ENVIRONMENTAL LAW—RIVERS AND HARBORS ACT OF 1899—CONSTRUCTION ACTIVITIES IN VIOLATION OF ACT ENJOINED BY WAY OF ABATEMENT—*United States v. Stoeco Homes, Inc.*, 359 F. Supp. 672 (D.N.J. 1973).

Stoeco Homes, Inc., a New Jersey corporation, began construction of a residential lagoon development on New Jersey's coast line at Ocean City in the fall of 1965.[1] To create lots suitable for the building of these homes Stoeco undertook dredging and land filling operations on its bay front property.[2] Stoeco continued these activities through 1971 without first securing a permit from the United States Army Corps of Engineers as required by section 403 of the Rivers and Harbors Act of 1899.[3] In *United States v. Stoeco Homes, Inc.*,[4] the United States District Court for the District of New Jersey permanently enjoined Stoeco from engaging in dredging, filling, or construction operations at its Ocean City site without the prior recommendation of the Army Corps of Engineers and approval of the Secretary of the Army.[5]

Stoeco had purchased the tract of bay front property from the city of Ocean City and from private parties in 1951.[6] The tract consisted of low lying marsh and tidal flats below grade level, in addition to an upland area which had been filled in 1927.[7] To facilitate construction, Stoeco commenced dredging and filling bulkheaded areas of the tract in 1965 in order to create building lots.[8] These lots were to be separated from each other by a series of nine small "finger lagoons" which opened

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1 United States v. Stoeco Homes, Inc., 359 F. Supp. 672, 674 (D.N.J. 1973).

2 *Id.* at 675.

3 *Id.* at 677. The Rivers and Harbors Act § 10, 33 U.S.C. § 403 (1970) provides:

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

4 359 F. Supp. 672 (D.N.J. 1973).

5 *Id.* at 679-80.

6 Memorandum of Law, Stoeco Homes, Inc. at 1-2 [hereinafter cited as Brief for Defendant].

7 *Id.* at 1.

8 359 F. Supp. at 674; Brief for Defendant, *supra* note 6, at 3.

into a larger central lagoon, which in turn, connected with the intracoastal waterway. During the course of construction activities, dredge spoils and fines were discharged into both the man-made lagoons and a larger adjacent channel, periodically obstructing these waterways. "Blow-outs" of fill, resulting from breaks in the dikes, also contributed to the discharge of solids into these waterways.[9] By 1971, after a substantial part of the development had been completed, Stoeco commenced the dredging and filling of one of the last major portions of the project.[10] In April, 1971, on the basis of a citizen's complaint, the Army Corps of Engineers (ACOE) investigated the construction site and informed Stoeco that its failure to secure an ACOE permit was in violation of section 403, and ordered Stoeco to cease further construction.[11] Additional inspections by the district engineer of the ACOE revealed that the dredging activities were continuing, and on each occasion Stoeco was ordered to halt such activities.[12] Contrary to these orders, the defendant continued to dredge and fill until the federal district court, in September, 1972, issued a temporary restraining order enjoining further development pending final disposition of the action.[13]

While the Rivers and Harbors Act of 1899 has recently seen application in the environmental context,[14] its purpose as originally enacted was to give the federal government exclusive control over navigable waters in order to prevent any interference with water borne commerce.[15] Section 403 is a regulatory provision of the Act and may be broken down for analysis into three separate clauses. The first clause absolutely prohibits the creation of any obstruction to the navigable capacity of any waters of the United States without the approval of Congress. The second clause prohibits the building of any structure in waters of the United States without the recommendation of the Chief

9 359 F. Supp. at 676.

10 Brief for Defendant, *supra* note 6, at 3-4.

11 Government's Memorandum of Law in Support of Application for Preliminary and Permanent Injunction at 1 [hereinafter cited as Brief for Plaintiff].

12 359 F. Supp. at 675; Brief for Plaintiff, *supra* note 11, at 1-3.

