.g., United States v. Huebner, 752 F.2d 1235, 1241 (7th Cir.), cert. denied, 474 U.S. 817 (1985); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 925 n.44 (5th Cir. 1983).

\textsuperscript{77} 33 U.S.C. § 1344(f)(2) (1982). The limiting paragraph provides in full:

Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

\textsuperscript{78} Id.


\textsuperscript{80} 33 U.S.C. § 1344(f)(1), (2) (1982).
agricultural exemptions, as approximately eighty percent of wetland losses result from agricultural conversion.\textsuperscript{81} Despite the general permit program and the limited agricultural exemptions, the statutory command against unauthorized discharges remains intact. Congress seems comfortable with the idea that the ACOE should use section 404 to prevent wetlands destruction. As Senator John Chafee, chairman of the Senate Subcommittee on Environmental Pollution, commented: “[t]he section 404 Dredge and Fill Program is the most important regulatory tool the Federal Government has to stem the loss of wetlands.”\textsuperscript{82} The Senator’s observation states succinctly the primary purpose of section 404: preventing unnecessary wetlands loss. This purpose makes clear the need for effective enforcement of section 404. Effective enforcement of section 404 mandates the use of restoration injunctions for those who violate the statute.

\section*{III. Development of the Restoration Guidelines}

The enforcement provisions of the Clean Water Act do not mention specifically that courts may order restoration as a remedy for statutory violations.\textsuperscript{83} The statute, however, authorizes the EPA to seek appropriate civil relief, including a temporary or permanent injunction,\textsuperscript{84} and grants to the federal courts jurisdiction to restrain

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\item \textsuperscript{81} OTA Report, supra note 11, at 8.
\item \textsuperscript{82} Oversight Hearings on Section 404 of the Clean Water Act Before the Subcomm. on Environmental Pollution of the Senate Committee on Environment and Public Works, 99th Cong., 1st Sess. \textemdash (1985), reprinted in Congressional Information Service 1 (microfiche no. S321-5) (1986).
\item \textsuperscript{84} 33 U.S.C. § 1319 (1982) as amended by Pub. L. No. 100-4, 101 Stat. 46 (1987). An injunction is an order that directs a defendant to act or to refrain from acting in a specified manner. Dobbs, Remedies § 2.10 at 105 (1973) [hereinafter Dobbs]. An injunction that forbids certain conduct is known as a prohibitory injunction, while an injunction requiring affirmative action on the part of a defendant is called a mandatory injunction. Id. This Comment concerns itself primarily with mandatory injunctions, although prohibitory orders play an important part in the § 404 enforcement scheme. See, e.g., United States v. Akers, 785 F.2d 814, 823 (9th Cir.), cert. denied, 107 S. Ct. 107 (1986).
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violations and require compliance with the Act. Courts have exercised their statutorily conferred equitable powers to order both prohibitive injunctions demanding cessation of illegal dredging and filling discharges, and affirmative injunctions requiring restoration. In finding their authority to order restoration, some courts have analogized to cases mandating restoration under the Rivers and Harbors Act (RHA) of 1899.

Evidence is not a requisite for the issuance of a preliminary injunction. Finally, a temporary restraining order (TRO) is an ex parte injunction. Id. at 107. A TRO's issuance requires neither notice nor opportunity for a hearing. Id.

33 U.S.C. § 1319(b) (1982). Under § 1344(s), Congress authorized the Secretary of the Army, acting through the Chief of Engineers, to seek the same relief specified under § 1319 when the terms of § 404 permits are violated. 33 U.S.C. § 1344(s). Thus, the present enforcement scheme calls for the EPA to initiate actions against violators who by-pass the § 404 permit process altogether, and the ACOE to prosecute those who violate permit conditions or limitations.

See, e.g., Akers, 785 F.2d at 823.

See, e.g., Cumberland Farms, 647 F. Supp. at 1180; Weisman, 489 F. Supp. at 1342-43.


Since the statute's passage, courts have consistently interpreted the RHA expansively. United States v. Sexton Cove Estates, Inc., 526 F.2d 1299, 1299 n.10 (5th Cir. 1976). The Supreme Court addressed specifically the issue of a broad interpretation of the RHA in United States v. Republic Steel, 362 U.S. 482 (1960). In that case, the defendants were steel mill operators who discharged industrial waste solids into a navigable river, thereby raising the elevation of the river bottom and reducing the river's navigable capacity. Id. at 483-84. The Court held that where Congress has, by its legislative enactment, made its intent clear, it need not provide for every contingency in the statute itself. Id. at 492. The Court found that Congress had "provided enough federal law in § 10 from which appropriate remedies may be fashioned, even though they rest on inferences." Id.

The expansive reading of the RHA became more crucial toward the end of the 1960's as public awareness of environmental concerns grew. At about that time, courts came to view § 10 of the RHA not simply as requiring the removal of unauthorized obstructions in the navigable waters, but also as a way to restore the whole water environment which had been damaged. Haagensen, Restoration as Federal Remedy for Illegal Dredging and Filling Operations, 32 U. Miami L. Rev. 105, 124-25 (1977); see also Zabel v. Tabb, 430 F.2d 199, 207-08 (5th Cir.) (environmental considerations unrelated to traditional navigability concepts upheld as valid reasons for denying an RHA § 10 permit), cert. denied, 401 U.S. 910 (1970).

The RHA permit program also served as a model for the FWPCA and, more particularly, § 404. A more detailed analysis of the RHA's relationship to the FWPCA can be found in Haagensen, supra, and Comment, Federal Protection of Wetlands Through Legal Process, 7 B.C. Envtl. Aff. L. Rev. 567, 579-89 (1979).
Two RHA cases from Florida—United States v. Joseph G. Moretti, Inc.,90 and United States v. Sexton Cove Estates, Inc.91—have served as guidance for some courts that have considered whether to order restoration under section 404. In the Moretti series of decisions,92 which concerned appropriate remedies for permitless dredging and filling operations, the district court found that a mandatory injunction requiring restoration was an appropriate use of injunctive power authorized by the RHA.93 The court determined that the word “obstruction” as used in the RHA was broad enough to justify the removal of any obstruction or any diminution of the navigable capacity of a waterway.94

The Fifth Circuit affirmed the reasoning of the district court. The appeals court held that the district court found its authority to order restoration not only from the express language of the RHA itself, but also from the trial court’s inherent equitable power to enforce the policy of the Act.95 Subsequently, the trial court ordered the

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90 The Fifth Circuit decided the cases on the same day.
91 389 F. Supp. 602 (S.D. Fla. 1975), rev'd in part and remanded, 526 F.2d 1293 (5th Cir. 1976). A third case, Weiszmann v. United States Army Corps of Engineers, 526 F.2d 1302 (5th Cir. 1976), on remand, 545 F. Supp. 721 (S.D. Fla. 1982), has also helped to guide courts in determining whether to order restoration under § 404. The Fifth Circuit decided Weiszmann on the same day that it decided Moretti and Sexton Cove. In writing its decision in Weiszmann, the Fifth Circuit relied on the reasoning developed in Sexton Cove. Weiszmann, 526 F.2d at 1304. For that reason, the case is not analyzed in the text but is discussed in note 97, infra.
92 The defendants thrice appealed decisions by the district court. Moretti, 478 F.2d 418 (5th Cir. 1973); Moretti, 526 F.2d 1306 (5th Cir. 1976); Moretti, 592 F.2d 1189 (5th Cir. 1979).
93 Moretti, 331 F. Supp. at 158. The defendants violated the RHA by dredging and filling in navigable water while developing a mobile home park in the Florida Keys. Id. at 156. In the process, defendants completely destroyed a thriving mangrove area, also resulting in the loss of other plant and animal life in a sensitive estuarine ecosystem. Id. Despite cease and desist orders issued by the ACOE and state officials upon their discovery of this illegal construction activity, defendants persisted in their excavation. Id. at 157. Even when a corporate officer, Joseph G. Moretti, Jr., was arrested for violating the RHA, the company bearing the family name continued to dredge and fill illegally. Id. at 155. The defendants’ flagrant disregard for the law placed the defendants in a poor equitable position to argue the unfairness of the restoration order. Moretti, 526 F.2d at 1308.
94 Moretti, 331 F. Supp. at 158.
95 Moretti, 478 F.2d at 430. The statutory authority for the RHA injunction provides in relevant part: “[t]he removal of any structures or parts of structures erected in violation of the provisions of said sections (401, 403, and 404) may be enforced by the injunction of any district court exercising jurisdiction . . . .” 33 U.S.C. § 406 (1982).

The circuit court stated that it had “no doubt that the issuance of a mandatory injunction requiring extensive restoration operations at very large expense to the developers is entirely
defendants to restore the property on which they had conducted permitless dredging and filling activities, after first having an opportunity to present objections to the restoration plans.\textsuperscript{96}

The most significant of the RHA decisions for section 404 enforcement purposes is \textit{United States v. Sexton Cove Estates, Inc.},\textsuperscript{97} in which the Fifth Circuit outlined the test many courts later employed to determine whether to order restoration in Clean Water Act enforcement actions. In \textit{Sexton Cove}, the defendants destroyed a mangrove area and all its wildlife while digging out ten canals as part of a seventy-three acre mobile home park development in southern Florida.\textsuperscript{98} The defendants conducted their excavation without the required RHA permits.\textsuperscript{99} Consequently, the district court ordered

within the Court's power as expressly mandated by the statute." \textit{Moretti}, 478 F.2d at 430–31.


\textit{United States v. Weiszmann}, 526 F.2d 1302 (5th Cir. 1976) used the reasoning developed in \textit{Sexton Cove} to uphold the trial court's restoration order and the lower court's jurisdiction over one of Weiszmann's canals. \textit{Id.} at 1304. Weiszmann had dug two canals as part of a residential development. When the ACOE told him that connection of the canals to a pre-existing one would require a permit, Weiszmann disputed and ignored this advice. \textit{Id.} at 1303. He then proceeded to connect one of the canals to the pre-existing one; the other remained landlocked. \textit{Id.} at 1303–04. When ACOE demanded that he plug the newly attached canal, he filed a declaratory judgment action to restrain the ACOE from exercising jurisdiction over the canal. \textit{Id.} at 1304. The trial court not only denied him his relief, but it also granted the government's counterclaims for restoration of both canals. \textit{Id.} Interestingly, the government also requested relief under the FWPCA but only to impose civil penalties for a § 404 violation (relief the court granted), not to order restoration under that section. \textit{Id.}

On appeal, the Fifth Circuit reversed in part and remanded. \textit{Id.} at 1304. It dismissed Weiszmann's objection to the validity of the restoration order for the reasons set forth in \textit{Sexton Cove}. \textit{Id.} As in \textit{Sexton Cove}, however, the appeals court held that the ACOE did not have jurisdiction over the landlocked canal. \textit{Id.} The Fifth Circuit then vacated the restoration order for the second canal because the district court's order lacked a "factual record establishing that the court's choice of the specific restoration ordered was based upon a comprehensive evaluation of the factors involved and the practicalities of the situation." \textit{Id.} Seven years later, after negotiations between the ACOE and Weiszmann had failed, and after Weiszmann was cited for contempt of court, the trial court held a hearing on restoration. \textit{Weiszmann v. District Engineer, United States Army Corps of Engineers}, 545 F. Supp. 721, 723 (S.D. Fla. 1982). Using the guidelines set forth in \textit{Sexton Cove}, the court rejected Weiszmann's proposal and accepted a modified version of the ACOE's plan to re-plug the canal so as to promote benthic development but not to restore the wetlands destroyed by Weiszmann's dredging activities. \textit{Id.} at 727.


