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# Purchaser Liability for the Restoration of Illegally Filled Wetlands under Section 404 of the Clean Water Act

by

John Webster Kilborn

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# PURCHASER LIABILITY FOR THE RESTORATION OF ILLEGALLY FILLED WETLANDS UNDER SECTION 404 OF THE CLEAN WATER ACT

*John Webster Kilborn**

## I. INTRODUCTION

Wetlands were once perceived as ugly, evil places. Now, they are treasured as ecosystems that support a broad diversity of animal and plant life and provide many economic and ecological benefits.[1] Wetlands, however, are disappearing at an alarming rate.[2] Federal law protects wetlands, and the government may force parties who fill wetlands illegally to restore them to their pre-filled condition.[3] Nevertheless, courts have not held subsequent purchasers of illegally filled wetlands liable for the restoration of illegally filled wetlands.[4] To prevent wetlands losses, courts should hold purchasers liable for restoration.

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[1] *See* 33 C.F.R. 320.4(b)(2) (1990); *see also* H.R. REP. NO. 271(I), 99th Cong., 1st Sess. 86–87, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 1103, 1190–91.

[2] *See* CONGRESSIONAL OFFICE OF TECHNOLOGY ASSESSMENT, WETLANDS: THEIR USE AND REGULATION 3 (1984), *reprinted in* CONGRESSIONAL INFORMATION SERVICE (microfiche no. J952-15 (1984)) [hereinafter OTA REPORT].

[3] The Clean Water Act (CWA), 33 U.S.C. §§ 1251–1387 (1988), protects wetlands and waters of the United States. *See id.* §§ 1311(a), 1344. The CWA's injunctive provisions authorize the government to seek restoration of illegally filled wetlands. *See id.* § 1319(b).

[4] *See, e.g.*, United States v. Ciampitti, 669 F. Supp. 684, 698 (D.N.J. 1987) (purchasers without notice of the seller's illegal activity not liable for restoration); United States v. Tull, 615 F. Supp. 610, 627 (E.D. Va. 1983), *aff'd*, 769 F.2d 182 (4th Cir. 1985), *rev'd on other grounds*, 481 U.S. 412 (1987) (defendant denied jury trial); United States v. Golden Acres, Inc., No. 76-0023, slip op. at 3 (E.D.N.C. Jan. 12, 1977), *summarized in* 13 Envtl. L. Rep. (Envtl. L. Inst.) 20,443; United States v. American Capital Land Corp., 8 Env't Rep. Cas. (BNA) 1654, 1656 (S.D. Miss. 1975).

Section 404 of the Clean Water Act (CWA)[5] is the principal vehicle for protecting wetlands in the United States.[6] All discharges of dredged or fill material into waters of the United States require a permit issued by the United States Army Corps of Engineers (Corps), unless the CWA exempts a discharge.[7] The Corps regulates waters of the United States, which it broadly defines as navigable waters and non-navigable lakes, rivers, streams, ponds, and wetlands.[8]

The Corps may seek an injunction to secure compliance with the CWA for unpermitted discharges or discharges in violation of an existing permit.[9] The injunction may either enjoin future filling activities or order restoration of illegally filled wetlands to their pre-filled condition.[10] By means of an injunction demanding restoration, a court may order removal of unauthorized material and replanting of an affected area with wetlands plants.[11]

When faced with a CWA violation, courts are not required to order restoration.[12] Rather, courts may use their equitable discretion to determine whether restoration is an appropriate remedy and to shape the nature of a restoration order.[13] Courts frequently have ordered restoration against landowners and developers who have filled wetlands on their property.[14] Courts usually refuse to order restoration, however, against purchasers who buy property containing illegally filled wetlands but who have not performed the unauthorized activity.[15]

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[5] 33 U.S.C. §§ 1251–1387 (1988).

[6] *See id.* § 1344.

[7] *Id.* §§ 1311(a), 1344. The CWA exempts farming, forestry, ranching activities, the maintenance of currently serviceable structures, and the construction of drainage ditches, temporary sedimentation basins, and farm or forest roads. *Id.* § 1344(f)(1).

[8] 33 C.F.R. 328.3(a) (1990). *See generally* Liebesman, *Clean Water Act's Section 404 Dredged and Fill Material Discharge Permit Program—Significant Issues*, 1989 A.B.A. SEC. NAT. RESOURCES 1.

[9] *See* 33 U.S.C. § 1344(s) (1988). The Environmental Protection Agency (EPA) has delegated its authority to enforce unpermitted CWA violations to the Army Corps of Engineers (Corps). United States v. Kelcourse, 721 F. Supp. 1472, 1478 (D. Mass. 1989).

[10] *See, e.g.*, United States v. Tull, 615 F. Supp. 610, 627 (E.D. Va. 1983), *aff'd*, 769 F.2d 182 (4th Cir. 1985), *rev'd. on other grounds*, 481 U.S. 412 (1987).

[11] *See* United States v. Cumberland Farms of Connecticut, Inc., 647 F. Supp. 1166, 1180–83 (D. Mass. 1986), *aff'd*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988); United States v. Robinson, 570 F. Supp. 1157, 1164 (M.D. Fla. 1983).

[12] *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 314 (1982).

[13] *See id.* at 321.

[14] *See, e.g.*, United States v. Ciampitti, 669 F. Supp. 684, 698 (D.N.J. 1987); United States v. Edwards, 667 F. Supp. 1204, 1215 (W.D. Tenn. 1987); *Cumberland Farms*, 647 F. Supp. at 1183; *Robinson*, 570 F. Supp. at 1164.

[15] *See, e.g.*, United States v. Golden Acres, Inc., No. 76-0023, slip op. at 3 (E.D.N.C. Jan.

Judicial reluctance to hold purchasers liable for the restoration of illegally filled wetlands results in the loss of those wetlands, gives an economic gain to the purchaser or the seller, and sends a message to purchasers that they will not be liable for restoration after purchasing illegally filled wetlands. Judicial reluctance to hold purchasers liable also allows the continuing harm of the filled wetlands to remain unabated, thus violating the CWA's goal of protecting and restoring this nation's waters.[16]

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[17] establishes purchaser liability for the cleanup of hazardous waste. For example, a purchaser is strictly liable for the cleanup of hazardous waste found on the purchaser's land, even if the purchaser did not cause or contribute to the discharge of the hazardous material.[18] The liability of purchasers under CERCLA for the cleanup of hazardous waste supports holding purchasers who knew or should have known about the existence of illegally filled wetlands on purchased property liable for restoration.

This Comment argues that purchasers of illegally filled wetlands should be held liable for restoration in two situations: when a purchaser has actual or constructive knowledge of illegally filled wetlands or when a purchaser fails to be duly diligent in his or her purchase. Purchasers who buy property without knowledge of illegally filled wetlands and after making a diligent search for the existence of illegally filled wetlands should not be held liable for restoration.

Section II of this Comment describes wetlands and their ecological value. Section III discusses the legislative history and strict liability standard of the CWA. Section IV describes judicial equitable discretion in formulating remedies for CWA violations, the guidelines courts use in ordering restoration,[19] and the liability of non-performing parties under the CWA. Section V discusses CERCLA hazardous waste liability and the requirement that purchasers exercise due diligence to detect hazardous waste. Section VI argues that the CWA's injunctive powers and the restoration case law authorize

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12, 1977), *summarized in* 13 Envtl. L. Rep. (Envtl. L. Inst.) 20,443; United States v. American Capital Land Corp., 8 Env't Rep. Cas. (BNA) 1654, 1656 (S.D. Miss. 1975).

[16] *See* 33 U.S.C. § 1251 (1988); *see also* United States v. Carter, 18 Env't Rep. Cas. (BNA) 1810, 1813 (S.D. Fla. 1982) (restoration is an authorized and appropriate remedy under the CWA).

[17] 42 U.S.C.A. §§ 9601–9675 (West 1983 & Supp. 1990).

[18] *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985).

[19] *See* United States v. Weisman, 489 F. Supp. 1331 (M.D. Fla. 1980).

courts to hold purchasers liable for the restoration of illegally filled wetlands. This section advocates that purchasers should be held liable for restoration when they have actual or constructive knowledge of illegally filled wetlands when they purchase property or when they fail to be duly diligent in their purchase.

## II. WETLANDS AND THEIR ECOLOGICAL VALUE

Wetlands are lands such as swamps, marshes, and bogs that are saturated with water.[20] The Corps, the agency that regulates 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."[21] Wetlands consist of coastal saltwater wetlands or inland freshwater vegetated wetlands.[22] Inland wetlands usually occur adjacent to bodies of water, but drainage, precipitation, or ground water discharges can create isolated wetlands.[23]

Although wetlands used to be considered unproductive areas suitable only for filling and development,[24] they actually serve many useful ecological and economic functions.[25] For instance, wetlands store rising flood waters and slowly release them as the flood waters subside.[26] Filling wetlands prevents flood storage and increases the level and velocity of flood waters.[27] Wetlands also purify water by trapping toxic chemicals, excess nutrients, and other pollutants.[28] The pollutants are either trapped and buried in the wetlands or are

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[20] 33 C.F.R. 328.3(b) (1990); J. KUSLER, OUR NATIONAL WETLAND HERITAGE: A PROTECTION GUIDEBOOK 11 (1983). For a useful bibliography of wetlands literature, see Note, *A Research Guide to Selected Wetlands Law and Policy Literature*, 7 VA. J. NAT. RESOURCES L. 435 (1988).

[21] 33 C.F.R. 328.3(b) (1990).

[22] J. KUSLER, *supra* note 20, at 11.

[23] *Id.* Ninety-five percent of the United States' vegetated wetlands are inland wetlands. OTA REPORT, *supra* note 2, at 3.

[24] OTA REPORT, *supra* note 2, at 37.

[25] 33 C.F.R. 320.4(b)(2) (1990). *See, e.g.*, H.R. REP. NO. 271(I), 99th Cong., 1st Sess. 86–87, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 1103, 1190–91.

[26] J. KUSLER, *supra* note 20, at 1.

[27] *See* OTA REPORT, *supra* note 2, at 45. The Corps determined that a 40% reduction in wetlands in a river basin in Massachusetts would cause a two-to-four foot increase in flood levels and cause $3 million in annual flood damage. *Id.*

[28] CONGRESSIONAL OFFICE OF TECHNOLOGY ASSESSMENT, WETLANDS: THEIR USE AND REGULATION, SUMMARY 10 (1984), *reprinted in* CONGRESSIONAL INFORMATION SERVICE (microfiche no. J952-16 (1984)) [hereinafter OTA SUMMARY]; *see also* W. WANT, LAW OF WETLANDS REGULATION 2-3 (1989).

converted into less harmful forms by microorganisms contained in the wetlands.[29]

Wetlands are unique ecosystems that sustain a large variety of plants and animals.[30] Wetlands produce vegetative material that serves as an important source of food for commercial fish and shellfish.[31] Birds, especially migratory waterfowl, rely on wetlands for breeding and nesting.[32] Thirty-five percent of all endangered species depend on wetlands for survival.[33]

Despite the value of wetlands, they are being destroyed quickly. Thirty to fifty percent of the wetlands originally existing in the contiguous United States have been converted into non-wetlands upland areas.[34] Wetlands are being lost at a rate of approximately 550,000 acres per year.[35] These losses are mostly agricultural conversions of inland wetlands.[36] People convert wetlands into uplands for a variety of reasons. Farmers are attracted to wetlands because of the rich soil.[37] Developers build in wetlands because of their open views[38] and their relatively low cost, compared to upland building sites.[39]

To stop the dramatic loss of wetlands, a national committee of politicians, scientists, and bureaucrats recommended that the United States adopt a policy that there should be no net loss of wetlands.[40]

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[29] OTA SUMMARY, *supra* note 28, at 10.

[30] OTA REPORT, *supra* note 2, at 39–41.

[31] J. KUSLER, *supra* note 20, at 1. The fish from the coastal continental shelf were valued at $520 million. *Id.*

[32] H.R. REP. NO. 271(I), 95th Cong., 1st Sess. 86–87, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 1103, 1191.

[33] J. KUSLER, *supra* note 20, at 3.

[34] OTA SUMMARY, *supra* note 28, at 6. Upland areas are dry areas that are not wetlands.

[35] *Id.*

[36] *Id.* Eighty percent of wetlands conversions are from agricultural conversions, six percent from urbanization, six percent from forestry and mining, and eight percent from the impoundment of water. *Id.*

[37] OTA REPORT, *supra* note 2, at 37.

[38] *Id.*

[39] *See* Comment, *Restoration of Wetlands Under Section 404 of the Clean Water Act: An Analytical Synthesis of Statutory and Case Law Principles*, 15 B.C. ENVTL. AFF. L. REV. 295, 297 (1988) (written by Mark C. Rouvalis).

[40] NATIONAL WETLANDS POLICY FORUM, PROTECTING AMERICA'S WETLANDS: AN ACTION AGENDA 3 (1988) [hereinafter WETLANDS FORUM]. This goal usually is referred to as the "no net loss of wetlands" policy. In a recent Memorandum of Agreement between the Corps and EPA, the Corps states that, for wetlands, the Corps will "strive to achieve a goal of no overall net loss of values and functions." ARMY CORPS OF ENGINEERS, MEMORANDUM OF AGREEMENT BETWEEN THE ENVIRONMENTAL PROTECTION AGENCY AND THE DEPARTMENT OF THE ARMY CONCERNING THE DETERMINATION OF MITIGATION UNDER THE CLEAN WATER ACT § 404(B)(1) GUIDELINES 2 (Feb. 6, 1990) [hereinafter WETLANDS MOA].

Under this policy, wetlands losses would be avoided whenever possible.[41] When wetlands losses are unavoidable, the lost wetlands would be offset by restoring filled or polluted wetlands or by creating new wetlands.[42] Among other suggestions, the committee recommended improved regulatory programs, enhanced enforcement, and increased restoration.[43]

## III. THE LEGISLATIVE HISTORY AND THE STRICT LIABILITY OF THE CLEAN WATER ACT

### *A. CWA Legislative History*

The Clean Water Act (CWA),[44] which amended the Federal Water Pollution Control Act Amendments of 1972 (FWPCAA),[45] regulates water pollution, including the filling of wetlands.[46] The CWA's goal is to protect and restore the nation's waters and wetlands, and, ultimately, to stop the discharge of all pollutants into United States waters.[47]

The original Federal Water Pollution Control Act (FWPCA) gave the states primary responsibility to control water pollution and enforce the Act.[48] Although Congress required the states to develop water-quality standards for interstate waters,[49] the federal government's role was limited to providing the states with grants for treatment plants and water pollution research.[50]

In 1972, Congress determined that many states had not created the mandatory water-quality standards and that the states were not

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[41] WETLANDS FORUM, *supra* note 40, at 3.

[42] *Id.* at 4.

[43] *Id.* at 4–6.

[44] 33 U.S.C. §§ 1251–1387 (1988).

[45] Pub. L. No. 92-500, 86 Stat. 816 (1972). The Federal Water Pollution Control Act Amendments of 1972 (FWPCAA) amended the original Federal Water Pollution Control Act (FWPCA) passed in 1948. *See* S. REP. NO. 414, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3669–70.

[46] *See* 33 U.S.C. 1342, 1344 (1988). The 1977 amendments to the FWPCA changed the name of the FWPCAA to the Clean Water Act. *See* H.R. CONF. REP. NO. 830, 95th Cong., 1st Sess. 50, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 4424, 4424–25. This comment refers to the water pollution control statute as the CWA, making reference to the predecessor FWPCA or FWPCAA as necessary.

[47] 33 U.S.C. § 1251 (1988). The Act protects wetlands by what is commonly referred to as the section 404 permit program. *See id.* § 1344.

[48] *See* S. REP. NO. 414, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3669–70.

[49] *Id.* at 3669.

[50] *See id.*

enforcing the Act.[51] Although the federal government had increased the amount of the state grants in an attempt to support state efforts to combat pollution,[52] Congress grew increasingly worried about the effects of water pollution on public health.[53] Congress found that the nation's navigable waters were unfit for most purposes and that they were being used as disposal systems, instead of supporting life and health.[54]

To cure state inaction and to improve water quality, Congress amended the FWPCA in 1972 by passing the FWPCAA.[55] The FWPCAA has broad and ambitious goals, which have been retained in the current CWA: "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[56]

The FWPCAA establishes a federal permitting program, called the National Pollutant Discharge Elimination System (NPDES), jointly administered by the Corps and the Environmental Protection Agency (EPA).[57] Instead of state regulation of water pollution based on water-quality standards, the NPDES limits the amount of pollutants that may be discharged from a point source.[58] While the EPA has the authority to issue NPDES permits for effluents under section 402 of the CWA, the Corps has the authority to regulate the discharge of dredged or fill material under section 404.[59] Although the Corps has primary permitting authority over wetlands, the Corps must issue permits according to guidelines developed by the EPA.[60] The EPA may veto a Corps permit if the EPA finds that the dis-

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[51] *Id.* at 3672. The FWPCA had an extremely cumbersome enforcement mechanism. *See id.* at 3669. Before enforcement proceedings could begin, a discharger could seek negotiations with the state government. *Id.* The Senate found a nearly total lack of enforcement of the FWPCA; only one case was brought to court during the life of the statute. *Id.* at 3672.

[52] *Id.* at 3670.

[53] *Id.* at 3674.

[54] *Id.*

[55] Pub. L. No. 92-500, 86 Stat. 816 (1972). *See* S. REP. No. 414, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3672, 3674.

[56] 33 U.S.C. § 1251(a) (1988).

[57] *Id.* § 1342.

[58] *Id.* §§ 1342(a)(1), 1362(12), (14). A point source is a discernible and confined conveyance of pollutants, which includes pipes, tunnels, ditches, and channels. *Id.* § 1362(14). For a short description of the 1972 FWPCAA and a more complete discussion of the CWA, see Hall, *The Clean Water Act of 1977*, 11 NAT. RESOURCES LAW. 343 (1978).

[59] 33 U.S.C. § 1344(a) (1988). The permits issued under this section of the CWA are usually called "section 404" permits or "dredge-or-fill" permits.

[60] *Id.* § 1344(b)(1). These guidelines are known as the section 404(b)(1) guidelines and are codified in 40 C.F.R. § 230 (1990).

charge has an unacceptable ecological impact.[61] According to a recent memorandum of agreement, the EPA shares enforcement duties with the Corps.[62]

Originally, Congress did not envision that the FWPCAA would protect wetlands.[63] The primary focus of the FWPCAA was to protect navigable waters from the disposal of dredged or fill material.[64] Accordingly, after Congress passed the FWPCAA, the Corps only regulated navigable waters, its traditional jurisdiction under the Rivers and Harbors Act of 1899 (RHA).[65] The Corps' refusal to regulate beyond navigable waters, however, was inconsistent with the FWPCAA's broad definition of navigable waters as being all waters of the United States.[66] In response to a suit challenging the Corps' limited interpretation of their jurisdiction, the District Court for the District of Columbia ruled, in *Natural Resources Defense Council, Inc. v. Callaway*,[67] that Congress meant to assert its jurisdiction to the fullest extent possible under the commerce clause.[68] Therefore, the district court ordered the Corps to regulate all waters of the United States and not just navigable waters.[69]

After the *Callaway* decision, the Corps issued a press release stating that the district court's decision in *Callaway* increased its

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[61] 33 U.S.C. § 1344(c) (1988). The EPA may use its veto when the Administrator of the EPA determines that a discharge of dredged or fill material has an unacceptable adverse impact on water supplies, shellfish beds, fishery areas, wildlife, or recreation areas. *Id.*

[62] The memorandum is reprinted in W. WANT, *supra* note 28, at App. 8-1. The memorandum established the Corps as the lead agency for section 404 enforcement, with EPA providing enforcement in special cases. *See id.* at 8-4 to 8-5.

[63] The Senate debate over section 404 centered on the effect of section 404 on commercial navigation. *See* 117 CONG. REC. 38,854 (1971) (comments of Senators Ellender and Muskie), *reprinted in* 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1387–89 (1973) [hereinafter FWPCAA LEG. HIST.] (the FWPCAA LEG. HIST. is reprinted in CONGRESSIONAL INFORMATION SERVICE (microfiche no. S 642-3 (1973))); *see also* Comment, *supra* note 39, at 295, 303 n.51. For a history of the adoption of the FWPCA, see Ablard & O'Neill, *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 (1976).

[64] *See* Comment, *supra* note 39, at 303.

[65] *See* Note, *Wetland's Reluctant Champion: The Corps Takes a Fresh Look at "Navigable Waters,"* 6 ENVTL. L. 217, 218 (1975).

[66] Natural Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975). Section 404, which gives the Corps authority to issue permits for the discharge of dredged or filled material into wetlands, uses the term "navigable waters." 33 U.S.C. § 1344(a) (1988). The use of the term "navigable waters" in this section would lead one to think that Corps authority extends only to navigable waters. The CWA, however, broadly defines "navigable waters" as being all "waters of the United States." *Id.* § 1362(7).

[67] 392 F. Supp. 685 (D.D.C. 1975).

[68] *Id.* at 686.

[69] *Id.*

jurisdiction to include all waters of the United States.[70] To illustrate its expanded jurisdiction, the Corps stated that farmers and ranchers might need to apply for a permit to build an irrigation ditch.[71] Upon learning of the expanded Corps jurisdiction, agricultural interests flooded Congress with complaints about the Corps' expanded jurisdiction and the bureaucratic delays caused by the section 404 permit program.[72]

Responding to the complaints of farmers, ranchers, and foresters,[73] the House of Representatives passed a bill restricting Corps jurisdiction to navigable waters capable of transporting interstate commerce.[74] This bill also exempted farming, forestry, and ranching from the permitting requirement.[75] The Senate, however, rejected the House bill and maintained the Corps' broad jurisdiction over all waters of the United States.[76]

In 1977, when Congress amended the FWPCAA by passing the CWA, the Senate bill prevailed, and Congress preserved the Corps' broad jurisdiction over all waters of the United States.[77] Nevertheless, Congress provided that certain activities, such as farming, forestry, and ranching were exempt from the permitting requirement.[78] The CWA also created a system of general permits for activities that have minimal ecological impact.[79] If a permit applicant can qualify for a general permit, an individual permit is not required.[80]

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[70] *See* Note, *supra* note 65, at 219.

[71] *Id.*

[72] *See* 123 CONG. REC. 26,711 (1977) (statement of Sen. Bentson), *reprinted in* 4 A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, at 902 (1978) [hereinafter CWA LEG. HIST.] (the CWA LEG. HIST. is reprinted in CONGRESSIONAL INFORMATION SERVICE (microfiche no. S322-9 to S322-10 (1978))).

[73] *See* 123 CONG. REC. 10,428 (1977) (statement of Rep. Smith), *reprinted in* 4 CWA LEG. HIST., *supra* note 72, at 1347.

[74] H.R. RES. 3199, 95th Cong., 1st Sess. § 16(b) (1977), *reprinted in* 4 CWA LEG. HIST., *supra* note 72, at 1157.

[75] *Id.* § 16(h), *reprinted in* 4 CWA LEG. HIST., *supra* note 72, at 1159.

[76] *See* S. REP. NO. 370, 95th Cong., 1st Sess. 75, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 4326, 4400. The report of the Senate Environment and Public Works Committee stated that restricting the jurisdiction of the Corps would cripple the CWA's objectives. *Id.*

[77] *See* 33 U.S.C. §§ 1344, 1362(7) (1988). The House and Senate bills are discussed in H.R. CONF. REP. NO. 830, 95th Cong., 1st Sess. 97–100, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 4326, 4472–75.

[78] 33 U.S.C. § 1344(f) (1988).

[79] *See id.* § 1344(e). In addition, the CWA allows the states to administer the section 404 permit program subject to EPA approval. *Id.* § 1344(g), (h).

[80] 33 C.F.R. 325.5 (1990). For a description of the section 404 permit program, see Blumm & Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695 (1989).