\textit{Id.} at 605. The defendants excavated the canals, five of which they connected to Key Largo Bay, five of which remained landlocked and unconnected to any other waters. \textit{Id.} The trial court found that defendants had ignored the directives of the ACOE, which had written to the defendants three times to advise them that their construction activities required a permit, \textit{id.}, and operated for their personal gain. \textit{Id.} at 606. The trial court also found that it
the defendants to fill the five plugged canals—canals not yet connected to another body of water—and three of the unplugged ones, to replant mangrove plants along the banks of the restored canals, and to fill in part of the remaining two connected canals.\textsuperscript{100}

In ordering this restoration, the court reasoned that a broad construction of the RHA was necessary "to effect the expressed intent of Congress and to protect the navigational and environmental public interest."\textsuperscript{101} Further, the court found that it possessed "far greater" injunctive authority to order the requested restoration because the defendant's unlawful activities implicated the public interest, as expressed by an act of Congress.\textsuperscript{102}

On appeal, the Fifth Circuit did not quarrel with this part of the district court's reasoning. The circuit court found that the district court had "powerful tools at its disposal" to fashion relief under the RHA.\textsuperscript{103} Nonetheless, the appeals court reversed the decision in part and remanded. It found that the trial court lacked jurisdiction over the landlocked canals\textsuperscript{104} and that the defendant did not have an "adequate opportunity" to present evidence as to the restoration issue.\textsuperscript{105} To guide the district court on the remanded issue of restoration, the Fifth Circuit stated:

\begin{quote}
The full effects of any environmental disturbance are difficult to measure. Attempts to reverse such effects and restore the environment to its natural state carry with them no guarantee of success. Hence, any restoration plan must be carefully designed to confer maximum environmental benefits. At the same time, the law must be tempered with a touch of equity. The degree
\end{quote}

\begin{footnotes}
\item[100] Id. at 613.
\item[101] Id. at 610.
\item[102] Id. The court also explained that the government need not prove two traditional requirements of injunctions, irreparable injury and an inadequate remedy at law, to obtain injunctive relief. The court noted that the "'United States, however, is not bound to conform with the requirements of private litigation when it seeks the aid of the courts to give effect to the policy of Congress as manifested in a statute.'" Id. at 609, citing United States v. Underwood, 344 F. Supp. 486, 494–95 (M.D. Fla. 1972).
\item[103] Sexton Cove, 526 F.2d at 1301; see also id. at 1298 n.10.
\item[104] Id. at 1300.
\item[105] Id. at 1301. The Fifth Circuit also made other key decisions in the case. The appeals court expanded the ACOE's jurisdiction under the RHA by ruling that dredge and fill operations above the ACOE's self-imposed jurisdictional boundary, the mean high tide line, may come within the permit provisions of the RHA. Id. at 1298–99. (This issue was also important in Moretti and Weiszmann). In addition, the court held that corporate officers could not be held civilly liable under the RHA absent proof of a piercing of the corporate veil. Id. at 1300–01.
\end{footnotes}
and kind of wrong and the practicality of the remedy must be considered in the formulation of that remedy.\textsuperscript{106}

The court for the Middle District of Florida in \textit{United States v. Weisman}\textsuperscript{107} drew upon the reasoning developed in the RHA cases\textsuperscript{108} to order restoration in a case involving section 404.\textsuperscript{109} Using \textit{Sexton Cove} as its primary guide, the court succinctly articulated the five requirements that the government must establish before courts may impose a restoration order upon defendants in section 404 cases.\textsuperscript{110} The court found that \textit{Sexton Cove} required satisfying two criteria before the court could consider the restoration plan itself: 1) the court must have jurisdiction over the property or activity affected by the plan;\textsuperscript{111} and 2) the court must hold a hearing to discuss the merits, drawbacks, and alternatives to the plan.\textsuperscript{112} Once the court meets these prerequisites, the court may order restoration (assuming liability) if the plan: 1) confers maximum environmental benefits;\textsuperscript{113} 2) is achievable as a practical matter;\textsuperscript{114} and 3) bears an equitable relationship to the degree and kind of wrong the plan intends to remedy.\textsuperscript{115} Significantly, the trial court did not find it necessary to provide a detailed explanation of its authority to issue a mandatory injunction requiring restoration. This is significant because the court’s reliance on the RHA cases,\textsuperscript{116} as well as its citation to the purpose of the CWA\textsuperscript{117}—to restore and maintain the nation’s waters in their natural condition—seemed to the court to be sufficient justification for its ability to direct Weisman to restore his property to a condition approximating its natural state.

\textsuperscript{106} \textit{Sexton Cove}, 526 F.2d at 1301 (citations omitted).
\textsuperscript{107} 489 F. Supp. 1331 (M.D. Fla. 1980), aff’d mem., 632 F.2d 891 (5th Cir. 1980).
\textsuperscript{109} The United States brought claims under both § 404 of the CWA and § 10 of the RHA. \textit{Weisman}, 489 F. Supp. at 1333. Weisman had constructed a new roadway on his property after the ACOE had denied him a permit to do so. \textit{Id.} at 1335–36. In the building process, Weisman destroyed 2.2 acres of wetlands, \textit{id.} at 1346, and affected another 14.5 acres. \textit{Id.} at 1349. Consequently, the court found violations of both statutes. \textit{Id.} at 1339–40. The ACOE would have issued a permit for modification of a pre-existing road, but Weisman rejected that option for personal, aesthetic reasons. \textit{Id.} at 1335.
\textsuperscript{110} \textit{Id.} at 1342–43.
\textsuperscript{111} \textit{Id.} at 1343.
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.} at 1349.
\textsuperscript{117} \textit{Id.}, citing 33 U.S.C. § 1251(a).
Three distinct features of the *Weisman* decision have special significance for section 404 cases. First, the *Weisman* case marked the first time that a court applied the *Sexton Cove* guidelines to restoration cases involving section 404. Even though the *Weisman* court never stated specifically that the sole authority for restoration rested on injunctive relief available under section 404, the bulk of the decision analyzed the CWA claim and the effect of the defendant’s activities on wetlands above the mean high tide line. Because section 404, but not the RHA, covers at least those dredge and fill activities occurring above that point, the opinion as a whole strongly suggests that the restoration remedy the *Weisman* court imposed derived from the federal courts’ injunctive powers under the CWA. The *Weisman* case has thus served as an important precedent for courts ordering restoration on the basis of section 404 alone.

The second feature of the *Weisman* decision that has special significance for section 404 cases is the court’s articulate definition of the broad criteria by which future courts could determine whether to order restoration when section 404 violations have occurred. The court’s discussion of each determinant provides an insight into ways in which courts may use the *Weisman* criteria either to promote or retard the environmental aims of the CWA. The *Weisman* court’s discussion of these standards also suggests a manner by which courts may improve the balancing process conducted in section 404 enforcement actions.

The third important aspect of the *Weisman* case is related to the second. The articulation in *Weisman* of three principal standards by which to judge restoration remedies represents a variant of the traditional equitable balancing process that normally occurs in the common law context. Typically, this common law process involves a balancing of competing, usually private, interests in which the court acts as arbiter. In this context, the *Weisman* standards are useful tools for analyzing whether the decisions of those courts that have not used the criteria, as well as the opinions of those judges who did

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118 See generally, *Weisman*, 489 F. Supp. at 1343–48. The mean high water mark, defined as the “average height of all high waters over a given location during a span of 18.6 years,” *id.* at 1335 n.7, has traditionally been the cut-off point for the ACOE’s jurisdiction under the RHA. *Id.* at 1340. Section 404 of the CWA covers dredge and fill activities both above and below that point.


employ them, promote the environmental aims and purposes of the CWA.

Courts that have weighed whether to require restoration under section 404 prior to the Weisman decision generally engaged in a balancing process without following a delineated set of equitable guidelines.\(^{121}\) The problem with this and the Weisman court approaches, however, is that they neglect or fail to emphasize sufficiently the statutory and environmental imperatives of the CWA, imperatives that should weigh heavily on the side of the party seeking restoration. Thus, the Weisman standards, which exemplify the more traditional, common law approach to equitable analysis, fall short of promoting the environmental goals and purposes of the CWA. An appropriate set of equitable balancing standards should instead seek to advance the CWA’s remedial environmental objectives.

IV. THE ENVIRONMENTAL BENEFITS AND DEFICIENCIES OF THE WEISMAN APPROACH TO SECTION 404 RESTORATION ORDERS

The manner in which courts have balanced the three main standards enunciated in Weisman\(^ {122}\) illustrates both the standards’ positive and negative environmental aspects when courts apply them to section 404 restoration cases.\(^ {123}\) In general, courts have misused these standards to undercut the purposes and intent of the CWA. However unintentionally this may have been, a test that courts conceivably could have used to promote the environmental objectives of the Act too frequently has been employed to nullify the effect of

\(^{121}\) See, e.g., Conservation Council of North Carolina v. Costanzo, 398 F. Supp. 653, 674–75 (E.D. N.C. 1975), aff’d, 528 F.2d 250, 252 (4th Cir. 1975) (district court appropriately balanced the rights of the parties in refusing to order restoration or to enjoin violation of FWPCA); Fleming Plantations, 12 Envt. Rep. Cas. at 1709.

\(^{122}\) The three Weisman standards used to determine whether a court should order restoration are whether the plan: 1) confers maximum environmental benefits; 2) is feasible as a practical matter; and 3) bears an equitable relationship to the degree and kind of wrong the plan intends to remedy. Weisman, 489 F. Supp. at 1343.

\(^{123}\) This section focuses primarily on the three requirements of restoration which address the merits of the proposed plan. Once the preliminary requisites of jurisdiction and a hearing are met, they do not have a direct bearing on the decision to issue a restoration order. To determine whether the court has jurisdiction over a particular parcel of wetlands under § 404, it need only compare the characteristics of that land with those contained in the regulatory definition under 33 C.F.R. § 328.3(b)(1987). Avoyelles Sportsmen’s League, 715 F.2d at 910–913 (comparison of soil, vegetation, and hydrology of land against wetlands regulatory definition upheld as valid method of determining § 404 jurisdiction). If the soil, vegetation, or water conditions reasonably match those described in the definition, the court has jurisdiction to require compliance with the CWA. Id.
the CWA's purposes. The shortcomings occur primarily when courts engage in an equitable balancing process to determine whether the restoration plan is achievable practically and whether the plan is appropriate given the degree and kind of section 404 violation. This balancing process effectively undermines the court's attempt to confer maximum environmental benefits because, as the cases demonstrate, these last two criteria too frequently justify the misuse of a court's discretion to devise a remedy that does not effectuate the CWA's remedial objectives.124

A. Conferring Maximum Environmental Benefits

The Weisman court's requirement that a restoration plan confer the maximum environmental benefits must remain part of any balancing of the equities that courts may perform in fashioning relief under section 404. The reasons for the necessity of this criterion are straightforward. This standard admirably serves the environmental purposes of the CWA and gives effect to the stated intent of Congress—to restore and maintain our nation's waters in their natural state.125 Equally important, however, achieving the most beneficial environmental result represents an absolute standard from which courts cannot retreat.126 Either a plan confers the optimal benefit or it does not. No middle ground exists in which a violator may reasonably suggest that a less than environmentally superior proposal will suffice to meet this goal. Finally, such an uncompromising standard reinforces the notion that the legal system takes violations of section 404 seriously. As a consequence, this judicial seriousness might deter those who may be tempted to violate section 404 but who would not do so because of the strong possibility of having to reverse the damage caused by their activity.127

124 This point becomes even more evident when one examines the cases in light of the CWA's declarations of national purpose, as well as the statutory prohibition against unauthorized discharges. To enforce the statute properly, courts must utilize a balancing test which places greater emphasis on an environmentally principled reading of the CWA and its objectives. See infra text accompanying notes 271-332, for suggestions on more appropriate equitable considerations.


126 The court in United States v. Huebner, 752 F.2d at 1245, did manage to compromise this theoretically uncompromisable standard, however. See infra text accompanying notes 215–218.

127 This not to suggest, however, that restoration is the only manner by which courts may confer maximum environmental benefits. In some instances, mitigation—requiring the defendant to deed in perpetuity to the government another wetland to replace the destroyed one or to set aside funds for this purpose—may more appropriately accomplish the requirement's
To determine whether a plan confers maximum environmental benefits, courts may compare the proposed restoration plans with the wetlands characteristics the ACOE regulations deem important. Courts should order the plan which will result in restoration of the characteristics outlined in the ACOE regulations. In *Weisman*, the court used this approach to determine both the environmental harm the defendant's unlawful activities had caused and which litigant's plan would confer maximum environmental benefits. First, the court described the current state of defendant Weisman's property, noting the environmental effects of the defendant's unlawful construction activities. The court then examined the harmful consequences of the defendant's actions by assessing the actions' impact against the ACOE regulations that describe important wetland functions deemed vital to the public interest. It found that Weisman's land performed several of the functions mentioned in the ACOE's regulations; consequently, returning the area as closely as possible objectives. United States v. M.C.C. of Florida, Inc., 752 F.2d 1501, 1507 (11th Cir. 1985), *reh'g en banc denied*, 778 F.2d 793 (11th Cir. 1985), *vacated on other grounds*, 107 S. Ct. 1831 (1987). In such a situation, courts must impose sufficient mitigation damages to ensure that the defendant fully compensates for the environmental harm caused and to promote other environmental reasons—for example, deterring future violators—for ordering restoration under the CWA.

128 The ACOE general policies for permit issuance state the several wetlands functions which it designates as important to the public. 33 C.F.R. § 320.4(b)(2). These important wetland characteristics include:

(i) Wetlands which serve significant natural biological functions, including food chain production, general habitat and nesting, spawning, rearing and resting sites for aquatic or land species;

(ii) Wetlands set aside for study of the aquatic environment or as sanctuaries or refuges;

(iii) Wetlands the destruction or alteration of which would affect detrimentally natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics;

(iv) Wetlands which are significant in shielding other areas from wave action erosion, or storm damage. Such wetlands are often associated with barrier beaches, islands, reefs and bars;

(v) Wetlands which serve as valuable storage areas for storm and flood waters;

(vi) Wetlands which are ground water discharge areas that maintain minimum baseflows important to aquatic resources and those which are prime natural recharge areas;

(vii) Wetlands which serve significant water purification functions; and

(viii) Wetlands which are unique in nature or scarce in quantity to the region or local area.


130 *Id.* at 1345–47.

131 *Id.* at 1346–47.
to its natural state would most benefit the environment.\textsuperscript{132} Finally, the \textit{Weisman} court considered the restoration plans proposed by both plaintiff and defendant in light of its earlier findings concerning the harm that Weisman's activities caused to the wetland. The court concluded that the government's proposal outweighed the defendant's because the latter's plan would not result in restoring the environmental characteristics important to this wetland.\textsuperscript{133} Other courts have used an approach similar to that of the \textit{Weisman} court in arriving at a conclusion to the maximum environmental benefits issue.\textsuperscript{134}

The \textit{Weisman} court's analysis of whether a restoration plan conferred maximum environmental benefits is sound for two reasons. First, the court utilized the relatively neutral\textsuperscript{135} ACOE regulations by which to assess the impact\textsuperscript{136} of illegal dredge and fill operations and to determine the advantages of restoration. The standards are available to all courts and would make determinations of this issue consistent. Second, the process of examining evidence against particular standards involves a function that courts do best—conducting factual analysis by comparing evidence against a specific set of requirements to see which evidence produces the most favorable resolution. Judges thus have little room in this process, if followed correctly, for substituting their own policy choices in place of hard fact-finding. Consequently, the courts' use of the \textit{Weisman} approach to determine whether a restoration plan confers maximum environmental benefits should result in consistent and factually well-grounded resolutions of this issue.

In actual implementation, however, conferring maximum environmental benefits may be trickier to achieve than a proposed plan

\textsuperscript{132} Id. at 1347. The court stated: "The wetland forest on the Weisman property is like productive farmland, producing a crop which is harvested not by man but by the natural action of the seasons and the tides." Id. at 1346. The court went on to point out that man also benefits from the wetlands' bounty. Wetlands produce detritus, an organic material which is produced from decayed vegetation. If not absorbed into the wetlands, detritus is flushed out into estuaries and harbors, where it serves as food for aquatic organisms, which in turn serve as food for fish and shrimp. \textit{Id.}

\textsuperscript{133} Id. at 1347–48.


\textsuperscript{135} The phrase "relatively neutral" is used because the ACOE definition of wetlands leaves unprotected a significant portion of the nation's wetlands. Note, \textit{Wetlands Protection}, supra note 11, at 239.

\textsuperscript{136} The degree of harm to the environment, however, is irrelevant for liability purposes under the CWA because the statute provides for strict liability. See \textit{infra} text accompanying notes 170–176 for additional analysis of liability under the CWA.
the Fifth Circuit noted in United States v. Sexton Cove, a restoration plan is not guaranteed to succeed. The restoration process may take twenty to thirty years before the damaged wetland will closely approximate its formerly undisturbed state. Even such a lengthy period does not ensure that the wetlands' former plant and animal life will recover fully from the unlawful dredging and filling operations. In fact, the restored wetland may never again perform all of the valuable functions that it performed prior to its destruction. Nevertheless, one study commissioned by the EPA recommended that the ACOE focus on restoration of ecologically degraded wetland areas or enhancement of ecologically less valuable wetlands as the best alternatives for mitigating unlawful wetlands destruction. This recommendation, as well as the possibility that the wetland may regain completely its former ecological state, makes crucial the effort to confer maximum environmental benefits.

B. Achievability as a Practical Matter

From a statutory and environmental perspective, the Weisman criterion that a court-ordered restoration plan be feasible as a practical matter has produced less than satisfactory results. This requirement may be interpreted in two ways. For one, practicality can mean the achievability of restoration from an engineering and environmental viewpoint. This interpretation simply requires that the restoration plan is capable of being implemented and is likely to provide the environmental benefits promised. Such an interpretation nicely complements the first Weisman standard. That is, a plan cannot possibly confer maximum environmental benefits if it cannot be implemented and if it is unlikely to succeed. In fact, the court in

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137 526 F.2d 1293 (5th Cir. 1976).
138 Id. at 1301.
139 Weisman, 489 F. Supp. at 1347.
140 Telephone conversation on March 10, 1987 with Michael Sheehan, Senior Biologist, United States Army Corps of Engineers, Waltham, Massachusetts.
141 R. Reimold & S. Cobler, Wetlands Mitigation Effectiveness 73–74. No studies have been done concerning the long-term effectiveness of restoration injunctions. Telephone conversation on February 8, 1988 with Matt Schweisberg, Wetlands Ecologist, EPA Region I, Boston, MA. Restoration, however, is gaining favor generally. In January 1988, the first major national conference on "Restoring the Earth" was held in Berkeley, California. Among the participants were scientists, ecologists, and industry and government officials. In addition, companies specializing in environmental restoration have emerged. Wetland, tropical forests, prairies and river wildlife restoration are all targets of restoration ecology. Begley, Zuckerman & Drew, Making Nature Whole Again, (January 18, 1988) NEWSWEEK 78–79.
142 Robinson, 570 F. Supp. at 1164.
Weisman implied that practicality should have this meaning.\textsuperscript{143} The Weisman court, however, felt constrained by its understanding of the Sexton Cove decision not to limit the interpretation of practicality to mean feasible in an engineering and environmental manner.\textsuperscript{144} Subsequently, no court has interpreted this prong of the test solely in this limited manner.

Instead, courts have enlarged the meaning of practicality to include consideration of a restoration plan's economic feasibility and cost-effectiveness.\textsuperscript{145} With this understanding, courts have examined the financial resources of the defendant(s),\textsuperscript{146} as well as the cost to the defendant(s) of the restoration plan\textsuperscript{147} in assessing the viability of a particular proposal. Such an interpretation diminishes the significance of conferring maximum environmental benefits in two respects. First, under this broad interpretation of practicality, potential defendants have an economic incentive to create large restoration costs in hopes that courts will find that the expense of restoration will offset the engineering and environmental feasibility of taking such action. By logical implication, the greater the dollar amount of wetlands destruction, the less likely it is that courts will require restoration. This reasoning has been partly if not completely successful in preventing the imposition of restoration orders in several cases.\textsuperscript{148}

The second way in which the enlarged meaning of the practicality standard diminishes the significance of conferring maximum environmental benefits is by over-emphasizing economics. Over-emphasis on economics frequently leaves the goal of reaching the best environmental result merely as rhetorical exhortation. In United States v. Huebner, for example, the Seventh Circuit reversed a restoration injunction primarily because it deemed the lower court's order to be cost-ineffective.\textsuperscript{149} As a basis for its decision, the appeals

\textsuperscript{143} Weisman, 489 F. Supp. at 1348. The judge reasoned that since the plaintiff's plan contained less doubt about its results than the defendant's proposal, it was more practical. Id.

\textsuperscript{144} Id.

\textsuperscript{145} Ciampitti, 615 F. Supp. at 123; Robinson, 570 F. Supp. at 1164; Weisman, 489 F. Supp. at 1348.

\textsuperscript{146} Ciampitti, 615 F. Supp. at 123; Robinson, 570 F. Supp. at 1164.

\textsuperscript{147} M.C.C. of Florida, 772 F.2d at 1507 (restoration too costly); Ciampitti, 615 F. Supp. at 123.

\textsuperscript{148} See, e.g., M.C.C. of Florida, 772 F.2d at 1507; Huebner, 752 F.2d at 1245. Courts have, however, ordered the restoration of large areas of wetlands. See, e.g., United States v. Murff, 13 Envtl. L. Rep. (Envtl. L. Inst.) 20199 (August 6, 1982) (consent decree approved requiring defendant to restore 8000 acres of wetlands to their original hydrologic and biotic regimes).

\textsuperscript{149} 752 F.2d at 1245.
court merely used the Huebners' assertion that the injunction would destroy a cranberry bed worth $400,000.\textsuperscript{150} Similarly, the Eleventh Circuit in United States v. M.C.C. of Florida, Inc. refused to reverse a district court order denying restoration in part because it considered the government's two alternative restoration plans too costly.\textsuperscript{151} The court made this determination despite finding that the damage to the wetland was "devastating"\textsuperscript{152} and without considering explicitly whether the cost of restoration equaled the cost of the damage caused by the defendant's illegal conduct.\textsuperscript{153}

An interpretation of the practicality standard that permits these results is inappropriate. Because the economic marketplace historically has not placed sufficient value on the functions that wetlands perform,\textsuperscript{154} any economic balancing of the wetlands value as compared to the value of the developer's project, as in Huebner, or as compared to the cost of compensation for the damage caused, as in M.C.C. of Florida, invariably results in the scale tipping against the wetlands. By virtue of section 404, however, Congress has upset the old economic balance and tipped the scale in favor of wetland protection and restoration of unlawfully destroyed wetlands. The purpose of the CWA is to protect and restore the nation's waters, not to protect the financial interests of those who have violated the law. Consequently, judicial notions of cost-effectiveness should not undermine the environmental priorities that Congress has set.

This is not to argue, however, that economics has no place in a discussion of restoration alternatives. Economic analysis performs the vital function of determining the dollar amount of wetlands damage for which defendants are responsible due to their unlawful dredging and filling. Further, economic analysis may be useful in choosing among alternative restoration plans, all of which confer maximum environmental benefits. Once courts have determined the maximum environmental benefits to be attained, they appropriately may consider alternative means of reaching the desired goals. Economics then may become a factor in choosing among equivalent restoration

\textsuperscript{150} Id.

\textsuperscript{151} 772 F.2d at 1507. The government's suggested plans would have cost $793,414 or $742,063. Id. at 1504. Both the trial and appellate courts stated that the plans also were too speculative, but neither court elaborated on the economics nor the speculative nature of the plans. Id.

\textsuperscript{152} Id. at 1503–04.

\textsuperscript{153} See also United States v. Sunset Cove, Inc., 514 F.2d 1089, 1090 (9th Cir. 1975) (lower court order in RHA case requiring complete removal of fill modified because appeals court decided, without explanation, that defendant lacked finances to effect total removal of fill).

\textsuperscript{154} See supra text accompanying notes 14–16.
plans. Courts should not, however, use economics as a basis for determining what constitutes maximum environmental benefits for the wetland at issue. In this way, economic considerations remain subordinate to the goal of maximizing environmental benefits. This subordination will serve better the protection and preservation of wetlands, as well as the statutory intent of the CWA.