Although Congress did not state specifically that its intent in passing the CWA was to protect wetlands, the legislative history of the CWA suggests that Congress intended the section 404 program to protect wetlands.[81] Congress rejected proposals to limit Corps jurisdiction severely, fearing that a limited Corps jurisdiction would jeopardize wetlands.[82] In addition, the Senate Committee on the Environment and Public Works concluded that efforts to restrict Corps jurisdiction would make it impossible to achieve the CWA's objective of maintaining and restoring the nation's waters.[83]

After Congress passed the CWA, the Supreme Court held that the language, history, and policy of the CWA authorized the Corps to regulate wetlands.[84] Currently, Congress looks to the section 404 program as the primary federal means to protect wetlands.[85] If there was any doubt when Congress passed the CWA, subsequent events have shown that Congress intends to protect wetlands through the section 404 permit program.

### *B. CWA Strict Liability and Enforcement*

Sections 301 and 404 of the CWA create liability for unpermitted discharges of dredged or fill material into wetlands as well as for discharges in violation of a permit.[86] Section 301 states that "the

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[81] 123 CONG. REC. 26,697 (1977) (statement of Sen. Muskie), *reprinted in* 4 CWA LEG. HIST., *supra* note 72, at 869. Senator Muskie stated that the destruction of wetlands was causing serious ecological damage to the waters of the United States. *Id.*; *see also* United States v. Hannah, 19 Env't Rep. Cas. (BNA) 1068, 1080 (D.S.C. 1983). "Congress intended to include wetlands under the definition of navigable waters." *Id.*

[82] S. REP. NO. 370, 95th Cong., 1st Sess. 75, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 4326, 4400. Senators in favor of preserving broad Corps jurisdiction argued that a restricted Corps jurisdiction would affect wetlands severely. *See* 123 CONG. REC. 26,713 (1977) (statement of Sen. Hart), *reprinted in* 4 CWA LEG. HIST., *supra* note 72, at 909. Senator Hart argued that restricting the Corps' jurisdiction would remove 98% of the rivers, lakes, and streams, and 85% of the wetlands from federal protection. *Id.*

[83] S. REP. NO. 370, 95th Cong., 1st Sess. 75, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 4326, 4400; S. REP. NO. 370, 95th Cong., 1st Sess. 10 (stating that the section 404 program is designed to end the unregulated destruction of wetlands), *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 4326, 4400.

[84] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 140 (1985).

[85] *See* GENERAL ACCOUNTING OFFICE, WETLANDS: THE CORPS OF ENGINEERS' SECTION 404 PROGRAM, EXECUTIVE SUMMARY 2 (1988), *reprinted in* CONGRESSIONAL INFORMATION SERVICE (microfiche no. H641-30 (1989)). For a more recent discussion of the section 404 permit program and the ineffectiveness of the Corps' enforcement efforts, see *Administration of Section 404 of the Clean Water Act, 1988: Hearings Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation*, 100th Cong., 2d Sess. (1988), *reprinted in* CONGRESSIONAL INFORMATION SERVICE, (microfiche no. H641-30 (1989)).

[86] *See* 33 U.S.C. §§ 1311(a), 1344 (1988).

discharge of any pollutant by any person" that does not comply with the CWA is illegal.[87] Accordingly, a discharge of dredged or fill material into wetlands must comply with section 404 of the CWA. To comply with section 404, a discharge must fall within an exemption, qualify for a general permit, or be permitted by an individual permit.[88]

Sections 301 and 404 do not create expressly any standard of liability.[89] Judicial decisions, however, have established that a person who discharges dredged or fill material into wetlands is strictly liable.[90] In *United States v. Earth Sciences, Inc.*,[91] the Court of Appeals for the Tenth Circuit held that the regulatory sections of the CWA do not limit liability to intentional acts.[92] Rather, section 301 merely states that any discharge not in compliance with the CWA is unlawful.[93] To establish liability, the CWA does not require scienter or a knowing violation of the CWA.[94]

Sections 301 and 309 authorize the EPA and the Corps to seek injunctive relief or a civil penalty to remedy any CWA violation.[95] Section 309(b) authorizes the Administrator of the EPA to commence a civil action "for appropriate relief" for any violation of the CWA for which the Administrator is allowed to issue a compliance order under section 309(a).[96] Section 309(a)(3) authorizes the Administrator to issue a compliance order to "any person" in violation of section 301.[97] Section 301 states that the discharge of any pollutant by any person is illegal, unless the discharge complies with the CWA.[98] Thus, if a discharge does not comply with the CWA, then section 301 is violated, and the EPA may exercise its authority under section

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[87] *Id.* § 1311(a).

[88] *Id.* § 1344; *see also* 33 C.F.R. 320.1(c) (1990).

[89] *See* 33 U.S.C. §§ 1311(a), 1344 (1988).

[90] *See, e.g.*, United States v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir. 1979); United States v. Bradshaw, 541 F. Supp. 884, 886 (D. Md. 1982); United States v. Board of Trustees of Fla. Keys Community College, 531 F. Supp. 267, 274 (S.D. Fla. 1981).

[91] 599 F.2d 368 (10th Cir. 1979).

[92] *Id.* at 374.

[93] 33 U.S.C. § 1311(a) (1988).

[94] *Earth Sciences*, 599 F.2d at 374. Strict liability, as it pertains to wetlands filling, means that liability arises from performing illegal activity or being responsible for illegal activity. *Board of Trustees*, 531 F. Supp. at 274.

[95] 33 U.S.C. §§ 1311(a), 1319 (1988).

[96] *Id.* § 1319(b). In practice, the EPA and the Corps request that the United States Department of Justice bring suit against a CWA violator on behalf of the EPA or the Corps. W. WANT, *supra* note 28, at 8-4.

[97] 33 U.S.C. § 1319(a)(3) (1988).

[98] *Id.* § 1311(a).

309 to issue a compliance order or to commence a civil action for appropriate relief.[99]

In assessing the CWA's civil penalties,[100] some courts have penalized defendants according to the number of days that illegal fill remains in wetlands, rather than penalizing the defendant merely for the number of days that a defendant engaged in illegal activities.[101] These courts treat illegally filled wetlands as a continuing CWA violation.[102] For example, in *United States v. Cumberland Farms, Inc.*,[103] the District Court for the District of Massachusetts defined a day of violation as one during which a defendant uses machinery to fill wetlands or allows fill to remain in wetlands.[104]

Because illegally filled wetlands are a continuing CWA violation,[105] the Corps or the EPA may seek restoration years after filling actually takes place.[106] In *North Carolina Wildlife Federation v. Woodbury*,[107] the District Court for the Eastern District of North Carolina allowed a citizen's suit for restoration brought six years after the defendant placed illegal fill in wetlands.[108] The court allowed the suit because it determined that wetlands filling is a continuing CWA

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[99] *Id.* §§ 1311(a), 1319(a), (b). Section 404 gives the Secretary of the Army authority to commence only civil actions for violations of permits issued under section 404, *id.* § 1344(s), whereas the EPA has statutory authority to enforce any CWA violation. *Id.* § 1319(b). While the Corps does not have direct statutory authority to seek remedies for unpermitted discharges, the EPA has delegated its enforcement authority over all CWA violations to the Corps. United States v. Kelcourse, 721 F. Supp. 1472, 1478 (D. Mass. 1989); *see generally* W. WANT, *supra* note 28, at 8-1 to 8-5.

[100] The CWA authorizes a $25,000 civil penalty for each day of violation. 33 U.S.C. § 1344(s)(4) (1988).

[101] *See, e.g.*, United States v. Tull, 615 F. Supp. 610, 626 (E.D. Va. 1983), *aff'd*, 769 F.2d 182 (4th Cir. 1985) (court considered both the days of the performance of the illegal activities and the days that the illegal fill remained in place), *rev'd on other grounds*, 481 U.S. 412 (1987) (defendant denied a jury trial on liability).

[102] *See* North Carolina Wildlife Fed'n v. Woodbury, 29 Env't Rep. Cas. (BNA) 1941, 1944 (E.D.N.C. 1989); *Tull*, 615 F. Supp. at 626.

[103] 647 F. Supp. 1166 (D. Mass. 1986), *aff'd*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988).

[104] *Id.* at 1183; *see also* United States v. Ciampitti, 669 F. Supp. 684, 700 (D.N.J. 1987) (violation occurs every day a defendant allows illegal fill to remain in wetlands).

[105] *Woodbury*, 29 Env't Rep. Cas. (BNA) at 1943. In *Woodbury*, the district court held that a defendant's failure to remove fill was a continuing CWA violation. *Id.* The court expressly applied this idea, which courts usually use in calculating civil penalties, to the restoration order. *Id.* at 1942–43.

[106] In *Cumberland Farms*, the circuit court upheld an enforcement action for restoration brought eight years after the defendant's first violation. 826 F.2d at 1161. The circuit court rejected the defendant's argument that the government was foreclosed equitably from bringing the action. *Id.*

[107] 29 Env't Rep. Cas. (BNA) 1941 (E.D.N.C. 1989).

[108] *Id.* at 1943.

violation.[109] The court stated that the federal statute of limitations, which forbids the enforcement of civil penalties after five years, did not bar the action[110] because the plaintiff was seeking injunctive relief and not a civil penalty.[111] Instead, the equitable doctrine of laches applied.[112] Because the plaintiff diligently brought suit, the court ruled that laches did not bar the action.[113]

Although the FWPCA originally protected only navigable waters, the CWA now protects all waters of the United States, including wetlands.[114] Section 309 of the CWA authorizes the Corps and the EPA to seek injunctive relief to remedy CWA violations, which includes an order to restore illegally filled wetlands.[115] Courts have held that illegal fill remaining in wetlands is a continuing CWA violation.[116] Therefore, the Corps and the EPA may seek restoration years after a defendant fills wetlands.

## IV. EQUITABLE BALANCING, THE RESTORATION GUIDELINES, AND THE LIABILITY OF NON-PERFORMING PARTIES

### *A. The Equitable Balancing of Statutory Violations*

The phrase "equitable balancing" describes a court's power to balance competing claims in order to effect justice.[117] As a prerequisite to exercising their equitable powers, courts usually require a finding that irreparable injury will result absent equitable action and that legal remedies are inadequate.[118] The Supreme Court has held that a court may exercise its equitable discretion when remedying

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[109] *Id.*

[110] *Id.* at 1944; *see also* 28 U.S.C. § 2462 (1988).

[111] *Woodbury*, 29 Env't Rep. Cas. (BNA) at 1944.

[112] *Id.*

[113] *Id.* The court in *Woodbury* stated that laches would bar an action if the plaintiffs failed to bring an action diligently and if the nature of the claim and the situation required diligence. *Id.* (citing Holmberg v. Armbrect, 327 U.S. 392 (1946)). The *Woodbury* court held that laches does not involve a strict time bar to an action but is a question of whether a plaintiff equitably may bring suit. *Id.*

[114] *See supra* text accompanying notes 81–85.

[115] *See infra* text accompanying notes 155–61.

[116] *See supra* text accompanying notes 100–113.

[117] *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982); *see generally* Axline, *Constitutional Implications of Injunctive Relief Against Federal Agencies in Environmental Cases*, 12 HARV. ENVTL. L. REV. 1 (1988); Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 45 U. PITT. L. REV. 513 (1984); Plater, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524 (1982); Comment, *Equitable Discretion and Statutory Interpretation*, 18 B.C. ENVTL. AFF. L. REV. (1991) (to be published).