C. Assessing the Degree and Kind of Wrong

The final Weisman requirement—that the restoration be equitable in view of the degree and kind of wrong committed by the defendant—provides courts with the greatest flexibility to undermine, in effect, statutory purposes and the quest to achieve the maximum environmental benefits. Too frequently, courts appear to weigh the degree and kind of harm the restoration plan imposes on the statute’s violator. In one early case involving violations of section 404, the District Court for the Eastern District of North Carolina refused to enjoin a defendant’s fill activities on ten acres of wetlands and order restoration in part because the plaintiffs’ lawsuit had inflicted “grievous injury upon the Corporation” and the court did not want to add to the defendant corporation’s problems by forcing it to restore the destroyed property. Similarly, the district court in United

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155 The only economic consideration which could mitigate against the primary environmental goal is financial insolvency. Debts resulting from environmental injunctions may not take priority over other claims in a bankruptcy proceeding, and may be discharged, thus allowing debtors to escape from the obligations they owe society. See Comment, The Future of the Environmental Enforcement Injunction After Ohio v. Kovacs, 13 B.C. ENV. AFF. L. REV. 397 (1986) for a discussion of the inherent tension between the environmental laws and the bankruptcy code. Obviously, a restoration order that forces a defendant into bankruptcy would not help the wetlands, either. Short of provoking insolvency, however, the restoration order should hold the defendant liable for the full cost of his statutory violations.

In re Robinson, 46 Bankr. 136 (Bankr. M.D. Fla. 1985) is the only case in which an individual sought the protection of the bankruptcy laws after a court required him to restore a wetlands area. In the section 404 proceeding, United States v. Robinson, 570 F. Supp. 1157 (M.D. Fla. 1983) the defendant unsuccessfully tried to defeat the jurisdiction of the court by engaging in a land conveyancing scheme. Id. at 1164. When the court ordered restoration, the court specifically found that defendant had the financial resources necessary to accomplish the restoration. Id. at 1164–65. The defendant’s actions indicate that he was intent on defeating the government’s enforcement action, a goal which seemed to succeed when the bankruptcy court determined that the restoration order could not be enforced because Robinson was under its jurisdiction. In re Robinson, 46 Bankr. at 139. The bankruptcy court, however, later reimposed the judgment in the § 404 proceeding because Robinson had failed to file an appeals brief. United States v. Robinson, 55 Bankr. 355, 356 (M.D. Fla. 1985).


157 The court did order the defendants to apply for an after-the-fact permit which, if denied, would cause it to reconsider its refusal to deny the injunctive relief. Conservation Council,
States v. Lambert\textsuperscript{158} refused to order the defendant to restore two of three unlawfully filled-in wetlands despite finding that the defendant violated section 404. Defendant Lambert unlawfully had used wetlands to dispose of scallop shells from his seafood business.\textsuperscript{159} The Lambert court justified its decision not to order complete restoration by noting that the defendant’s filling had not “so significantly disrupted”\textsuperscript{160} the environment of an adjacent navigable water as to require restoration.\textsuperscript{161} Despite the CWA’s prohibition of all unpermitted discharges, not merely of those which, in the court’s opinion, significantly disrupt the environment, the Lambert court decided that ordering restoration of two of the three affected wetlands would present an “unduly burdensome and inequitable application of injunctive power.”\textsuperscript{162}

Other cases also demonstrate the tendency of courts to give significant consideration to the violators’ hardships. In United States v. Robinson,\textsuperscript{163} the court refused to order complete restoration because such an injunction would be “inequitable.”\textsuperscript{164} The court came to this conclusion despite the defendant Robinson’s knowledge that a permit, which defendant did not obtain, was necessary for his fill activities\textsuperscript{165} and that the defendant concocted a land conveyancing

\textsuperscript{158} 589 F. Supp. 366 (M.D. Fla. 1984).
\textsuperscript{159} United States v. Lambert, 695 F.2d 536, 538 (11th Cir. 1983).
\textsuperscript{160} Lambert, 589 F. Supp. at 372.
\textsuperscript{161} Id.
\textsuperscript{162} Id. The court, however, ordered the defendant to restore a different part of his property which he had filled in because of the fill’s effect on the environment. Id. at 374. All violations of the CWA, however, not simply significant ones, require complete compensation by the defendant.
\textsuperscript{163} 570 F. Supp. 1157 (M.D. Fla. 1983).
\textsuperscript{164} Id. at 1165.
\textsuperscript{165} Id. at 1163–64. The defendant knew that he needed both state and federal permits to fill in his wetlands because he had objected previously about a neighbor’s unpermitted construction activities. Id. at 1159. In fact, Robinson applied to state and federal agencies for the required permits. Id. at 1160. He began filling his property before obtaining the permits, although the state subsequently approved his permit application. Id. at 1161. Robinson exceeded the bounds of the state permit and never received approval for the ACOE permit. The court ordered restoration of the wetland only up to the state permit line, even though the court’s opinion indicates that the defendant needed a federal permit for that portion of the property as well. Id. at 1165.
scheme with which he attempted to foil the government's enforcement action. 166 Similarly, in Weisman, where the judge found a "flagrant and defiant"167 violation of the law, the court believed that assessing the degree and kind of wrong presented the toughest question in the case. 168 The Weisman opinion indicates that the court at least considered the possibility of permitting flagrant violations to go unremedied. 169 Given the facts in Robinson and Weisman, any equitable considerations that the defendants had in their favor are difficult to discern.

As the above discussion demonstrates, courts have some difficulty preventing this third Weisman requirement from overwhelming the CWA's environmental goals and purposes. Courts should not find this so difficult, however, when the CWA's strict liability provisions and the ACOE's enforcement regulations properly are taken into account.

The CWA creates strict liability by flatly prohibiting the unauthorized discharge of pollutants into the nation's waters, including wetlands. 170 Consequently, the intentions of a defendant in complying or not complying with the statute should be irrelevant for enforcement purposes. 171 As the district court noted in United States v. Board of Trustees of Florida Keys Community College, 172 "[t]he

166 The defendant conveyed his property to a relative, stipulated his wife—an original co-owner of the property and thus a defendant—out of the lawsuit, then instructed the relative to convey the property back to his wife. Id. at 1164. The court refused to allow this scheme to succeed, however. Id.; but see, supra, note 155.
167 Weisman, 489 F. Supp. at 1349.
168 Id. The court had this belief because the ACOE had admitted that it would have granted a permit for the new roadway, which Weisman built without a permit, had no viable alternative existed. Id.
169 Id. at 1349. The court had the inclination that it only had to choose the proper site for a road on the defendant's property, id., thereby implying that the legal transgressions committed by Weisman were secondary and relatively unimportant. The court, of course, did not follow this inclination.
170 33 U.S.C. § 1311(a) (1982); see also United States v. City of Fort Pierre, South Dakota, 580 F. Supp. 1036, 1041 (D. S.D. 1983) (CWA is strict liability statute), rev'd on other grounds, 747 F.2d 464 (8th Cir. 1984); United States v. Earth Sciences, Inc., 599 F.2d. 368, 374 (10th Cir. 1979) (CWA provides for strict liability). The limited exemptions—such as the agricultural exemptions and the nationwide permit program—created by the statute do not alter this analysis. Dischargers must act within the limits of the exemptions or be subject to liability under the Act.
mandatory nature of the statutes is consistent with the Congressional interest in preventing the destruction of natural resources which may be difficult or impossible to restore, and of eliminating pollution from the nation’s waters.” 173

Strict liability has significant ramifications for enforcement of section 404. This liability standard requires that the courts keep the focus of inquiry on the violation, not the acts of the violator. Consequently, the strict liability standard requires courts to order remedies that fully compensate for all environmental losses caused by a defendant’s discharges, whether the discharges were purposeful or negligent. 174 Once a court finds that a defendant has unlawfully deposited dredged or fill material onto a wetlands, the violation itself should mean that the defendant, at a minimum, compensate for all the environmental losses. 175 In section 404 cases, the CWA’s environmental objectives mandate that courts frequently use restoration

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173 Id. at 274. The court used the word statutes in plural form because it also referred to the RHA, which the court found to have a comparable strict liability standard. Id.

174 The court in Board of Trustees seemed to follow this reasoning when it ordered the defendant trustees either to pay a $3000 fine and restore the illegally destroyed wetland area, id. at 275–76, or to pay a $15,000 fine and restore a different part of the trustees’ property to a condition comparable to that of the formerly undamaged wetland. Id. at 275. The court based the defendant’s options on the estimated $12,000 cost of restoration of the destroyed wetland, id. at 272, plus an additional $3000 as civil penalty for violating the CWA. Id. at 276. The court issued such a strict injunction because it determined that the environmental harm was great, even though the affected area was small. Id. at 275.

Not all courts have used the Board of Trustees court’s approach, however. For example, in United States v. Lambert, the court held that the defendant’s permitless filling of a wetland on his property did not so significantly disrupt an adjacent body of navigable water that it would order restoration. Lambert, 589 F. Supp. at 372. The court felt that such an order would be inconsistent with the burden restoration would impose on the landowner and that the court should not use its injunctive powers to penalize a landowner for improving his property. Id. Such reasoning conveniently overlooks the defendant’s failure to abide by the statutory and regulatory provisions of the CWA. The statute does not regulate merely significant (whatever that term may mean) discharges of pollutants. The CWA seeks to regulate virtually all of them. Thus, although the Lambert court ordered the defendant to restore another section of wetlands which he had filled in, id. at 374, the court’s disregard for the statutory scheme demonstrates a major problem with the equitable balancing process employed by most courts in trying to achieve the law’s objectives.

175 Complete compensation may occur through the use of restoration or other types of mitigation measures, such as requiring a defendant to preserve in perpetuity another wetland area of equal size and ecological value. Civil penalties, by themselves, are insufficient to compensate for the environmental losses caused by unlawful dredging and filling operations. When used in conjunction with restoration or other sorts of mitigation, however, civil penalties can have a useful deterrent effect on future violators. Courts should impose civil fines that are commensurate with the severity of the violation. Thus, the greater the wetland damage a defendant caused, the greater the civil fine the court should order.
of wetlands to their natural condition as an appropriate remedy to achieve complete compensation.\textsuperscript{176}

The ACOE enforcement regulations are another factor that makes the courts' application of the third \textit{Weisman} standard puzzling. These regulations create a sequential enforcement scheme that places a premium on negotiated resolution of section 404 disputes and becomes more harsh, requiring litigation, only when negotiations fail.\textsuperscript{177} The regulations distinguish between violations caused by unauthorized and authorized activities.\textsuperscript{178} Upon the discovery of unauthorized dredging or filling operations, the regulations require the ACOE's district engineer to notify the parties responsible for uncompleted projects. Usually, this notification is in the form of an order prohibiting further work.\textsuperscript{179} The regulations provide that the district engineer should, in appropriate cases, then conduct an investigation\textsuperscript{180} to determine whether the illegal activity jeopardizes life, property, or important public resources.\textsuperscript{181} If such jeopardy exists, the district engineer should order the violator to undertake initial corrective measures.\textsuperscript{182} If the violator complies with the ACOE order, the violator may apply for an after-the-fact permit that may allow him to complete the activity that prompted the district engineer's initial concern.\textsuperscript{183} If the violator fails to pursue this option and

\textsuperscript{176} One problem with the strict liability standard of the CWA is that the statute does not have a comparably stringent enforcement mechanism. The equitable discretion retained by courts \textit{after Weinberger v. Romero-Barcelo, see infra text accompanying notes 252-80, may (but should not) allow persons strictly liable under the CWA to get away without compensating fully for the environmental damage caused. Thus, the Act creates a certain tension between its liability and enforcement provisions. One possible solution to this problem is to re-write the CWA to provide for the automatic issuance of an injunction upon the finding of a § 404 violation and to require compensation exactly proportional to the amount of damage caused by the unlawful activities. Further analysis of this possibility is outside the scope of this article, however.