[118] *Romero-Barcelo*, 456 U.S. at 313.

violations of the CWA and other statutes.[119] The Supreme Court rejected the principle that a court always should issue an injunction to remedy a statutory violation.[120] Instead, if Congress has not foreclosed the use of equitable discretion explicitly, courts may use their equitable discretion to fashion an appropriate remedy to a statutory violation, which may or may not include an injunction.[121]

In *Tennessee Valley Authority v. Hill*,[122] the Supreme Court ruled that a court could not engage in equitable balancing when faced with a violation of the Endangered Species Act (ESA).[123] The *Hill* Court affirmed a lower court order enjoining construction of a dam across a river in Tennessee.[124] Construction of the dam would result in the extermination of the snail darter, an endangered species of fish.[125] The Court ruled that the ESA plainly prohibited construction of the dam because it would result in the eradication of the snail darter.[126] Although the *Hill* Court acknowledged that a court need not issue an injunction for every violation of a statute, it ruled that, when faced with a clear congressional mandate for a course of action, a court's role is to enforce the congressional mandate and not review legislative decisions.[127] When faced with a law that creates a strict prohibition, such as the ESA, the court's discretion was limited to enforcing the act involved.[128]

In *Weinberger v. Romero-Barcelo*,[129] the Supreme Court rejected the principle that injunctions should issue automatically to cure CWA violations.[130] In *Romero-Barcelo*, the governor of Puerto Rico sued the Navy to enjoin the Navy's use of navigable waters off of Puerto Rico as a practice bombing range.[131] Puerto Rico claimed that the Navy was violating the CWA because it did not have an NPDES

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[119] *Id.* at 321; *see also* Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 544 (1987) (district court did not have to issue an injunction to comply with a federal statute protecting the subsistence resources of Alaskan natives).

[120] *Romero-Barcelo*, 456 U.S. at 321; *see also Gambell*, 480 U.S. at 544.

[121] *Romero-Barcelo*, 456 U.S. at 321

[122] 437 U.S. 153 (1978).

[123] *Id.* at 195. *See* 15 U.S.C. §§ 1531–1544 (1988).

[124] *Hill*, 437 U.S. at 172.

[125] *Id.*

[126] *Id.* at 174–75. The Supreme Court ruled that building the dam would violate the ESA because it would disrupt the snail darter's habitat and most probably lead to the snail darter's extinction. *Id.* An injunction was the only way to protect the snail darter. *Id.* at 195.

[127] *Id.* at 194–95.

[128] *Id.* at 195.

[129] 456 U.S. 305 (1982).

[130] *Id.* at 315.

[131] *Id.* at 308.

permit to discharge munitions.[132] Ruling that it had an absolute duty to restrain CWA violations and that an injunction should issue automatically, the Court of Appeals for the First Circuit reversed the District Court for the District of Puerto Rico's refusal to grant an injunction to stop the bombing.[133]

The Supreme Court, however, reversed the First Circuit decision and approved of the district court's use of equitable balancing.[134] The Supreme Court ruled that the principle set forth in *Hill*, of automatically issuing an injunction, was inapplicable to the CWA.[135] Equitable balancing was appropriate to remedy CWA violations because an injunction is not the only remedy for CWA violations[136] and because the statutory framework and the legislative history of the CWA did not clearly circumscribe a court's equitable discretion.[137] In fact, the Court found that the CWA, by implication, provided for equitable balancing and discretion in curing CWA violations.[138]

The Court held that the district court had the discretion to order the type of relief it considered necessary to achieve prompt compliance with the CWA.[139] The Supreme Court held that the district court could exercise its discretion and refuse to grant an injunction.[140] Although the district court had the power to enjoin the bombing immediately, the district court's remedies were not limited to injunctive relief.[141] The district court could weigh the harm to national defense against the harm to the environment and refuse to enjoin the Navy's munitions discharges.[142]

Although a court has equitable discretion to fashion remedies for CWA violations, the Supreme Court stated in *Romero-Barcelo* that a court cannot ignore a statutory violation.[143] A court must order

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[132] *Id.* at 309. The CWA specifically includes munitions as a pollutant. 33 U.S.C. § 1362(6) (1988).

[133] *Romero-Barcelo*, 456 U.S. at 311–12.

[134] *Id.* at 321.

[135] *Id.* at 315.

[136] *Id.* The Court held that fines and criminal penalties were alternative remedies. *Id.*

[137] *Id.* at 317, 320.

[138] *Id.* The Court was persuaded that Congress envisioned equitable balancing because the CWA allows the discharge of some pollutants and has a program of phased compliance. *Id.* at 317–18. Additionally, the CWA requires immediate cessation of violations only if pollution endangers public health or welfare. *Id.*

[139] *Id.* at 321.

[140] *Id.* at 320.

[141] *Id.*

[142] *Id.* at 311. The Supreme Court ruled that the appellate court could overturn the district court only for an abuse of discretion and not for the mere exercise of equitable discretion. *Id.* at 321.

[143] *See id.* at 315

the relief necessary to achieve compliance with the CWA.[144] The Court indicated that the district court respected the purpose of the CWA because it did not ignore the statutory violation.[145] The district court ordered the Navy to apply for a permit and only allowed the Navy to discharge pollutants pending the EPA's consideration of the Navy's permit application.[146]

Because wetlands restoration is achieved through an injunctive order,[147] which is based in a court's equitable powers, equitable discretion allows courts to refuse to order restoration altogether and to modify proposed restoration orders.[148] Nevertheless, many courts have ordered restoration using equitable balancing, and the Supreme Court's decision in *Romero-Barcelo* has not prevented courts from issuing wetlands restoration orders.[149] For example, in *United States v. Lofgren*,[150] the District Court for the Eastern District of Michigan rejected the defendant's argument that, according to *Romero-Barcelo*, the government was required to make a clear showing of irreparable injury and the inadequacy of legal remedies before the government could obtain a preliminary injunction to restrain CWA violations.[151]

The *Lofgren* court ruled that equitable balancing and the concepts of irreparable injury and inadequacy of legal remedies "should be exercised with flexibility and with sensitivity to the larger public interest at play."[152] Applying the traditional standard for a preliminary injunction with a sensitivity to the public interest, the district court held that an injunction should issue.[153] The court found that

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[144] *Id.* at 318, 320.

[145] *Id.* at 316. The Supreme Court implied that the district court might have had to issue an injunction if the Corps denied the Navy a permit to discharge the munitions. *See id.*

[146] *Id.* at 310.

[147] 33 U.S.C. § 1319(b) (1988). The CWA does not authorize restoration expressly, but courts have inferred the power to order restoration from the Corps' and the EPA's authority to seek a temporary or permanent injunction to restrain CWA violations. *See* 33 U.S.C. § 1319(b) (1988); *see also* United States v. Carter, 18 Env't Rep. Cas. (BNA) 1810, 1813 (S.D. Fla. 1982). "Restoration is an authorized and appropriate remedy under the Clean Water Act." *Id.*

[148] For a full discussion of how equitable discretion undermines the purposes of the CWA, see Comment, *supra* note 39, at 295.

[149] *See, e.g.*, United States v. Cumberland Farms, Inc., 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988); United States v. Ciampitti, 669 F. Supp. 684 (D.N.J. 1987); United States v. Robinson, 570 F. Supp. 1157 (M.D. Fla. 1983).

[150] 13 Envtl. L. Rep. (Envtl. L. Inst.) 20,164 (E.D. Mich. 1982) (the government sought a preliminary injunction to prevent the defendant from filling wetlands to build a condominium).

[151] *Id.* at 20,166.

[152] *Id.*

[153] *Id.*

there was a likelihood of success, an irreparable injury to the permit process, a lack of harm to others, and that an injunction would serve the public interest.[154]

### *B. The Restoration Guidelines—The* Weisman *Tests*

Although the CWA does not require explicitly the restoration of illegally filled wetlands, courts have inferred the power to order restoration from the EPA's statutory authority to seek a permanent or temporary injunction to remedy CWA violations.[155] In *United States v. Weisman*,[156] the District Court for the Middle District of Florida held that two prerequisites must be satisfied before a court may consider a restoration order.[157] The property to be subject to the order must be within CWA jurisdiction, and a court must conduct a hearing to consider the benefits, detriments, and alternatives to the restoration plan.[158] If these prerequisites are met, a court should consider the propriety of a restoration plan by using three criteria.[159] A restoration plan must confer the maximum environmental benefits, must be practically achievable, and must bear an equitable relationship to the wrong it is supposed to remedy.[160] The *Weisman* requirements, which other courts have followed,[161] allow courts to consider a broad range of non-environmental equitable factors, such as harm

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[154] *Id.*; *see also* United States v. Ciampitti, 583 F. Supp. 483, 499 (D.N.J. 1984) (restoration would be in the public interest because it was "axiomatic" that strict enforcement of the CWA was necessary to achieve the objectives of the Act).

[155] *See* United States v. Carter, 18 Env't Rep. Cas. (BNA) 1810, 1812–13. (S.D. Fla. 1982). The EPA's and the Corps's authority to seek an injunction is contained in 33 U.S.C. §§ 1319(b), 1344(s) (1988).

[156] 489 F. Supp. 1331 (M.D. Fla. 1980).

[157] *Id.* at 1342–43. The court in *Weisman* derived its tests from earlier cases ordering the restoration of illegally dredged canals. *Id.*; *see* Weiszmann v. District Eng'r, United States Army Corps of Eng'g, 526 F.2d 1302, 1304 (5th Cir. 1976), *on remand*, 545 F. Supp. 721 (S.D. Fla. 1982) (restoration hearing); United States v. Sexton Cove Estates, Inc., 526 F.2d 1293, 1301 (5th Cir. 1976). *See generally* Tripp & Hertz, *Wetland Preservation and Restoration: Changing Federal Priorities*, 7 VA. J. NAT. RESOURCES L. 21 (1988); Want, *Federal Wetlands Law: The Cases and the Problems*, 8 HARV. ENVTL. L. REV. 1, 46–53 (1984). For a historical discussion of restoration, see Haagensen, *Restoration as a Federal Remedy for Illegal Dredging and Filling Operations*, 32 U. MIAMI L. REV. 105 (1977).

[158] United States v. Weisman, 489 F. Supp. 1331, 1343 (M.D. Fla. 1980).

[159] *Id.*

[160] *Id.* These tests are commonly called the *Weisman* tests or guidelines.

[161] *E.g.*, United States v. Cumberland Farms, 826 F.2d 1151, 1164 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988); United States v. Ciampitti, 615 F. Supp. 116, 122 (D.N.J. 1984), *aff'd mem.*, 772 F.2d 893 (3d Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986); United States v. Bradshaw, 541 F. Supp. 884, 885–86 (D. Md. 1982).

to the defendant, in addition to the harm to the environment. Courts may consider non-environmental factors in each of the three tests.

1. Maximum Environmental Benefits

In *United States v. Cumberland Farms, Inc.*, the District Court for the District of Massachusetts considered whether the restoration of a cedar swamp that the defendant illegally converted into farm land would confer the maximum environmental benefits.[162] To determine whether a restoration plan offered the maximum environmental benefits, the district court weighed the detriments of the plan, the destruction of 110 acres of farm land and the possibility of damage to neighboring homes and farm land, against the benefits of the plan, improved flood control, water quality, and animal habitat.[163] The *Cumberland Farms* court stated that courts should favor restoration unless the detriments of restoration significantly outweigh the benefits.[164] The district court ruled that the restoration plan conferred maximum environmental benefits, that it was in the national interest, and that it was consistent with both the controlling law and the legislative intent of preserving wetlands.[165]

Although the *Cumberland Farms* court favored restoration, it did not confine its analysis to a consideration of the environmental merits of the restoration plan. The district court also considered the non-environmental consequences of the harm to abutters and the harm to agricultural production. Although the court did not ignore environmental effects, it had the flexibility to consider non-environmental factors, many of which weighed against a restoration order.[166]

2. Practicality

The practicality test involves a consideration of whether a restoration plan is possible and a consideration of the cost of the restoration plan to the defendant. The *Weisman* court ruled that a restoration plan that theoretically provides the maximum environmental benefits also has to be achievable as a practical matter and must be cost-effective.[167]

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[162] *Id.* at 1181; *see supra* note 103.

[163] *Id.* at 1181–82.

[164] *Id.* at 1182.

[165] *Id.*

[166] *See id.* at 1181. The *Weisman* court weighed the environmental benefits of two restoration plans very carefully and considered the cumulative environmental effects of the proposals. United States v. Weisman, 489 F. Supp. 1331, 1346–48 (M.D. Fla. 1980).