\textsuperscript{177} Dinkins, \textit{Shall We Fight or Will We Finish: Environmental Dispute Resolution in a Litigious Society}, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10398, 10400 (November, 1984) [hereinafter Dinkins, \textit{Environmental Dispute Resolution}]. The revised regulations adopted as final in November, 1986, 51 Fed. Reg. 41220–60 (1986), are considerably more lenient than the regulations they replace. For example, the revised regulations remove mandatory language requiring the district engineer to take specific action, and substitute language which grants the district engineer great discretion in deciding what action, if any, to take to correct violations. Cf. 33 C.F.R. § 326.3–.4 (July 1, 1986) with 33 C.F.R. § 326.3–.4 (1987).

\textsuperscript{178} 33 C.F.R. § 326.3 and § 326.4 (1987).

\textsuperscript{179} Id. § 326.3(c)(1). The regulations recognize that a cease and desist order should not be necessary for an unlawfully completed project, but the district engineer must still notify the responsible parties of possible violations. Id. § 326.3(c)(2).

\textsuperscript{180} Id. § 326.3(d).

\textsuperscript{181} Id.

\textsuperscript{182} Id.

\textsuperscript{183} Id. § 326.3(e)(1).
to comply with the ACOE order, the district engineer may refer the matter to the United States Attorney for legal action.\footnote{Id. § 326.5(a). Once the ACOE initiates an enforcement action the agency will not process an after-the-fact permit. Id. § 326.3(e)(1)(ii). The regulations also recommend that the district engineer seek a civil penalty for cases involving willful, flagrant, repeated or substantial impact violations of the CWA. Id. § 326.5(a).}

The enforcement regulations governing violations of authorized work are even more lenient. Once the ACOE district engineer determines that a permittee has violated the terms of a permit and that the violation is significant enough to warrant an enforcement action, he should contact the permittee and attempt to resolve the violation through either voluntary compliance or permit modification.\footnote{Id. § 326.4(d).} If the attempt fails, the district engineer may then order the permittee to comply with the permit within a maximum of thirty days.\footnote{Id.} In the event that the permittee fails to comply with the order, the district engineer then may consider suspending or revoking the permit, or also recommend legal action.\footnote{Id.} The ACOE regulations are thus designed to give section 404 violators considerable opportunity to correct their violations before the ACOE resorts to court action.\footnote{Id.}

Given the strict liability standard and the ACOE's relaxed enforcement regulations, the courts' emphasis on the hardships that full restoration may impose on CWA violators has several negative effects. Such emphasis means that section 404 violators likely will not bear the full costs of their environmental destruction. By not ordering full restoration, the courts permit section 404 violators to benefit from the alteration of the destroyed wetlands without compensating for the full environmental damage caused. Such emphasis on the section 404 violators' hardships also undercuts the effectiveness of governmental enforcement actions by allowing statutory violations to go unremedied. Deterring potential CWA violators is made more difficult when courts, in essence, ignore statutory violations. For these reasons, the third \textit{Weisman} requirement should be revised to promote more effectively the environmental aims and deterrent purposes of the CWA.

\footnote{Id. In 1983, the ACOE dealt with more than two thousand cases involving § 404 violations, but only five percent were referred to the Justice Department for prosecution. The ACOE resolved the overwhelming majority either by using restoration agreements or by having violators submit to the permitting process. Dinkins, \textit{Environmental Dispute Resolution} supra note 177, at 10400.}
An analysis of the degree and kind of wrong a defendant commits may play a role outside of the judicial decision to order a restoration injunction however. The defendant’s behavior throughout the proceeding with the ACOE and the court should factor into a decision as to whether or not the defendant will pay civil penalties in addition to compensation for the harm done to the wetlands. Once the statutory violation is remedied, the court may then focus its attention on the defendant’s actions and decide whether to impose a civil penalty for the purpose of: 1) punishing the defendant for inappropriate activity such as violating the ACOE cease and desist orders or court orders; 2) eliminating profits from the illegal activity; or 3) deterring future defendants from believing they may flout the law without consequence. If, however, the defendant has complied with all administrative or court orders and merely has been an unsuccessful litigant in a wetlands action, the court properly may withhold the imposition of fines as long as the statutory violation was remedied appropriately. Using an analysis of the degree and

189 Conrad, 13 Envtl. L. Rep. at 20532–33 (defendant who ignored five cease and desist orders in constructing condominiums on wetlands ordered to pay $100,000 civil penalty or to deed 200 acre natural site in perpetuity to county government).
191 Tull, 615 F. Supp. at 626 (defendant fined $5000 per home lot illegally filled in to prevent defendant from benefitting from unlawful acts on lots which could not be restored). In Tull, the Supreme Court ultimately held that the defendant had a Seventh Amendment right to a jury trial on the issue of liability for penalties. Tull, 107 S. Ct. at 1838. Nevertheless, the rationale behind imposing the civil penalties remains valid.
193 In Ciampitti, 615 F. Supp. at 124–25, the court essentially agreed with the government that the flagrancy of the defendant’s conduct warranted a civil penalty. The court, however, preferred to use Ciampitti’s resources toward restoration, but cautioned that his good faith in implementing the plan would affect the amount or necessity for civil penalties. Id.; see also, United States v. Bradshaw, 541 F. Supp. 880, 883 (D. Md. 1982); but cf. Avoylees Sportmen’s League, Inc. v. Alexander, 473 F. Supp. 525, 536–37 (W.D. La. 1979), aff’d in part, rev’d in part and remanded, 715 F.2d 897 (5th Cir. 1983) (no restoration ordered because defendants complied with all court and administrative orders). In Avoylees, however, the court did not appropriately remedy, either through restoration or civil penalties, the clearing of thousands of acres of forested wetlands. Id. Still, its analysis for not ordering restoration could be applied to a consideration of the appropriateness of civil penalties.
kind of wrong in any of these ways would make the standard more appropriately advance the CWA’s objectives.

D. United States v. Huebner: An Example of the Statutory and Environmental Shortcomings of the Weisman Approach

The reasoning of the Seventh Circuit in United States v. Huebner\textsuperscript{194} dramatically demonstrates how the requirements of the Weisman test may be used improperly so as to subvert the goals and purposes of the CWA. In Huebner, the Wisconsin western district court had ordered, among other remedies, restoration of a ten acre cranberry bed that defendants had constructed unlawfully.\textsuperscript{195} The Huebners owned a 5000 acre parcel of land which was the largest continuous area of wetlands in Wisconsin.\textsuperscript{196} The Huebners intended to convert the wetlands, a portion of which contained cranberry bogs, into land suitable for growing upland crops. They also planned to expand their existing cranberry beds.\textsuperscript{197}

Shortly after beginning their expansion and conversion activities in 1977, the ACOE issued several cease and desist orders because of alleged section 404 violations.\textsuperscript{198} The ACOE soon filed suit against the Huebners, requesting a permanent injunction against further fill activities and civil penalties.\textsuperscript{199} The action was settled by consent decree in June 1978.\textsuperscript{200}

The consent decree essentially required the defendants to comply with the provisions of the CWA, although the decree placed greater burdens of notice on them. Among other actions, the decree required the Huebners to: 1) obtain a permit for any dredge and fill activities on their property; 2) contact the ACOE twenty days in advance of their intention to conduct dredge or fill operations so that the ACOE could notify them of the need for a permit; 3) restore and maintain specific areas of the wetlands in their pre-filled condition; and 4) pay a $1000 fine.\textsuperscript{201}

In late 1982, the ACOE again sued the Huebners, this time for violating the consent decree.\textsuperscript{202} The district court then determined

\textsuperscript{194} 752 F.2d 1235 (7th Cir. 1985).
\textsuperscript{195} Huebner, 752 F.2d at 1237.
\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} Id. at 1237–38.
\textsuperscript{199} Id. at 1238.
\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} Id. at 1238–39.
that the Huebners' activities in violation of the consent decree and section 404 warranted the restoration of the cranberry bed. Specifically, the district court found the defendants in contempt of the 1978 consent decree and in violation of section 404 by virtue of the following activities: 1) the defendants removed wetland vegetation from three reservoir sites and leveled the reservoir dikes in preparation for planting dryland crops; 2) they cleaned and deepened existing ditches and excavated a new one, which resulted in the draining of additional reservoirs; 3) the Huebners filled in wetlands by maintaining farm roads at greater width than was necessary; 4) the defendants unlawfully bulldozed large mounds of dirt; and 5) they expanded their cranberry beds by ten acres by converting wetlands into land suitable for cranberries. To determine a remedy for violating the consent decree and the statute, the trial judge ordered the Huebners to maintain certain water levels at specified locations around the property, and also to conduct restoration, including environmental reversal of the ten acre cranberry bed expansion. The court used the Weisman test to conclude that restoration was an appropriate remedy.

On appeal, the Seventh Circuit confirmed each of the court's findings concerning the violations and contempt. In addition, the circuit court rejected other arguments which the Huebners raised on appeal. The remaining question for the court to decide was whether the trial court had abused its discretion in ordering restoration of the ten acre cranberry bed. Surprisingly, the Seventh Circuit held that the trial court had abused its discretion.

In concluding that destruction of the expanded cranberry bed was neither "cost-effective nor environmentally warranted," the ap-
peals court completely ignored the *Weisman* standards that it pur-
ported to use. The judges first dismissed the trial court’s finding
that the cranberry bed “‘would not achieve the maximum environ-
mental benefits for the land at issue . . .’”216 without disagreeing
with the lower court’s ruling. Instead, the court found it sufficient
merely that cranberry beds “are compatible with wetlands.”217 Even
though the Seventh Circuit conceded that the alleged compatibility
reduced the wetlands’ capacity to carry out two functions—water
filtration and flood storage—which the ACOE regulations deem vital,
it did not alter its position concerning the first prong of the *Weisman*
test.218 The appeals court also did not clarify whether compatibility
was to replace conferring maximum environmental benefits as the
standard by which to judge the effectiveness of a restoration plan.

As for the requirement that the plan be achievable as a practical
matter, the court never discussed it explicitly. The circuit judges
mentioned only that the ten acres of cranberry beds had an estimated
worth of $400,000.219 The court neither discussed whether the res-
toration plan was achievable from an environmental standpoint, nor
examined the cost of the plan or defendant’s assertion of the beds’
approximate value. Neither the decision in *Weisman* nor in *United
States v. Sexton Cove Estates, Inc.* sanction such a superficial anal-
ysis under this standard.

Finally, the circuit court found that two equitable considerations
tipped the balance away from the restoration required by the trial
court’s allegedly “draconian exercise of judicial discretion.”220 First,
some evidence indicated that the Huebners might have received a
permit had they applied for one.221 Using this evidence as a basis for
reversal, however, ignores the existence of the CWA’s permitting
requirements. The government would not have had to pursue an
enforcement action had the Huebners applied for a permit as re-
quired both by section 404 and the consent decree. For the court to
rely on conjecture as to action the Huebners might have taken
regarding the permitting process contradicted the court’s pronounce-
ment that “proper compliance with the permit process is all that is
required under the Clean Water Act to ensure that the use of the
nation’s wetlands proceeds with care.”222 As the Huebners did not comply properly with the permit process, the court’s speculation about what might have occurred had the defendants not broken the law is not a sufficient reason to overturn the restoration order.

The Seventh Circuit’s other “equitable” basis for reversal was that the court believed that the ACOE’s cognizance of the Huebners’ activities was a factor to be given “considerable weight” in deciding upon appropriate relief.223 The defendants had alleged that the ACOE’s cognizance and approval of their work estopped the agency from pursuing claims under the CWA.224 The Seventh Circuit, however, had affirmed the district court’s rejection of the Huebner’s estoppel claim.225 The appeals court’s reasoning in subsequently using a claim it had rejected as a primary basis for reversing a restoration order demonstrates the weakness of the court’s reasoning.226 Consequently, despite affirming the district court’s findings as to section 404 and consent decree violations,227 and basing its equitable considerations on questionable foundations,228 the Seventh Circuit reversed the major part of the restoration order.229 When an equitable balancing test may be misconstrued so as to allow such egregious violations to go unremedied,230 the necessity for standards that more clearly take into account the environmentally protective nature of the CWA becomes obvious.

V. EQUITABLE BALANCING AND VINDICATION OF STATUTORY AND PUBLIC INTERESTS

When Congress passed the CWA, it did more than establish a comprehensive program for the clean-up of the nation’s waters. By

222 Id. at 1246; see id. at 1239 (permit process is the cornerstone of the CWA scheme).
223 Id. at 1245.
224 Id. at 1244.
225 Id. at 1244.
226 The Huebner court’s curious reasoning may in part be explained by the significant pressure imposed on it by the Wisconsin Cranberry Growers Association, a group that filed an amicus curiae brief on behalf of the defendants. The amicus curiae brief apparently emphasized that Wisconsin leads the nation in the production of cranberries, Huebner, 752 F.2d at 1235 n.2, and that failure to reverse the lower court’s order would hamper seriously the ability of Wisconsin farmers to continue to grow cranberries. Id. at 1245. Although the court specifically rejected the Cranberry Growers Association’s contentions, id., ultimately the court gave the organization (and the defendants) what they wanted, while paying lip service to the CWA’s requirements.
227 Huebner, 752 F.2d at 1241–43.
228 Id. at 1245.
229 Id. at 1246.
230 The Huebner court did not even assess civil penalties against the defendants.
enacting the CWA, Congress also established the national policy that the public's interest in clean water would be served best by restoring the nation's waters to their natural condition and working to eliminate completely the discharge of pollutants into the waters of the United States. Those individuals and entities who violate the CWA also violate this legislatively-created policy. Courts should, therefore, consider the public's interest when determining an appropriate remedy for violations of section 404.

Two United States Supreme Court cases, *Tennessee Valley Authority v. Hill* and *Weinberger v. Romero-Barcelo* demonstrate the necessity for courts to consider the statutory and public interests embodied in remedial statutes such as the CWA when engaging in equitable balancing to fashion remedies for statutory violations. In each case the Court specifically addressed the appropriateness of equitable balancing where violations of environmental statutes had occurred. In *Hill*, the Court determined that the traditional balancing of the equities was not appropriate, while in *Romero-Barcelo* the Court seemed to endorse such a process. A main, overarching theme running through both opinions, however, is that remedies must vindicate congressional choices by promoting public and statutory interests. In the section 404 context, such vindication necessarily will entail wetland restoration as a remedy for statutory violations.

The plaintiffs in *Hill* had obtained a permanent injunction from the Sixth Circuit against the Tennessee Valley Authority (TVA), enjoining it from completing the Tellico Dam project which, if finished, would destroy the existence of the snail darter. The snail darter is a species of perch protected under the Endangered Species Act. The Endangered Species Act commands all federal agencies to insure that actions which they authorize, fund, or carry out do

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233 The *Hill* case involved the Endangered Species Act, 16 U.S.C. §§ 1531–43 (1982), and *Romero-Barcelo* concerned the CWA.
234 *Hill*, 437 U.S. at 194.
237 *Hill v. Tennessee Valley Authority*, 549 F.2d 1064, 1068–69 (6th Cir. 1977). The Sixth Circuit had reversed the district court's failure to enjoin the TVA.
not jeopardize the continued existence of endangered species, or do  
not destroy or modify such species’ habitats.\textsuperscript{239} The Court noted that  
this statutory command was to apply without exception.\textsuperscript{240}  

For the Supreme Court, the primary issue the case presented was  
whether a potential violation of the Endangered Species Act re­  
quired the court to enjoin completion of the dam without engaging  
in the customary equitable balancing process.\textsuperscript{241} The Court began its  
analysis of the question by recognizing the principle that “a grant  
of jurisdiction to issue compliance orders hardly suggests an absolute  
duty to do so under any and all circumstances.”\textsuperscript{242} The Court con­  
tinued along this line of argument by stating that “[a]s a general  
matter it may be said that ‘[s]ince all or almost all equitable remedies  
are discretionary, the balancing of equities and hardships is appro­  
priate in almost any case as a guide to the chancellor’s discretion.”\textsuperscript{243}  
Following this reasoning, the balancing test the district court used  
in denying injunctive relief would appear to have been appropriate.\textsuperscript{244}  

The Supreme Court in \textit{Hill}, however, did not find the above­  
quoted language sufficient under the circumstances. Instead, the  
Court held that enforcement of the statute required the issuance of  
the permanent injunction.\textsuperscript{245} It reasoned that where “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,” the Court possesses no authority to balance  
other equities against the congressional mandate.\textsuperscript{246} Moreover, Con­  
gress has the exclusive responsibility to formulate legislative policies  
and programs and also to establish the policies’ and programs’ rela­  
tive priority for the country.\textsuperscript{247} The courts merely have the respon­  
sibility to enforce Congress’ decisions.\textsuperscript{248} Consequently, “[o]nce the  

\begin{footnotesize}  
\begin{itemize}  
\item \textsuperscript{239} Id. at 173.  
\item \textsuperscript{240} Id. at 164 n.15. The Endangered Species Act subsequently was amended to permit  
exceptions to the statute if certain criteria are met. See 16 U.S.C. § 1536(h) (1982).  
\item \textsuperscript{241} \textit{Hill}, 437 U.S. at 156.  
\item \textsuperscript{242} Id. at 193, \textit{citing} Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). Presumably, this  
principle would also apply in the context of a CWA enforcement action.  
\item \textsuperscript{243} \textit{Hill}, 437 U.S. at 193, \textit{citing} DOBBS, REMEDIES 52 (1973)  
\item \textsuperscript{244} See, 419 F. Supp. 753 (E.D. Tenn. 1977). Following the same reasoning, the balancing  
test courts have utilized in § 404 restoration cases was appropriate also.  
\item \textsuperscript{245} \textit{Hill}, 437 U.S. at 194. In relevant part, the statute states that: “Each federal agency  
shall . . . insure that any action authorized, funded, or carried out . . . is not likely to jeopardize  
the continued existence of any endangered species or threatened species or result in the  
\item \textsuperscript{246} Id.  
\item \textsuperscript{247} Id.  
\item \textsuperscript{248} Id.  
\end{itemize}  
\end{footnotesize}
meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end."249 As a matter of separation of powers, equitable balancing should not be used to countenance a continuing violation where the statute provides otherwise.250 For these reasons the Supreme Court in Hill affirmed the Sixth Circuit's decision to enjoin completion of the Tellico Dam project to protect the snail darter's continued existence.251

In Weinberger v. Romero-Barcelo, the Court addressed the question of whether a violation of the CWA required the Court to restrain immediately the violator's activities.252 In this case, the United States Navy violated the CWA by discharging bombs without permits off the coast of a Puerto Rican island in the course of conducting training exercises.253 The Court found that the CWA did not foreclose completely the exercise of a court's discretion.254 Rather, the CWA allows a court "to order that relief it considers necessary to secure

249 Id. at 194–95.
250 This proposition is embraced and persuasively advanced in Plater, Statutory Violations and Equitable Discretion, 70 CAL. L. REV. 524 (1982). Professor Plater divides the traditional common law balancing test into three, distinct components: Threshold Balancing, Determination of Contending Conducts, and Discretion in Fashioning Remedies. Id. at 536. In the threshold balancing area, the court determines whether plaintiffs are entitled to maintain their actions. During this phase of the proceeding, courts look to examine whether estoppel or injunctive requirements, for example, preclude the relief plaintiff seeks. If not, courts begin the second area of the balancing process. In this area, courts determine whether to abate the complained of conduct. If abatement is warranted, the court proceeds to the final balancing phase, the process of fashioning equitable remedies. Id.

Professor Plater contends that statutes have removed the second component of equitable balancing from the court's discretion. The decision to abate certain conduct "is taken over when a statute declares a mandatory rule of conduct." Id. at 540. Professor Plater argues, as did the Supreme Court in Hill, that the underlying justification for this proposition is the separation of powers of the three branches of government. Id. at 588. The elementary notion that Congress writes the laws and the judiciary enforces them (assuming, of course, their constitutionality), requires that courts order immediate abatement for statutory violations. In these cases, the role of equity is to force the party enjoined to obtain relief from the statute in the legislature, rather than to permit the judiciary to re-write statutes through an equitable balancing process. Id. at 583–88.

The first and third segments of the equitable balancing process—threshold balancing and discretion in fashioning remedies, respectively—remain relatively untouched by statutory commands, according to Plater. This is less true in the decision to fashion remedies, however, where "'remedies are to be tailored to achieve statutory compliance, not punishment,' id. at 564, citing Walling v. Clinchfield Coal Corp. 159 F.2d 395, 399 (4th Cir. 1946) and "[t]he court . . . has a heavy responsibility to tailor the remedy to the particular facts of each case so as to best effectuate the remedial objectives" of the statute. Id. at 564, citing Gilbertville Trucking Co. v. United States, 371 U.S. 115, 130 (1965).

251 Hill, 437 U.S. at 195.
253 Id. at 307–08.
254 Id. at 320.
prompt compliance with the Act. 255 Such relief, the Court pointed out, is in the trial court's discretion and may or may not include an injunction. 256 As a consequence of this conclusion, the Romero-Barcelo Court condoned a continuing statutory violation.257

The Court justified its conclusions by making two principle arguments. First, the Court recognized that an injunction is an extraordinary equitable remedy that courts have historically used cautiously in attempts to balance and reconcile fairly competing claims.258 The Court stated that this judicial caution should become more pronounced when issuing an injunction that implicates the public interest.259 Although the Court correctly conceded that Congress could "guide or control the exercise of the court's discretion,"260 the Supreme Court would assume a lack of restrictions on their adjudicatory powers absent a clear legislative command indicating otherwise.261

The second principle argument the Court made to support its holding was that the CWA's regulatory scheme, as suggested by its terms and legislative history, contemplates that courts will exercise their discretion in fashioning remedies.262 As support for this proposal, the Court cited the Act's plan of phased rather than immediate

\[\text{Id. at 328 (Stevens, J., dissenting). The facts essential to the analysis here are as follows: The United States Navy conducted training exercises off the island of Vieques, Puerto Rico, during which the Navy bombed targets in the water. Barcelo v. Brown, 478 F. Supp. 646, 663 (D. P.R. 1979). In a suit brought by the government of Puerto Rico and others, the district court ruled that the bombing constituted permitless discharges into the waters of the United States which violated the CWA, id. at 664, (although they did not "harm" the waters) but refused to enjoin the activity, citing primarily national security reasons. Id. at 707-08. Instead, the court merely ordered the Navy to obtain a permit as it continued its unlawful discharges. Id.}

The First Circuit reversed this part of the district court's order. Brown v. Romero-Barcelo, 643 F.2d 835, 862 (1st Cir. 1981). Basing its decision on Hill's reasoning, the appeals court held that the trial court should not have undertaken a traditional balancing of competing interests because Congress, through the CWA, had ordered national priorities. Id. at 861. By simply instructing the Navy to apply for a permit, the lower court failed to protect the administrative procedure—to obtain a permit prior to discharging pollutants—created by Congress. Id. Accordingly, the First Circuit determined that the Navy had "an absolute statutory obligation to stop any discharges of pollutants until the permit procedure has been followed," whether or not the discharges harmed the aquatic environment. Id.

259 Id. at 312. Throughout its opinion, the Court referred to the Navy's interests as the public interest. Impliedly, the Court did not equate the environmental interests represented by the CWA with the public interest.
260 Romero-Barcelo, 456 U.S. at 313.
261 Id.
262 Id. at 316.
compliance, as well as the alternative methods (other than an injunction) of civil fines and criminal sanctions for achieving compliance. This legislative scheme distinguished the Navy's legal predicament from the one the TVA faced in Hill. In Hill, the language and purpose of the Endangered Species Act, not just the fact of a statutory violation, compelled the Court to enjoin the project's completion. Without a comparable legislative directive from the CWA, the Court did not feel a similar compulsion to require an injunction in the Navy's case.