[167] *Weisman*, 489 F. Supp. at 1348; *see also* United States v. Robinson, 570 F. Supp. 1157,

In assessing the cost-effectiveness of a restoration plan, courts have considered the financial effect of restoration on a defendant.[168] In *United States v. Robinson*,[169] the District Court for the Middle District of Florida carefully calculated the cost of restoration and the financial resources of the defendant.[170] One of the reasons the court ordered restoration was that the defendant had adequate resources to restore the wetlands.[171]

Alternatively, the financial effect of a restoration order on a defendant may weigh against restoration.[172] In *United States v. Heubner*,[173] the Court of Appeals for the Seventh Circuit refused to order restoration of an illegally filled wetlands because restoration would destroy the defendant's cranberry bog, which was worth $400,000.[174] The court also refused to order restoration because it stated that cranberry bogs were ecologically compatible with wetlands.[175] The court denied restoration of the cranberry bog even though the defendant created the cranberry bog in violation of a consent decree that the defendant had entered into voluntarily.[176]

### 3. Equity

Some courts have refused to order restoration when they have considered the third *Weisman* requirement that restoration be equitable in light of the degree and kind of wrong. This test allows a

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1164 (M.D. Fla. 1983). In *Cumberland Farms*, the district court approved a restoration plan even though it found that the plan had an element of uncertainty. *Cumberland Farms*, 647 F. Supp. at 1182.

[168] United States v. Ciampitti, 615 F. Supp. 116, 123 (D.C.N.J. 1984), *aff'd mem.*, 772 F.2d 893 (3d Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986); *Robinson*, 570 F. Supp. at 1164.

[169] 570 F. Supp. 1157 (M.D. Fla. 1983).

[170] *Id.* at 1164-65.

[171] *Id.* The district court found that the defendant could finance the restoration through the savings in his bank account and by selling a house trailer. *Id.* at 1164.

[172] *See* United States v. Huebner, 752 F.2d 1235, 1245 (7th Cir.), *cert. denied*, 474 U.S. 817 (1985). This is not to say that all courts will refuse to order restoration upon a finding of some burden to the defendant. Courts sometimes are willing to order restoration at great cost to the defendant. *See* United States v. Cumberland Farms, Inc., 647 F. Supp. 1166, 1180 (D. Mass. 1986), *aff'd*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988).

[173] 752 F.2d 1235, 1245 (7th Cir.), *cert. denied*, 474 U.S. 817 (1985).

[174] *Id.* at 1245.

[175] *Id.*

[176] *Id.* The *Heubner* court also was influenced by the possibility that the defendants might have been able to get a permit for the bog expansion and the failure of Corps officials to take action when they knew about the expansion. *Id.* at 1245.

In United States v. Lambert, 589 F. Supp. 366 (M.D. Fla. 1984), the District Court for the Middle District of Florida refused to order restoration in one wetlands area finding that the burden on the defendant outweighed the environmental benefit. *Id.* at 372. The district court did order restoration, however, for a wetlands area that would not be burdensome to restore. *Id.* at 374.

court broad flexibility to consider various equitable factors that may weigh against restoration. For example, in *United States v. Board of Trustees of Florida Keys Community College*,[177] a community college filled wetlands containing mangrove trees and vegetation that served as wildlife habitat,[178] causing serious environmental harm.[179] Nevertheless, the District Court for the Southern District of Florida refused to order restoration because, among other factors, the court found that the violation was negligent and not willful, that the wetlands were unattractive, and that the defendant could create an artificial wetlands to mitigate the harmful environmental effects of the violation.[180] The district court also considered the defendant's lack of willfulness in violating the CWA even though, for establishing liability for CWA violations, courts have found that the CWA is a strict liability statute.[181]

Courts also have considered the expense of a restoration plan and the hardship that a plan would have on a defendant. For example, in *United States v. Michael's Construction Company of Florida, Inc.*,[182] the Court of Appeals for the Eleventh Circuit ruled against the government's proposed restoration plan, which cost $793,414, because it was too speculative and too costly.[183] Although the defendant did not have to restore the site, the defendant did have to provide an alternative environmental area comparable to the destroyed area.[184]

These cases show that courts have considered many non-environmental factors in deciding whether to order restoration.[185] Courts

[177] 531 F. Supp. 267 (S.D. Fla. 1981).

[178] *Id.* at 271–72.

[179] *Id.* at 275.

[180] *Id.*

[181] *Id.* at 274. The defendant had to pay a civil fine and develop an area to replace the illegally filled wetlands. *Id.* at 275. *But see* United States v Bradshaw, 541 F. Supp. 844, 886 (D. Md. 1982) (the court ordered restoration for an unintentional violation because the CWA is a strict liability statute).

In establishing liability for CWA violations, courts adhere to the strict liability of the CWA and do not consider the intent of the defendant. In the remedy phase, however, in deciding whether to order restoration, courts have considered the intent of the defendant. *See, e.g.*, United States v. Ciampitti, 669 F. Supp. 684, 698 (D.N.J. 1987); United States v. Tull, 615 F. Supp. 610, 626 (E.D. Va. 1983), *aff'd*, 769 F.2d 182 (4th Cir. 1985), *rev'd on other grounds*, 481 U.S. 412 (1987) (defendant denied a jury trial on liability); United States v. Weisman, 489 F. Supp. 1331, 1349 (M.D. Fla. 1980). The third *Weisman* test requires a consideration of the willfulness of the defendant by calling upon courts to determine whether restoration is justified in light of the degree and kind of wrong. *See Weisman*, 489 F. Supp. at 1349.

[182] 772 F.2d 1501 (11th Cir. 1985), *vacated on other grounds*, 481 U.S. 1034 (1987) (defendant denied a jury trial on liability).

[183] *Id.* at 1504, 1507.

[184] *Id.* at 1507.

[185] *See supra* notes 155–84 and accompanying text.

have denied restoration for a variety of reasons: that a violation was merely negligent and not willful,[186] that wetlands were filled to create a use that is deemed compatible with wetlands,[187] and that a restoration plan is too costly.[188] The *Weisman* guidelines give courts considerable latitude to weigh a broad range of equities that frequently may weigh against a restoration order.

### *C. The Judicial Reluctance to Hold Purchasers Liable*

In wetlands cases, courts carefully protect the interests of innocent purchasers. Courts usually refuse to order innocent purchasers to restore illegally filled wetlands,[189] and they modify restoration plans to protect the interests of innocent purchasers and abutters. For example, in *United States v. Golden Acres, Inc.*,[190] the District Court for the Eastern District of North Carolina refused to order restoration against innocent purchasers.[191] The defendant, Golden Acres, created conveyable lots, which it sold to innocent purchasers, by filling wetlands illegally.[192] The court noted that the purchasers were unaware that the fill was illegal, and that they took no part in the illegal filling.[193] The court, however, fined the defendant so that it would not profit from the sale of the illegally filled lots.[194]

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[186] United States v. Board of Trustees of Fla. Keys Community College, 531 F. Supp. 267, 275 (S.D. Fla. 1981).

[187] United States v. Heubner, 752 F.2d 1235, 1245 (7th Cir.), *cert. denied*, 474 U.S. 817 (1985).

[188] United States v. Michael's Constr. Co. of Fla., Inc., 772 F.2d 1501, 1507 (11th Cir. 1985), *vacated on other grounds*, 481 U.S. 1034 (1987).

[189] *See, e.g.*, United States v. Golden Acres, Inc., No. 76-0023, slip op. at 1 (E.D.N.C. Jan. 12, 1977), *summarized in* 13 Envtl. L. Rep. (Envtl. L. Inst.) 20,443 (1977); United States v. American Capital Land Corp., 8 Env't Rep. Cas. (BNA) 1654 (S.D. Miss. 1975).

[190] No. 76-0023, slip op. at 1 (E.D.N.C. 1977), *summarized in* 13 Envtl. L. Rep. (Envtl. L. Inst.) 20,443 (1977).

[191] *Id.* at 7.

[192] *Id.* at 2–3.

[193] *Id.* at 3.

[194] *Id.* at 7. The court ordered the defendant to restore two areas that he had filled illegally, but not conveyed. *Id.* at 6. In United States v. American Capital Land, 8 Env't Rep. Cas. (BNA) 1654 (S.D. Miss. 1975), the defendant dredged a canal in a marsh and deposited the dredged material in wetlands. *Id.* at 1655. The defendant, planning to create a recreational and residential subdivision, sold lots along the canal as waterfront property to innocent purchasers. *Id.* The government demanded total restoration of all the fill that the defendant had placed, even though the defendant had conveyed the lots to the innocent purchasers. *See id.* The District Court for the Southern District of Mississippi refused to approve the government's restoration plan because it would punish the innocent purchasers. *Id.* at 1656. The court characterized the sales as negligent but did not provide any detail as to the circumstances of the sales. Although *American Capital Land* and *Golden Acres, Inc.* involved violations of § 10 of the Rivers and Harbors Act (RHA), their precedents are applicable to wetlands protected under § 404 of the CWA. Courts have looked to cases involving violations of § 10

In *United States v. Ciampitti*,[195] the defendant, Ciampitti, sold two residential lots that contained areas of illegally filled wetlands.[196] The District Court for the District of New Jersey refused to order removal of the fill from these lots because the lots had been transferred to innocent bona fide purchasers[197] and because restoration would have involved removal of the purchasers' homes.[198] Given the purchasers' innocence and the harm that the restoration of the illegally filled wetlands would cause the purchasers, the court found that removal of the fill would be inequitable to the purchasers.[199]

Courts often modify restoration plans in order to protect innocent purchasers and abutters. For example, in *United States v. Moretti*,[200] a developer, Moretti, dredged canals in navigable waters and used the dredged material to fill tidal wetlands to create a mobile home subdivision.[201] Each lot in the subdivision had access to Florida Bay, a navigable water,[202] by way of the illegally dredged canals. After the dredging, Moretti conveyed lots in one half of the development but not in the other half.[203] Not wishing to create a hardship on the innocent, but negligent,[204] purchasers, the District Court for the Southern District of Florida ordered Moretti to fill the canals completely and remove the unauthorized fill from the wetlands in the parcel that had not been conveyed, but ordered Moretti only to fill partially the canals in the area that had been conveyed to the innocent purchasers.[205] By only ordering Moretti to fill partially the

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of the RHA in deciding cases involving violations of § 404 of the CWA. *See, e.g.*, United States v. Carter, 18 Env't Rep. Cas. (BNA) 1810, 1812 (S.D. Fla. 1982); United States v. Weisman, 489 F. Supp. 1331, 1342 (M.D. Fla. 1980).

[195] 669 F. Supp. 684 (D.N.J. 1987).

[196] *Id.* at 689.

[197] *Id.* at 698. The court ordered the defendant to restore the illegally filled wetlands on the lots that had not been conveyed. *Id.* The defendant also had to pay a civil penalty of $235,000. *Id.* at 700.

[198] *Id.* at 698. For one of the lots, the wetlands line went through the purchaser's dining room. *Id.* at 689.

[199] *Id.* at 698.

[200] 331 F. Supp. 151 (S.D. Fla. 1971), *vacated in part*, 478 F.2d 418 (5th Cir. 1973), *on remand*, 387 F. Supp. 1404 (S.D. Fla. 1974), *rev'd in part, vacated in part*, 526 F.2d 1306 (5th Cir.), *on remand*, 423 F. Supp. 1197 (S.D. Fla. 1976), *vacated and remanded mem.*, 592 F.2d 1189 (5th Cir. 1979). *Moretti* involved a violation of § 10 of the RHA, but its precedent is applicable to CWA violations. *See supra* note 194.

[201] *Moretti*, 331 F. Supp. at 153–54.

[202] *Id.*

[203] *Moretti*, 387 F. Supp. at 1404, 1407.

[204] The purchasers were negligent because they bought their parcels after the government filed a *lis pendens*. *Id.* Because of increasing environmental enforcement, however, the court stated that there would be no such compassion in the future. *Id.*

[205] *Id.* Shallow canals are more beneficial environmentally than deep canals because shallow

canals in the lots that he had conveyed, the district court made certain that the restoration order would not interfere with the purchasers' use of the canals.[206]

While some courts have been reluctant to injure innocent purchasers and either have refused to order restoration altogether or have modified restoration orders so as not to harm innocent parties, other courts have been more willing to order restoration that might affect innocent parties adversely. In *United States v. Cumberland Farms, Inc.*, the District Court for the District of Massachusetts ordered the defendant to restore all the wetlands it had filled after July 1, 1977, the date when the Corps asserted jurisdiction over wetlands.[207] The court ordered restoration of the filled wetlands even though there was a possibility, but not a likelihood, that the restoration order would damage nearby cranberry bogs and flood nearby homes.[208] The court found that there was a distinct possibility that the restoration order would flood basements and ruin the septic systems of these homes.[209] These homes, built after 1977, would also suffer because the restored wetlands would be a mosquito breeding ground.[210]

Even though the district court found that the abutting homeowners built their homes in complete good faith and without any knowledge that the defendant was filling illegally,[211] the district court held that the plan was equitable because the homes were built after the Corps claimed jurisdiction over wetlands.[212] These homeowners, like people who build in violation of zoning laws of which they know nothing, had to bear the risk that the law would be enforced.[213] The

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canals support more aquatic life. *See Moretti*, 331 F. Supp. at 156. Therefore, Mr. Moretti had to raise the level of the canals. *See id.*

[206] *See Moretti*, 423 F. Supp. at 1201. Even though the canals would be partially filled, the lot owners still could use the canals for swimming, fishing, and for access to Florida Bay. *Id.*

[207] United States v. Cumberland Farms, Inc., 647 F. Supp. 1166, 1183 (D. Mass. 1986), *aff'd*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988).

[208] *Id.* at 1181. The district court indicated that it might have ruled against restoration if there was a greater possibility that the abutters would be injured. *See id.*

[209] *Id.* Flooded septic systems would be especially serious because the town had no sewage system. *Id.* If the septic system flooded, the value of the homes would be reduced greatly. *Id.*

[210] *Id.* Even with a possibility that abutters would face flooding of cellars and an increased mosquito population, the Court of Appeals for the First Circuit approved the district court's restoration plan. *Cumberland Farms*, 826 F.2d at 1165; *see also* United States v. Edwards, 667 F. Supp. 1204, 1211 (W.D. Tenn. 1987) (violations of the CWA "may be remedied even if other property in the immediate area is affected").

[211] *Cumberland Farms*, 647 F. Supp. at 1183.

[212] *Id.*

[213] *Id.*

district court modified the restoration order so as not to harm the nearby cranberry bogs because the cranberry bogs existed before the Corps claimed jurisdiction over wetlands and because the cranberry bogs would qualify for an agricultural exemption to the CWA.[214]

### *D. The Liability of Non-Performing Parties Under the CWA*

Courts usually hold parties who have performed unauthorized activity liable for the restoration of illegally filled wetlands. A typical wetlands enforcement action involves parties, such as landowners and developers, who have performed unauthorized activity on their own property. A number of courts, however, also have held non-performing parties, people who have not actually performed illegal activity, liable for the restoration of illegally filled wetlands.[215]

In *United States v. Robinson*, the District Court for the Middle District of Florida held a purchaser who tried to evade Corps jurisdiction liable for restoration because the purchaser had actual and constructive knowledge of the existence of illegally filled wetlands on the purchased property.[216] Garland Robinson violated the CWA by placing fill in wetlands before receiving a Corps permit.[217] The government filed suit against Garland Robinson and his wife, Ernestine, and filed a *lis pendens*[218] against their property.[219] Shortly after the United States filed the suit and the *lis pendens*, the Robinsons conveyed their property to their cousin, Bradley Robinson.[220] Garland Robinson, claiming that his wife had no interest in the property, then had his wife stipulated out of the lawsuit.[221] Ernestine then purchased the property from Bradley in an apparent attempt to evade Corps jurisdiction.[222]

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[214] *Id.* On appeal, the circuit court affirmed the restoration plan, ruling that the district court had protected adequately the abutter's interests. *Cumberland Farms*, 826 F.2d at 1165. The court noted that the evidence showed that there was only a minimal possibility of basement or septic flooding. *Id.*

[215] *See* United States v. Edwards, 667 F. Supp. 1204, 1215 (W.D. Tenn. 1987); United States v. Lambert, 589 F. Supp. 366, 374 (M.D. Fla. 1984); United States v. Robinson, 570 F. Supp. 1157, 1164 (M.D. Fla. 1983).

[216] *Id.* at 1164; *see supra* note 169.

[217] *Id.* at 1160.

[218] A *lis pendens* is a public notice filed to alert all persons that title to property is in litigation and that purchasers may be bound by an adverse judgment. BLACK'S LAW DICTIONARY 840 (5th ed. 1979).

[219] *Robinson*, 570 F. Supp. at 1162.

[220] *Id.*

[221] *Id.*

[222] *Id.* at 1162, 1164.

The district court held that these elusive transfers would not render Ernestine immune from liability for the restoration of the illegally filled wetlands because she had actual and constructive notice of the lawsuit before acquiring title to the property.[223] She had actual knowledge because she knew about the lawsuit filed by the United States, and she had constructive knowledge from the *lis pendens* that was on record.[224]

A landowner's knowledge that another party has placed unauthorized fill in wetlands on the landowner's property also may establish liability for the restoration of illegally filled wetlands. In *United States v. Lambert*,[225] William Lambert placed fill on land, owned jointly with his wife Lucille, containing wetlands.[226] The District Court for the Middle District of Florida imposed a civil penalty on Mr. Lambert and ordered him to restore part of his property.[227] The court also held Mrs. Lambert subject to the restoration order because she was aware of the illegal filling.[228] The court refused to impose a civil penalty on Mrs. Lambert, however, because she did not actually direct or cause the filling.[229] To enforce Mr. Lambert's civil penalty, the court placed an equitable lien for the amount of the civil penalty on Mrs. Lambert's interest in the property.[230]

In *United States v. Edwards*,[231] the District Court for the Western District of Tennessee held a landowner who did not perform illegal activity, but who inherited property that contained illegally filled wetlands, liable for restoration.[232] In *Edwards*, Joseph Carter constructed unauthorized drainage ditches and levees that damaged

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[223] *Id.* at 1164.

[224] *Id.* at 1162.

[225] 589 F. Supp. 366 (M.D. Fla. 1984).

[226] *Id.* at 374.

[227] *Id.*

[228] *Id.* A court probably would not find that knowledge of illegal filling alone would result in liability. If this were true, a landowner could be liable if a third party dumped illegal fill on a landowner's property without permission. A court probably would require some evidence of tacit permission, acquiescence, or financial benefit of the landowner to hold the landowner liable. *See id.*; *see also Robinson*, 570 F. Supp. at 1165.

[229] *Lambert*, 589 F. Supp. at 374.

[230] *Id.* The CWA, unlike CERCLA, 42 U.S.C. § 9607(l) (1988), does not authorize a lien to enforce payment for restoration. A court may place an equitable lien, however, on corporate real estate and on corporate assets. *See* United States v. Moretti, 423 F. Supp. 1197, 1202 (S.D. Fla. 1976), *vacated and remanded mem.*, 592 F.2d 1189 (5th Cir. 1979). The Corps also may perform the restoration and look to the responsible party for recovery. *See* W. WANT, *supra* note 28, at 12-6.

[231] 667 F. Supp 1204 (W.D. Tenn. 1987).

[232] *Id.* at 1215.

three hundred acres of wetlands on his property.[233] The government brought suit against Carter seeking civil penalties and a restoration order, but Carter died before final judgment.[234] His wife, Elizabeth Carter, inherited the property and claimed that the civil penalty should not survive the death of her husband.[235]

After a lengthy analysis, the court ruled that, because the civil penalty was penal in nature, it did not survive Carter's death.[236] Without much discussion, however, apparently assuming that the remedial, and not penal, nature of the restoration order meant that the injunction order survived Joseph Carter's death, the court held Elizabeth Carter liable for the restoration of the illegally filled wetlands.[237] The court noted that the restoration would be inexpensive because Elizabeth Carter had the necessary equipment to perform the restoration.[238] She would only have to remove levees and fill in drainage ditches, rather than removing large amounts of fill.[239]

## V. PURCHASER LIABILITY FOR THE CLEANUP OF HAZARDOUS WASTE UNDER CERCLA

CERCLA imposes strict liability for the costs of hazardous waste cleanup.[240] To avoid liability, purchasers must conduct a duly diligent

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[233] *Id.* at 1205.

[234] *Id.*

[235] *Id.* at 1211. Mrs. Carter was joined in the suit both as executrix of Mr. Carter's estate and individually when she inherited the property. *Id.* at 1205.

[236] *Id.* at 1214. The court relied upon the common-law principle that penal actions cease upon the death of the responsible party. *Id.* at 1212.

[237] *Id.* at 1214.

[238] *Id.* at 1210.

[239] *Id.* Courts may be able to hold non-performing parties liable for illegally filled wetlands or force landowners to allow a third party to restore wetlands on the landowner's property under the All Writs Act. *See* 28 U.S.C. § 1651(a) (1988). The All Writs Act states: "The Supreme Court and all courts established by Acts of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law." *Id.*; *see also* United States v. New York Telephone Co., 434 U.S. 159, 171–78 (1977). The Supreme Court stated that the All Writs Act "extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper implementation of justice." *Id.*; *see also* Mumford Cove Ass'n v. Town of Groton, 647 F. Supp. 671, 688, 693 (D. Conn. 1986) (court restrained actions of town of Groton, its officials, and all persons who received actual notice of the court's order from interfering with prior court decisions demanding compliance with the CWA). *But cf.* General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 401 (1982) (All Writs Act did not impose liability on the Buildings Contractors Association to aid in curing past discrimination).

[240] *See* 42 U.S.C. §§ 9601(32), 9607(a), (b) (1988).

investigation to detect hazardous waste before they buy property.[241] This due diligence requirement for hazardous waste suggests that purchasers of illegally filled wetlands may be held liable for restoration if they do not conduct a duly diligent investigation to detect illegally filled wetlands before purchasing property.

In response to public concern over the toxic waste problem, Congress passed CERCLA to promote the cleanup of existing toxic waste disposal sites.[242] CERCLA created a fund (now called "The Hazardous Substance Superfund") to pay for the cleanup of hazardous substances.[243] CERCLA mandates that the government should commence a cleanup using money from the fund and then look to private parties to recover cleanup costs.[244] In passing CERCLA, Congress intended that those responsible for pollution should pay for all of the costs associated with the cleanup of pollution.[245]

Under CERCLA, four classes of people face liability for cleanup costs: the current owner of a facility,[246] the owner at the time of the disposal of the hazardous waste, the generator of the hazardous waste, and the transporter of the waste.[247] Because CERCLA defines "liability" by referring to the strict liability established by a section of the Clean Water Act that regulates the release of oil and hazardous substances, defendants face strict liability.[248] Congress believed that strict liability would achieve the goal of making those

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[241] *See infra* text accompanying notes 263–68.

[242] *See* H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt.1, at 17–18, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6119–20. Congress was reacting partly in response to the public furor created over the hazardous waste contamination found at Love Canal. *See* Glass, *Superfund and SARA: Are There Any Defenses Left?*, 12 HARV. ENVTL. L. REV. 385 (1988).

[243] 42 U.S.C.A. § 9611 (West 1983 & Supp. 1990).

[244] *See* 42 U.S.C. § 9607(a) (1988); *see also* J. MOSKOWITZ, ENVIRONMENTAL LIABILITY AND REAL PROPERTY TRANSACTIONS: LAW AND PRACTICE 47 (1989).

[245] *See* S. REP. NO. 848, 96th Cong., 2d Sess. 13, *reprinted in* 2 H. NEEDHAM & M. MENEFEE, SUPERFUND: A LEGISLATIVE HISTORY 483 (1984) (published by the Environmental Law Institute) [hereinafter SUPERFUND LEG. HIST.].

[246] CERCLA defines "facility" as any building, structure, site, or area where a hazardous substance has been deposited, disposed of, or otherwise come to be located. 42 U.S.C. § 9601(9) (1988).