At first glance, the sweeping language concerning equitable remedies in Romero-Barcelo seems to grant license to courts of equity to disregard a statutory scheme under the cloak of equitable balancing. The Romero-Barcelo decision also seems to repudiate the rationale in Hill, that a statute passed by Congress necessarily circumscribes the equitable balancing process to be performed by courts and tips the balance in favor of the interests promoted in the statute.

For several reasons, however, the Romero-Barcelo opinion, appropriately read, supports neither of these propositions. Two main
points compel this conclusion. First, the Court based its decision on an unusual fact foundation. With the Department of Defense as a defendant, the Supreme Court, like the district court, viewed an injunction that would stop naval training exercises as a threat to national security.270 Given this assumption, the Court believed it very unlikely that a CWA permit to conduct the exercise would not issue.271 Second, and most important, the Supreme Court emphasized that compliance with the statutory scheme was extremely important. If the permit were denied and the Navy remained out of compliance with the CWA, “the statutory scheme and purpose would require the court to reconsider the balance it has struck.”272 Consequently, a court’s discretion to refuse to enjoin a violation of the CWA is limited in scope.273 It does not have the authority, equitable or otherwise, to allow a statutory violation to continue unchecked indefinitely. Instead, a court must act to ensure prompt compliance with the CWA.274

The Romero-Barcelo Court also cited cases indicating that it was not oblivious to the limits that statutes may impose on the historical process of balancing competing claims. For instance, the Court relied significantly on Hecht Co. v. Bowles,275 in part for the proposition that equity courts’ “‘traditional practices’”276 are “‘conditioned by the necessities of the public interest which Congress has sought to protect.’”277 The Court additionally noted that unless a statute ex-

Barcelo is given a narrow reading, the Supreme Court’s opinions concerning equitable discretion form a consistent pattern of placing “primary emphasis on vindication of the congressional scheme.” Id.

A fourth reason to give the opinion a narrow interpretation is that the Court decided the case incorrectly. For an analysis of this thesis, see Note, Weinberger and Equitable Discretion, supra note 267, at 84–94; Note, Weinberger v. Barcelo-Romero: Equitable Discretion and the Enforcement of the Federal Water Pollution Control Act, 3 VA. J. NAT. RESOURCES L. 347, 357–61 (1984).

270 Barcelo-Romero, 456 U.S. at 310. Why the two courts made this assumption is unclear. The CWA specifically applies to all federal agencies and provides a specific exception for defense-related activities only if the President has made a finding that such an exception is in the paramount interest of the United States. 33 U.S.C. § 1323(a) (1982).

271 Id. at 320.


273 Unfortunately, the Court in Romero-Barcelo did not define the extent of a court’s discretion in designing a remedy for CWA violations. Farber, Equitable Discretion, supra note 236, at 524.

274 Romero-Barcelo, 456 U.S. at 320.


277 Id. Of course, the Court confused the public interest represented by the statute with
pressly, or by necessary and inescapable inference, restricts the court's equitable jurisdiction, the court should recognize and apply the full scope of that jurisdiction. The Supreme Court in *Romero-Barcelo* did not recognize, however, that the CWA does create necessary and inescapable inferences that limit the courts' discretion by, for example, establishing a flat ban on the discharge of pollutants without a permit. The CWA's legislative history also supports the notion of limitations on a court's equitable balancing. Far from demonstrating an intent to restrict the meaning of the *Hill* case, the *Romero-Barcelo* Court cited specific language from previous cases that endorsed *Hill*'s principal proposition. The *Romero-Barcelo* Court simply did not apply this language appropriately in this instance.

Both the *Hill* and *Romero-Barcelo* decisions have great significance for an assessment of the *Weisman* standards. In each case the Supreme Court emphasized that appropriate remedial balancing under environmental statutes must vindicate statutory schemes and purposes. In *Hill*, the Court came to this conclusion as a result of separation of powers analysis. The Court stressed that as long as a statute was constitutional, the courts were bound to follow congressional directives. In the section 404 context, this theme of vindicating the alleged public interest represented by the Navy's activities. See also Note, Weinberger and Equitable Discretion, supra note 267, at 86 (the public interest was the effort to clean up the nation's waters, not the Navy's operations).

The Senate Report commented that "[e]nforcement of violations . . . should be based on relatively narrow fact situations requiring a minimum of discretion making or delay" situations requiring a minimum of discretionary decision making or delay" S. REP. NO. 414, 92nd Cong, 1st Sess. 64, 1972 U.S. CODE CONG. & AD. NEWS 3668, 3730 and that "the issue before the courts would be a factual one of whether there had been compliance." S. REP. NO. 414, 92nd Cong., 1st Sess. 80, 1972 U.S. CODE CONG. & AD. NEWS 3668, 3746.

Some lower courts, in the preliminary injunction context, have taken the position that the overarching public interest embodied in the CWA required enjoining preliminarily § 404 violators. See, e.g., United States v. Lofgren, 13 Envtl. L. Rep. (Envtl L. Inst.) 20164, 20165 (November 30, 1982) (court's "discretion should be exercised with flexibility and with sensitivity to the large public interest at play when an administrative agency requests an injunction in aid of its enforcement of the law"); United States v. Ciampitti, 583 F. Supp. 483, 498 n.12 (D. N.J. 1984) ("Inherent in the statute itself is the legislative conclusion that violations of it cause irreparable injury to the public").
ing congressional and statutory interests requires that the *Weisman* test be revised. A synthesis of certain statutory and case law principles should make the *Weisman* test more appropriately reflect the congressional determination of the public interest.

VI. A SYNTHESIS OF APPROPRIATE CONSIDERATIONS FOR REMEDIAL BALANCING UNDER SECTION 404

A synthesis of the cases in which courts have considered whether to order restoration provides several considerations that should feature prominently in any decision concerning how to remedy section 404 violations. Most of these considerations have their roots in the CWA itself. They include: 1) preliminarily, deferring to the government’s decision to prosecute by deciding the restoration issue, not by returning the case to the agency for further administrative action; 2) creating a remedy that will confer maximum environmental benefits; 3) examining violations with a view towards vindicating statutory purposes and the public interest; and 4) designing a remedy that is likely to deter future violators. Once the court addresses each of these elements, it may then examine the equitable factors that a defendant may have in its favor. Most defendants undoubtedly will be hard pressed to overcome the determinants on the side of restoration.

As a preliminary matter, numerous lawsuits since Congress enacted the FWPCA in 1972 have clarified many of the initially vexing interpretation problems posed by the new statute and section 404 in particular. Section 404 has withstood legal attack on its constitutionality, the scope of its regulatory jurisdic-

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284 Ideally, of course, little equitable balancing would enter into the decision at all. The court would merely determine that it had jurisdiction over the site, find the violation, and order the property restored to its pre-violation condition. In effect, courts would create a presumptive rule in favor of restoration once a statutory violation had been found. Civil penalties might also be imposed as an additional deterrent. Some courts seemed to have followed this approach. See, e.g., Conrad, 13 Env. L. Rep. at 20532-33; United States v. Lee Wood Contracting, Inc., 529 F. Supp. 119, 121 (E.D. Mich. 1981); United States v. Isla Verde Investment Corp., 17 Env’t Rep. Cas. (BNA) 1854, 1855-56 (July 16, 1980). Since, however, most courts seem inclined to conduct some balancing of competing interests, courts must give full expression to statutory and environmental concerns in the process.


286 The constitutional questions raised by many defendants have centered around four topics: takings, void for vagueness, selective prosecution and right to a jury trial. Defendants frequently claim that uncompensated takings occur when the government denies them a permit to build upon wetlands. See, e.g., Deltona Corp. v. United States, 657 F.2d 1184, 1189 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982) (permit denial not an unconstitutional taking where plaintiff had previously developed other portions of its property but was denied per-
tion,287 the definition of both statutory and regulatory terms,288 and mission to develop all of it); but cf. 1902 Atlantic Ltd. v. Hudson, 574 F. Supp. 1381 (E.D. Va. 1983) (denial of permit constituted an unconstitutional taking where plaintiff’s proposal would result in no net loss in wetland due to offer to mitigate and the ACOE did not consider all relevant factors in decision to deny). Takings claims have infrequently arisen without success when courts have ordered restoration. Robinson, 570 F. Supp. at 1166 (restoration could not be a taking because it merely returns property to its condition before unauthorized filling and defendant offered no evidence to show that restoration would so diminish value of land as to amount to taking). Quite often, a defendant’s takings claim is simply deemed premature. See, e.g., Ciampitti, 615 F. Supp. at 121; United States v. Byrd, 609 F.2d 1204, 1211 (7th Cir. 1979) (defendant must apply for and be denied permit before takings claim is ripe).

Some parties affected by the CWA have unsuccessfully challenged its constitutionality by arguing that the terms of the statute or its regulations are void for vagueness, Bayou Des Familles Development Corp. v. United States Corps of Engineers, 541 F. Supp. 1025, 1039 (E.D. La. 1982) (neither statute nor regulations are unconstitutionally vague); United States v. Oxford Royal Mushroom Products, Inc., 487 F. Supp. 852, 855 (E.D. Pa. 1980) (CWA terms navigable waters and waters of United States not void for vagueness as they give fair notice of forbidden conduct), or that the government’s regulation under § 404 is an invalid exercise of the police power under the Commerce Clause. Tull, 769 F.2d at 185, rev’d on other grounds, 107 S. Ct. 1831 (1987); Bayou Des Familles, 541 F. Supp. at 1039; Byrd, 609 F.2d at 1210 (government may regulate dredging or filling activities that may affect interstate commerce). In general, the defendants’ constitutional challenges to these two issues seemed largely perfunctory.

Defendants who have argued that the government unfairly prosecuted their CWA cases and thereby deprived them of due process rights have met with little success. United States v. City of Fort Pierre, South Dakota, 580 F. Supp. 1036, 1041 (D. S.D. 1983), rev’d on other grounds, 747 F.2d 464 (8th Cir. 1984); Bayou Des Familles, 541 F. Supp. at 1040. In the absence of allegations of discriminatory prosecution based on impermissible considerations such as race, religion, or the prevention of the exercise of a constitutional right, the claim will not be considered in depth. United States v. Alleyne, 454 F. Supp. 1164, 1174 (S.D.N.Y. 1978) (court granted evidentiary hearing for allegations of selective enforcement based on race).

In a victory for § 404 defendants on a constitutional issue, the Supreme Court recently held that defendants are entitled to a jury trial on the issue of liability for civil penalties, but are not entitled to a jury trial for the amount of civil penalty. Tull v. United States, 107 S. Ct. 1831, 1839–40 (1987).

See supra text accompanying note 2.

The most prominent controversy over a statutory definition has been the one concerning the meaning of navigable waters as used in the CWA. See supra text accompanying notes 57–69.

Defendants have also questioned whether their activities constituted discharges of pollutants from point sources. Avoyelles Sportmen’s League, 473 F. Supp. at 532 (land-clearing equipment was point source as it excavated wetland soil and then discharged it back into the land); Fleming Plantations, 12 Env’t Rep. Cas. at 1706 (marsh buggies and draglines used in dredging operation were point sources); but cf. 33 C.F.R. § 323.2(d) (1987) (ACOE regulations excluding de minimis incidental soil movement occurring during normal dredging operations from definition of discharge of dredged material). The breadth of the term pollutant has similarly come into dispute. Minnehaha Creek Watershed District v. Hoffman, 597 F.2d 617, 625 (8th Cir. 1979) (pollutant defined broadly and without regard as to whether the discharge affects significantly water quality).

The principal struggle over the regulatory terms has centered on the definition of wetlands. See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) supra note 2; see also Jackson, THE CONSTITUTIONAL TEST FOR WETLANDS JURISDICTION: AGENCIES IN A
the courts' authority to order restoration. Courts have resolved these issues, if not finally, at least with sufficient clarity to put individuals on notice that a permit may be required for a particular project.

The clarification of issues has had two results: 1) individuals who intend to put wetlands to another use can no longer claim as a defense ignorance or confusion over the substance of the section; and 2) a sufficient body of case law has developed on which courts may base their decisions to order restoration. This latter result has generated both good and bad effects, however. Although courts have required restoration in many significant cases, the standards that have evolved to determine the appropriateness of that remedy are not the best possible ones to promote CWA’s environmental values. The clarification of issues basic to section 404, however, should make it easier to develop a more statutorily and environmentally adequate balancing test.

An initial but essential issue in section 404 enforcement actions is the notion of deferring to the government’s decision to prosecute a case. One commentator has argued that judicial deference to agency action is especially appropriate in section 404 cases because of their complex mix of law and public policy. Once the government initiates a proceeding seeking restoration, the courts should respect that decision by deciding that issue, not by returning the problem to the

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**Muddle, 9 National Wetlands Newsletter No. 5, 7-9 (Sept.–Oct. 1987)** (agencies should regulate isolated wetlands without determining connection to interstate commerce).

289 See supra text accompanying notes 83–117.

290 The applicability of the permitting process for a construction project has not always been so clear. In an RHA case where restoration was ordered, the defendant complained that the remedy unfairly punished him as the ACOE had not objected to or had approved similar projects in the recent past. United States v. Joseph G. Moretti, Inc. 478 F.2d 418, 431 n.47 (5th Cir. 1973). The court observed that the defendant's complaint:

- throws in a sharp conflict the claim of equal protection—or perhaps more accurately an equal right to violate the law—a sometime facet of equal protection which is today a very appealing claim, on the one hand, and the incessant demand from environmentalists that what has gone on in the past can no longer be tolerated and the time has come to start cleaning up no matter how much it hurts, on the other.

_Id._ (citations omitted).

As the CWA has been on the books since 1972, the defendant's complaint in Moretti, supra, is not a viable one today. Moreover, since § 404 in particular and wetlands in general have received great attention in Congress, it is at least arguable that most Americans would recognize that destruction or construction activity on wetlands could involve the federal regulatory process.

291 Habicht, *Implementing Section 404: The View From the Justice Department*, 16 Envtl. L. Rep. (Envtl. L. Inst.) 10073, 10077 (March, 1986) [hereinafter "Habicht, Justice Department View"]. Habicht's comments primarily referred to judicial review of ACOE decisions pertaining to permit issuance, but they would appear to be equally applicable to the choice to litigate.
ACOE. The district court in *Cumberland Farms* employed such reasoning in deciding to order restoration, rather than to require additional administrative proceedings. The court felt that a determination not to resolve the question presented would produce little more than delay and would constitute an abdication of its responsibilities. When the ACOE has chosen to enforce the law through court action, the court owes a "great deal of deference" to that manner of proceeding. Merely ordering statutory violators to return to the ACOE to submit, for example, an after-the-fact permit is inadequate when restoration is requested.

Any equitable balancing process involving section 404 must confer maximum environmental benefits for the wetlands site at issue. This criterion appropriately serves the environmental purposes of the CWA and promotes the stated intent of Congress—to restore and maintain the nation's waters in their natural condition. The standard also presents an absolute goal that the court must strive to meet in fashioning relief for section 404 violation. As the court in *United States v. Weisman* noted: "The intricate web of interdependence which characterizes our environment requires that we look beyond the present and immediate in assessing the value of any particular element of the environment or in gauging the harm that will accrue from its destruction." Conferring maximum environmental benefits takes stock of the environment's "intricate web of interdependence" and seeks to preserve that web to the fullest extent possible.

Another component of an appropriate section 404 balancing process requires courts to view violations so as to vindicate statutory purposes and the public interest embodied in the statute. This means that courts cannot engage in a traditional balancing of competing claims but must instead take into account the legislative determination that statutory violations contravene public policy. The federal courts have the responsibility to enforce the legislative

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292 *Cumberland Farms*, No. 85-0846-Y slip op. at 3 (referred to in 647 F. Supp. at 1168 n.1); cf. United States v. Akers, 785 F.2d 814, 817 (9th Cir. 1986) (restoration request denied but defendant ordered to seek permits for farming-related activities).

293 *Id.* Deference is especially appropriate because the ACOE regulations provide many opportunities to negotiate resolutions to wetlands problems without resorting to litigation.

294 This factor is discussed in greater depth in the text accompanying notes 125–41, *supra*.


297 See *supra* text accompanying notes 231–83 for a more detailed discussion of equitable discretion and the statutorily-embodied public interest.

policies and programs which the Congress has established and prioritized for the nation. In section 404 enforcement proceedings, this judicial responsibility requires courts to give great weight to the national policy in favor of restoring the nation's waters to their natural condition when considering appropriate remedies for statutory violations.

An examination of the legislative intent and purposes of the CWA should play an important part in vindicating the public interest when deciding whether to order restoration. In fact, such considerations have been persuasive for a number of courts that ultimately ordered restoration. The Massachusetts district court in United States v. Cumberland Farms was most explicit about the importance of the intent and purpose of the statute in ordering restoration. The court stated:

What tips the balance in this case are two factors. First, it seems clear to me that the controlling law favors the retention of wetlands which have been adversely affected without a permit contrary to law. That is to say, it seems to me that it is the legislative determination, that unless the balance cuts significantly against a restoration of the environment to the status that it enjoyed when the legislation with respect to this land took effect in 1977, that restoration ought to be ordered.

The Cumberland Farms court went on to state that because of the legislative intent, restoration of the wetlands was in the public and national interest.

Other courts have found the CWA's legislative intent controlling in ordering restoration. For example, in Fleming Plantations, the defendants' activities had destroyed more than one hundred acres of wetlands. The federal district court instructed the defendants to restore the wetlands because the adverse environmental results that the defendants caused were contrary to United States policy under the FWPCA.

Similarly, the court in Weisman overcame its temptation to allow the defendant to keep his unlawfully built road because to do so would undermine the CWA's stated purpose of restoring and maintaining the nation's waters in their natural

300 Cumberland Farms, No. 85-0846-Y slip op. at 12 (referred to in 647 F. Supp. at 1168 n.1). The second factor which the court found relevant was the practicability of achieving restoration of the site. Id. at 13.
301 Id. at 12.
302 Fleming Plantations, 12 Env't Rep. Cas. at 1709.
303 Id.
condition.\textsuperscript{304} Decisions such as these demonstrate that the legislative intent of the CWA should be a powerful component of any equitable balancing in favor of restoration.

Moreover, the Supreme Court's interpretation in \textit{Romero-Barcelo} of the CWA's enforcement provisions virtually compels the use of restoration as a remedy for section 404 violations. In that case, the Court said that district courts must act to secure "prompt compliance" with the CWA.\textsuperscript{305} Because each day unauthorized dredged or fill material remains in a wetland is one day of violation of section 404,\textsuperscript{306} restoration may be the only way to achieve prompt compliance with that section.\textsuperscript{307} In sum, by considering congressional policy, legislative intent, and securing prompt compliance with the CWA when deciding whether to order restoration for section 404 violations, courts will vindicate more effectively the Act's statutory purposes and the public interest.

Finally, the concept of deterring future violators should represent a significant element of a statutorily effective balancing test. Strict enforcement of section 404 through the imposition of restoration orders and stiff civil penalties would likely have a salutary deterrent effect on potential violators. The Supreme Court in \textit{Romero-Barcelo} recognized that the purpose of an injunction is to deter improper behavior.\textsuperscript{308} In fact, however, a main failure of current equitable balancing decisions is the lack of specific language concerning the importance of deterring through restoration those who might violate section 404 in the future. Some courts, however, have sent the message to future violators implicitly by stating that they could not allow defendants to profit from their illegal activities,\textsuperscript{309} or that the public interest warrants strict enforcement of the CWA to clean up the nation's waters.\textsuperscript{310} The courts, however, should deliver the message more clearly.

\textsuperscript{304} Weisman, 489 F. Supp. at 1349.
\textsuperscript{305} Romero-Barcelo, 456 U.S. at 320.
\textsuperscript{307} See United States v. Edwards, 667 F. Supp. 1204, 1215 (W.D. Tenn. 1987) (restoration ordered to achieve compliance with the CWA). In some cases, restoration may be impossible to order because the statutory violator has conveyed the filled-in wetland to innocent third parties. See, e.g., Ciampitti, 669 F. Supp. at 699–700.
\textsuperscript{308} Romero-Barcelo, 456 U.S. at 310.
\textsuperscript{309} Tull, 615 F. Supp. at 626–27 (court would not look favorably upon defendant's failure to apply for permit or to abide by ACOE cease and desist order; court therefore ordered restoration and civil penalties).
\textsuperscript{310} Akers, 785 F.2d at 823; Ciampitti, 583 F. Supp. at 499.
The concept of deterrence has important effects for a balancing of the equities in section 404 cases for several reasons. The issuance of civil penalties alone may allow future wetlands developers to include such potential penalties as a cost of doing business. Restoration, conversely, minimizes the incentive to conduct this type of business planning by removing the ability to profit from illegally filled-in wetlands. Restoration orders thus may deter future violators and thereby enhance the credibility of section 404 enforcement.

In addition, because the statute sets as a goal the eventual elimination of all pollutant discharges into the nation's waters, consideration of the deterrent value of restoration, combined with strong civil penalties, will help to promote that objective. Finally, deterrence may also serve as justification for courts to issue a mandatory injunction. Courts should reason that deterrence, when viewed in conjunction with the statute's intent and its strict liability standard, will help to justify the imposition of a relatively harsh remedy.

Appropriate consideration of these elements—deferring to the agency decision to prosecute, conferring maximum environmental benefits, vindicating the statutory scheme and the public interest, and deterring future violators—will lead to a more environmentally principled reading of the CWA. As the CWA nears the end of its second decade, it is as important as ever that courts bear in mind the ultimate purposes of the Act, that is, the restoration and maintenance of the country's waters to their natural condition. An equitable balancing process that weighs these factors will help to give appropriate attention to the statutory concerns and public interest that Congress expressed in the CWA.

VII. CONCLUSION

The federal government has used section 404 of the Clean Water Act as its primary method for protecting the nation's wetlands. One of the ways in which the government has been enforcing the statutory prohibition against the unauthorized discharge of dredge or fill materials is to request that courts order restoration of sites approximately to their natural condition. In deciding whether to order restoration, courts have frequently utilized a traditional equitable balancing process. In particular, many courts have adopted the three principle standards articulated in United States v. Weisman to determine the appropriateness of the restoration remedy. The Weisman test instructs courts to impose restoration if the plan: 1) confers maximum environmental benefits; 2) is feasible as a practical matter;
and 3) bears an equitable relationship to the degree and kind of wrong intended to be remedied by the proposal.\textsuperscript{311} Courts have not used these standards, however, to promote the environmental purposes and objectives of the CWA as effectively as possible.\textsuperscript{312} The Weisman requirements provide courts with too much discretion to create orders that undermine the attempt to confer maximum environmental benefits.\textsuperscript{313} Too frequently, courts have exercised their discretion in precisely this fashion.

The objective of any equitable balancing process involved in section 404 violation cases should be to effectuate an environmentally principled reading of that section and the statute as a whole. To further that end, courts should discuss explicitly several issues that should tend to tip the balance in favor of ordering restoration of unlawfully destroyed wetlands. These considerations include deferring to the government to prosecute by not remanding the issue to the agency,\textsuperscript{314} conferring maximum environmental benefits,\textsuperscript{315} remediying the violation so as to vindicate statutory purposes and the public interest,\textsuperscript{316} and designing a remedy that promotes the concept of deterrence.\textsuperscript{317} If courts give proper attention to these elements, courts will promote more substantially the environmental purposes of the Act.

\textsuperscript{311} Weisman, 489 F. Supp. at 1342–43.
\textsuperscript{312} See supra text accompanying notes 122–93.
\textsuperscript{313} See supra text accompanying notes 194–230.
\textsuperscript{314} See supra text accompanying notes 291–94.
\textsuperscript{315} See supra text accompanying notes 295–96.
\textsuperscript{316} See supra text accompanying notes 297–307.
\textsuperscript{317} See supra text accompanying notes 308–10.