[247] *Id.* § 9607(a).

[248] *Id.* § 9601(32). Section 311 regulates the discharge of oil and hazardous waste and does not establish strict liability for § 404 wetlands violations and other CWA violations. *See* 33 U.S.C. § 1321 (1988). Congress was aware that by referring to § 311 of the Clean Water Act they were establishing a strict liability standard. *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985); 126 CONG. REC. 11,787 (1980), *reprinted in* 1 SUPERFUND LEG. HIST., *supra* note 245, at 164; 126 CONG. REC. 14,963 (1982), *reprinted in* 1 SUPERFUND LEG. HIST., *supra* note 245, at 168.

who benefit financially from the production of hazardous waste bear its costs.[249]

Although CERCLA imposes strict liability, it also contains three defenses to liability: acts of God, acts of war, or acts or omissions of third parties.[250] In order for a defendant to assert the third-party defense successfully, CERCLA has three requirements: the third party must not be an employee or an agent of the defendant;[251] the release of the hazardous waste may not occur in connection with a contractual relationship between the defendant and the third party;[252] and the defendant must establish that he or she exercised due care with the hazardous substance and took precautions against foreseeable acts of third parties.[253]

The third-party defense appears to provide an avenue of escape from liability. Courts, however, have been reluctant to grant the third-party defense.[254] For example, in *New York v. Shore Realty Corp.*,[255] the defendant realty corporation acquired a parcel for development that contained 700,000 gallons of hazardous waste placed there by the previous owner.[256] The defendant argued that it met the requirements of the third-party defense because the previous owner was a third party who had discharged the waste.[257] The Court of Appeals for the Second Circuit held that the defendant could not use the third-party defense because the acts and omissions of the third party occurred not during the defendant's ownership, but prior to the defendant's ownership.[258]

In addition to interpreting the third-party defense narrowly, courts also hold landowners liable for the cleanup of hazardous waste

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[249] S. REP. NO. 848, 96th Cong., 2d Sess. 13 (1979), *reprinted in* 2 SUPERFUND LEG. HIST., *supra* note 245, at 482.

[250] 42 U.S.C. § 9607(b) (1988).

[251] *Id.* § 9607(b)(3).

[252] *Id.*

[253] *Id.* Although the Senate and House reports show that Congress was concerned about holding liable those who caused or financially benefitted from waste disposal, there does not seem to be an intent to hold innocent parties liable. *See* S. REP. NO. 848, 96th Cong., 2d Sess. 13 (1979), *reprinted in* 2 SUPERFUND LEG. HIST., *supra* note 245, at 483; H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 33 (1980), *reprinted in* 2 SUPERFUND LEGISLATIVE HISTORY, *supra* note 245, at 445.

[254] *See* Glass, *supra* note 242, at 395–96.

[255] 759 F.2d 1032 (2d Cir. 1985).

[256] *Id.* at 1038. Shore Realty was aware that hazardous waste was being stored on the parcel it purchased. *Id.*

[257] *Id.* at 1048.

[258] *Id.* The circuit court found that the acts or omissions of a third party had to occur during the ownership or operation of the defendant, even though this limitation is not contained in the language of CERCLA. *See* J. MOSKOWITZ, *supra* note 244, at 124.

regardless of causation.[259] In *Shore Realty*, the circuit court ruled that CERCLA imposes liability regardless of an owner's causation of, or contribution to, the discharge of hazardous waste.[260] The circuit court held Shore Realty liable as a current owner of the site even though the corporation neither had been a cause of, nor had contributed to, the discharge of the hazardous waste.[261] Another court held a lessor of a site containing hazardous waste liable for cleanup costs even though the lessor merely owned the property and had not contributed to the discharge of the hazardous waste.[262]

In response to this rigid liability, Congress amended the third-party defense by passing the Superfund Amendments and Reauthorization Act of 1986 (SARA).[263] SARA allows innocent landowners to use the third-party defense if they purchase contaminated property after the disposal of hazardous waste and if they did not know, and had no reason to know, about the presence of the hazardous waste.[264] To meet this requirement, the defendant must have undertaken all appropriate inquiries of the previous uses and ownership of the property consistent with good commercial practice.[265]

Accordingly, SARA envisions that a landowner must engage in a diligent search for hazardous waste before purchase to qualify for the defense, a so-called "due diligence" search.[266] A due diligence search may involve a site investigation to spot hazardous waste problems, a historical review of a site, a search of agency files to

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[259] *See* J. MOSKOWITZ, *supra* note 244, at 49; Glass, *supra* note 242, at 396.

[260] *Shore Realty*, 759 F.2d at 1044. *See generally* Comment, *The Practical Significance of the Third-Party Defense Under CERCLA*, 16 B.C. ENVTL. AFF. L. REV. 383 (1988).

[261] *Shore Realty*, 759 F.2d at 1044.

[262] United States v. Argent Corp., 21 Env't Rep. Cas. (BNA) 1354, 1356 (D.N.M. 1984). The owner could not use the third-party defense because the owner had a contractual relationship, a lease, with the discharger of the hazardous waste. *Id.*

[263] Pub. L. No. 99-499, 100 Stat. 1615 (1986); *see* H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. 186–88, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3276, 3279–80.

[264] 42 U.S.C. § 9601(35)(A) (1988).

[265] *Id.* § 9601(35)(B). To determine what constitutes an appropriate inquiry, SARA states that a court shall consider a number of factors: any specialized knowledge of the defendant, the ability of an inspection to detect the contamination, the obviousness of the contamination, common or easily discernible information about the contamination, and the difference between the purchase price of the property and the value of the property if uncontaminated. *Id.* In addition, a district court found that commercial transactions are to be held to the highest standard of liability, private transactions to be less strict, and inheritances and bequests the least strict standard of liability. United States v. Pacific Hide & Fur Depot, Inc., 716 F. Supp. 1341, 1348 (D. Idaho 1989); *see* H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. 187–88, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3276, 3280–81.

[266] H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. 186–88, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3276, 3279–81; *see also* J. MOSKOWITZ, *supra* note 244, at 125.

detect past violations, an analysis of aerial photographs, and chemical sampling of soil and ground water.[267] If a purchaser does not exercise due diligence in purchasing property, a court probably would find that the purchaser does not qualify for the third-party defense.[268]

## VI. WETLANDS PURCHASER LIABILITY: ACTUAL KNOWLEDGE, CONSTRUCTIVE KNOWLEDGE, AND DUE DILIGENCE

### *A. The Statutory and Case Law Argument for Purchaser Liability*

Purchaser liability for the restoration of illegally filled wetlands will fulfill the congressional objective of maintaining and restoring the nation's waters, including wetlands.[269] Holding purchasers liable will protect wetlands in several ways: it will deter the illegal filling of wetlands, provide for increased restoration of illegally filled wetlands, and dampen the incentive to purchase illegally filled wetlands. Perhaps most important, purchaser liability will increase public awareness about the importance of wetlands.

Purchaser liability also will allow courts to remedy the continuing harm of filled wetlands.[270] Compared to liquid water pollution, which dissipates when discharged into wetlands, fill material remains in wetlands, destroying their value and function.[271] For example, filled wetlands do not filter pollutants, provide wildlife habitat, or store flood waters.[272]

Courts may hold purchasers liable for the restoration of illegally filled wetlands for several reasons. Courts have held that illegally filled wetlands are a continuing CWA violation. Courts have interpreted the CWA as establishing liability for the number of days that

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[267] J. MOSKOWITZ, *supra* note 244, at 207–19.

[268] Glass, *supra* note 242, at 397.

[269] *See* 33 U.S.C. § 1251(a) (1988). Recently, the Corps and the EPA recognized the special significance of wetlands. *See* WETLANDS MOA, *supra* note 40, at 2. The Corps declared that it would strive to achieve a goal of no net loss of wetlands. *Id. See generally* Gardner, *The Army-EPA Mitigation Agreement: No Retreat from Wetlands Protection*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,337 (1990); Houck, *More Net Loss of Wetlands: The Army-EPA Memorandum of Agreement on Mitigation Under the Section 404 Program*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,213 (1990); Want, *The Army-EPA Agreement on Wetlands Mitigation*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,209 (1990).

[270] *See* United States v. Carter, 18 Env't Rep. Cas. (BNA) 1810, 1812 (S.D. Fla. 1982).

[271] *See* North Carolina Wildlife Fed'n v. Woodbury, 29 Env't. Rep. Cas. (BNA) 1941, 1943 (E.D.N.C. 1989).

[272] J. KUSLER, *supra* note 20, at 7.

wetlands remain filled.[273] A CWA violation does not just consist of the days that a defendant has actually discharged fill into wetlands.[274] Courts also assess civil penalties based on the number of days that illegal fill remains in wetlands[275] and have held defendants liable for restoration years after a defendant has actually filled wetlands.[276] Because filled wetlands are a continuing CWA violation, purchasers of illegally filled wetlands may be held liable for their restoration.

Restoration case law supports the proposition that non-performing parties,[277] such as purchasers, may be held liable for the restoration of illegally filled wetlands. Because courts have held a landowner who inherited illegally filled wetlands[278] and a purchaser with actual and constructive knowledge of illegally filled wetlands[279] liable for restoration, a party need not actually fill wetlands to be liable for a CWA violation.

A court's power to hold non-performing parties liable also may be inferred from the broad and inclusive language of the CWA's enforcement sections. Section 309(b) authorizes the EPA to commence a civil action "for appropriate relief."[280] Section 309(a) authorizes the EPA to issue a compliance order against "any person" in violation of the CWA.[281] "Appropriate relief" and "any person" are broad enough to include purchasers and other non-performing parties. Given this broad language, courts should not limit the relief authorized by the CWA by refusing to hold purchasers liable.

Purchasers might object to purchaser liability because the CWA makes illegal "any discharge by any person."[282] Thus, an argument could be made that only people who actually discharge fill into wetlands may be held liable. Purchasers would argue that, because there is no express statutory language authorizing purchaser liability,

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[273] *See supra* text accompanying notes 100–13.

[274] *See, e.g., Woodbury*, 29 Env't. Rep. Cas. (BNA) at 1943; United States v. Cumberland Farms, 647 F. Supp. 1166, 1183 (D. Mass. 1986), *aff'd*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988); United States v. Tull, 615 F. Supp. 610, 626 (E.D. Va. 1983), *aff'd*, 769 F.2d 182 (4th Cir. 1985), *rev'd on other grounds*, 481 U.S. 412 (1987).

[275] *See supra* notes 100–04 and accompanying text.

[276] *See, e.g., Cumberland Farms*, 647 F. Supp. at 1183. A purchaser may argue that the cases that treat filled wetlands as a continuing CWA violation do not establish that illegally filled wetlands are a continuing violation that purchasers must remedy. A purchaser may argue that these cases only establish that a person who discharges fill must remove the fill remaining in wetlands.

[277] Non-performing parties are parties who have not actually filled wetlands illegally.

[278] United States v. Edwards, 667 F. Supp. 1204, 1205, 1215 (W.D. Tenn. 1987).

[279] United States v. Robinson, 570 F. Supp. 1157, 1164 (M.D. Fla. 1983).

[280] 33 U.S.C. § 1319(d) (1988).

[281] *Id.* § 1319(a).

[282] *Id.* § 1311(a).

courts should refuse to hold purchasers liable. If congress had intended to hold purchasers liable, they should have included specific language authorizing purchaser liability.[283] A purchaser would see the imposition of purchaser liability under section 404 of the CWA as unwarranted judicial activism.[284]

### *B. Equitable Balancing and Purchaser Liability*

If courts respect the congressional objective of restoring wetlands and if they accord sufficient weight to environmental harm, they should favor restoration and not hesitate to hold purchasers liable when they balance the equities in deciding whether to order restoration. Although the Supreme Court stated in *Romero-Barcelo* that a court does not have to issue an injunction automatically when faced with a statutory violation, courts may not ignore statutory violations.[285] Courts must exercise their equitable discretion to achieve prompt compliance with the CWA and to achieve the objectives of the Act.[286] Therefore, in wetlands cases, courts may balance the equities, but they must be certain to achieve prompt compliance with the CWA.

The district court's decision in *Cumberland Farms* is an example of the presumption in favor of wetlands restoration that courts should adopt when exercising their equitable discretion.[287] Ruling upon a wetlands restoration plan, the district court stated that courts should order restoration unless the detriments of a restoration plan significantly outweigh the benefits.[288] The court found that the controlling law and the CWA's legislative intent favored restoration.[289]

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[283] A purchaser also may argue that CERCLA liability for hazardous waste shows that Congress knows how to hold purchasers liable. *See* 42 U.S.C. § 9607(a) (1988). Nevertheless, the CWA grants courts broad power to issue injunctions. *See* 33 U.S.C. § 1319(b) (1988). These broad powers indicate that Congress trusted the courts to determine appropriate remedies for CWA violations. If courts prove reluctant to hold purchasers liable for illegally filled wetlands, a CWA amendment creating purchaser liability may be necessary to protect wetlands. Any amendments to the CWA may create too strict a standard of liability, however, and may be unfair to purchasers. Scholars have criticized CERCLA, which creates purchaser liability for hazardous waste, as being too strict. J. MOSKOWITZ, *supra* note 244, at 7–8. The SARA amendments to CERCLA tried to soften purchaser liability by creating an innocent-landowner defense. Glass, *supra* note 242, at 396. Commentators, however, have attacked this defense as not giving purchasers any real relief from liability. *Id.* Accordingly, leaving purchaser liability to the flexibility of equitable discretion may be the wisest course.

[284] For a response to this criticism, see *supra* text accompanying notes 269–81.

[285] *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 321 (1982).

[286] *Id.*

[287] United States v. Cumberland Farms, 647 F. Supp. 1166, 1182 (D. Mass. 1986), *aff'd*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988).

[288] *Id.*

[289] *Id.*

The *Weisman* tests, which courts use to determine whether to order restoration,[290] allow a court broad flexibility to consider non-environmental factors. Many of these, such as the cost to the defendant,[291] weigh against restoration.[292] Courts should consider non-environmental factors but should not over-emphasize them. The *Weisman* tests should be used with an awareness of the environmental harm caused by filled wetlands and with a special awareness for environmental harm that is not immediately apparent.[293] Courts should follow the *Cumberland Farms* decision and exercise the *Weisman* tests realizing that the controlling law, the legislative intent, and the harm to the environment all favor restoration.[294]

Courts, however, should neither issue an injunction automatically nor create an irrebuttable presumption in favor of restoration. Judicial consideration of non-environmental factors, including the harm to a defendant, is necessary to prevent purchaser liability from becoming unfair. Equitable discretion gives courts flexibility to tailor the remedy to the violation. For example, courts should refuse to impose liability for restoration on a purchaser of residential property who purchases property without knowledge that the property contains illegally filled wetlands if restoration would require removal of the purchaser's home.[295] Courts should be more willing to hold commercial purchasers of property that is obviously wetlands liable for restoration.[296] Thus, courts should exercise their equitable discretion with a presumption in favor of restoring wetlands but with an awareness that purchasers should not be held liable unjustly.

### *C. The Nature of Purchaser Liability for the Restoration of Illegally Filled Wetlands*

Given that the CWA and restoration case law authorizes courts to hold purchasers liable, purchasers should be held liable if they have

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[290] United States v. Weisman, 489 F. Supp. 1331, 1342–43 (M.D. Fla. 1980).

[291] United States v. Huebner, 752 F.2d 1235, 1245 (7th Cir.), *cert. denied*, 474 U.S. 817 (1985).

[292] *See supra* notes 155–88 and accompanying text.

[293] *See Weisman*, 489 F. Supp. at 1346.

[294] *See* United States v. Cumberland Farms, 647 F. Supp. 1166, 1182 (D. Mass. 1986), *aff'd*, 826 F.2d 1151 (1st Cir 1987), *cert. denied*, 484 U.S. 1061 (1988).

[295] *See* United States v. Ciampitti, 669 F. Supp. 684, 698 (D.N.J. 1987) (court denied restoration because it would require removal of residences of purchasers, who had no knowledge of illegally filled wetlands); United States v. Board of Trustees of Fla. Keys Community College, 531 F. Supp. 267, 275 (S.D. Fla. 1981) (court refused to order restoration of illegally filled wetlands although defendant had to create new wetlands to replace the illegally filled wetlands).

[296] *See infra* text accompanying notes 305–09.

actual or constructive knowledge of the presence of illegally filled wetlands or if they fail to be duly diligent in their purchase. A purchaser who had actual and constructive knowledge of the presence of illegally filled wetlands was held liable for restoration in *United States v. Robinson*.[297] Although *Robinson* involved a purchaser who was engaged in a fraudulent scheme to evade Corps jurisdiction,[298] the *Robinson* decision illustrates that courts will consider holding purchasers liable if they have actual or constructive knowledge of illegally filled wetlands.[299]

Courts should adopt the *Robinson* precedent and hold purchasers liable if they have actual or constructive knowledge. Actual knowledge would consist of knowledge of the existence of illegally filled wetlands, of a federal enforcement action, or of a lawsuit alleging a CWA violation. Constructive knowledge would exist when the Corps or the EPA provides notification of a lawsuit against a defendant by filing a *lis pendens* against the property involved in the lawsuit.[300]

In addition to liability premised on actual or constructive knowledge, purchasers should be held liable for a failure to be duly diligent when they purchase property containing illegally filled wetlands. CERCLA holds purchasers liable for the cleanup of hazardous waste if purchasers fail to exercise due diligence when they buy property containing hazardous waste.[301] The concept of a duly diligent investigation may be applied to the purchase of illegally filled wetlands.

To satisfy a wetlands due diligence requirement, purchasers could investigate a site to see if it contained any wetlands. For many types of wetlands, a purchaser easily could see whether a piece of property contains wetlands. If property contained wetlands, a purchaser would be on notice that the property could contain illegally filled wetlands, and would know to investigate further. Purchasers could research whether a piece of property contains filled wetlands by examining aerial photographs and soil samples.[302] At the very least,

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[297] 570 F. Supp. 1157, 1164 (M.D. Fla. 1983).

[298] *Id.* at 1162.

[299] *See id.* at 1164.

[300] *See supra* text accompanying notes 216–24. Constructive knowledge also could exist because of the condition of property. For example, a purchaser would have constructive knowledge if property was obviously wetlands and if there were signs of recent filling. For a discussion of this type of constructive knowledge, see *infra* text accompanying notes 301–02.

[301] *See* 42 U.S.C. § 9601(35) (1988).

[302] In United States v. Larkins, 657 F. Supp. 76 (W.D. Ky. 1987), *aff'd*, 852 F.2d 189 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1131 (1989), the court based its finding that the defendant illegally filled wetlands on an analysis of aerial photographs and of the soil beneath the filled wetlands. *Id.* at 81. Experts can detect when and if wetlands have been filled by comparing

purchasers could ask the seller for a written guarantee that, as far as the seller knew, there were no filled wetlands on the property.[303] If filling had occurred, the purchasers could obtain a copy of the Corps permit authorizing the filling or determine whether the filling was exempt from the permitting requirement of section 404 of the CWA.

Wetlands due diligence would be narrow in scope. Purchasers would only have to be concerned about areas that possibly contain wetlands. Due diligence would not apply to areas that obviously are not wetlands or wetlands that were filled before Corps jurisdiction applied to those wetlands.[304]

Because purchaser liability would be exercised in the context of a court's equitable discretion, purchaser liability would be sufficiently flexible to avoid inequity. Like CERCLA liability, courts could consider the type of transaction in deciding whether to order restoration.[305] The legislative history of CERCLA establishes that commercial transactions have the highest standard of liability, residential transactions have a lower standard, and inheritances and bequests have the lowest standard of liability.[306] Courts could use a similar standard in assessing wetlands liability. A corporation engaged in development could be held to a higher standard of liability than a residential landowner. A court also could consider any special knowledge or skill of the defendant.[307]

Courts also could consider the type of wetlands involved. Courts could be more strict with purchasers of property, such as tidal marshes and swamps, that is obviously wetlands. Courts could be less strict if the wetlands was not obviously wetlands, for example, a wet meadow that was wet only during certain times of the year.

Courts have additional flexibility because they do not have to force a purchaser to pay for the entire cost of restoration. Courts may

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aerial photographs taken before any possible filling and after the wetlands have been filled. These aerial photographs are available at federal and state agencies.

[303] If a seller states that no wetlands filling has occurred knowing that filling has occurred, a purchaser could seek rescission of the contract or an abatement of the purchase price. *See* Shore Builders, Inc. v. Dogwood, Inc., 616 F. Supp. 1004, 1005–06 (D. Del. 1985) (purchasers sought rescission of contract to buy partnership whose sole asset was an undeveloped parcel of land, when the Corps claimed it had jurisdiction over the parcel).

[304] SARA requires courts to consider the obviousness of the hazardous waste. *See* 42 U.S.C. § 9601(35)(b) (1988).

[305] *See* United States v. Pacific Hide & Fur Depot, Inc., 716 F. Supp. 1341, 1348 (D. Idaho 1989).

[306] *Id.*

[307] SARA requires courts to consider any special knowledge of the defendant. 42 U.S.C. § 9601(35)(B) (1988).

require third parties who have performed the actual filling, such as a seller, to restore wetlands on the purchased property. Thus, a purchaser would be required only to allow the third party on the purchased property to restore the wetlands.[308]

Although wetlands due diligence is a novel idea, hazardous waste due diligence is accepted commercial practice.[309] Due diligence should be applied to wetlands because of the increasing awareness of the importance of wetlands, the accepted nature of due diligence for hazardous waste, and because courts could equitably hold purchasers liable for failing to be duly diligent. Due diligence for the restoration of illegally filled wetlands also will realize the congressional intent to restore and maintain wetlands.

## VII. CONCLUSION

The Clean Water Act's objective is to restore and maintain this nation's waters, including wetlands. Purchaser liability for the restoration of illegally filled wetlands will fulfill this objective. Purchaser liability will improve public awareness of the importance of wetlands, deter the illegal development of wetlands, and remedy the continuing harm of filled wetlands.

Courts have the authority under the CWA to hold purchasers liable for wetlands restoration because illegally filled wetlands are a continuing CWA violation, because non-performing parties may be held liable for restoration, and because the CWA's enforcement and liability provisions are broad enough to include purchasers. Because purchaser liability will further the CWA's objectives, courts should abandon their reluctance to hold purchasers liable.

The Comprehensive Environmental Response, Compensation, and Liability Act requires that purchasers perform a duly diligent search to avoid hazardous waste liability. Given that vital wetlands are disappearing rapidly, purchaser liability for the restoration of ille-

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[308] *See* W. WANT, *supra* note 28, at 12-6. In United States v. Pozsgai, 31 Env't Rep. (BNA) 1230 (E.D. Pa.), *aff'd mem.*, 897 F.2d 524 (3d Cir. 1990), the District Court for the Eastern District of Pennsylvania divided the cost of restoration of illegally filled wetlands among three liable parties, the owner of the filled wetlands and two contractors, according to the parties' responsibility for the damage to the wetlands. *Id.* at 1231. Even if a third party pays for the cost of restoration, restoration of filled wetlands probably would reduce the value of purchased property significantly. If so, a purchaser could seek a rescission of the deed transferring the property or seek an abatement of the purchase price. *See* Shore Builders v. Dogwood, Inc., 616 F. Supp. 1004, 1005–06 (D. Del. 1985) (purchaser sought rescission or abatement from seller when property could not be developed because the Corps determined that the purchased property contained wetlands).

[309] *See* J. MOSKOWITZ, *supra* note 244, at 206.

gally filled wetlands demands a similar response. Purchasers should be held liable if they have actual or constructive knowledge that they are purchasing illegally filled wetlands or if they fail to be duly diligent in their purchase. Because restoration is an equitable order, courts will be able to hold purchasers liable without unduly punishing them. Courts should employ a presumption in favor of restoration but be aware of the hardship of forcing purchasers to restore illegally filled wetlands.