13 359 F. Supp. at 675.

14 *See* notes 67-72 *infra* and accompanying text.

15 *See* United States v. Republic Steel Corp., 362 U.S. 482, 485-86 (1960). The basis for the enactment of the statute was the Supreme Court's decision in Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888). In this case, review was sought of a circuit court decision which had granted a permanent injunction against the building of a bridge, and an abatement of a portion which had already been constructed in a navigable river in the state of Oregon. The Supreme Court reversed, concluding that while Congress had the power to regulate navigable waterways, in the absence of legislation, there was no federal common law which prohibited obstruction of a navigable river. *Id.* at 8. To remedy this situation, a regulatory statute, which was the immediate predecessor to the 1899 Act, was enacted. Act of Sept. 19, 1890, ch. 907, 26 Stat. 426.

of Engineers of the ACOE and authorization by the Secretary of the Army. The third clause prohibits the excavation, fill, or alteration of any navigable water of the United States without the recommendation of the Chief of Engineers of the ACOE and authorization by the Secretary of the Army.[16] The enforcement provision of the Act, section 406, sanctions criminal penalties for violation of section 403, and further empowers the district court to enforce the removal of structures erected in violation of that section by way of injunction.[17]

Fundamental to the application of section 403 is a preliminary finding that the waters at issue are navigable waters under federal jurisdiction. Although the oldest definition of navigable waters is that of the English common law, which considered all waters influenced by the ebb and flow of the tides to be navigable, in the context of the American federal system this concept proved inadequate to meet the unique requirements of American geography. Instead, the definition as developed in federal case law involves the utility of the waterway as a commercial artery.[18]

This American concept of navigability was first articulated in *The Daniel Ball*,[19] where navigable waters were found to be those susceptible

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16 33 U.S.C. § 403. See note 3 *supra* for the full text of the statute. The administrative procedure by which the Corps of Engineers issues permits under section 403 is detailed in 33 C.F.R. § 209.110 *et seq.* (1972).

17 33 U.S.C. § 406 (1970) provides:

> Every person and every corporation that shall violate any of the provisions of sections 401, 403, and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

33 U.S.C. § 413 (1970) requires the United States attorney to "vigorously prosecute all offenders" of the Act.

18 The common law definition of navigability was uniquely suited for the purposes of English law since, by virtue of its topography and the sea surrounding that island nation, virtually all waterways which were navigable in fact were subject to tidal influences. By way of contrast, the geography of the United States necessitates a different conclusion. Many rivers of this nation are navigable far above the reaches of tidal waters, and some are not affected by tidal influences at any point along their entire lengths. The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1871). Thus, the test applied in this country is the navigable capacity of the river itself. "Those rivers must be regarded as public navigable rivers in law which are navigable in fact." *Id.*

19 77 U.S. (10 Wall.) 557 (1871).

of commerce.[20] According to this standard, if a waterway is capable of supporting commerce in its natural state, it is navigable in fact, and thus is navigable in law.[21] A significant extension of this doctrine was realized in *United States v. Appalachian Electric Power Co.*,[22] a case involving the proposed construction of a dam across a river, which in its natural state was characterized by falls, rapids and obstructions.[23] The Court, in broadening the scope of *The Daniel Ball*, held that a waterway need not be navigable in its natural state if it has been, or could be, made navigable by reasonable means.[24]

The concept of navigability, however, is not the sole basis upon which federal jurisdiction over waters may be invoked. Wetlands, marshes and meadows lying below the ordinary high water mark and influenced by the tides, are subject to federal regulation and control no matter how shallow or obstructed.[25] Thus, all navigable waterways and virtually all lands covered by tidal waters are proper subjects of federal regulation.

In *Stoeco Homes* the court expressly determined that the activities conducted by Stoeco took place in navigable waters,[26] and that their activities in those waters constituted an obstruction.[27] The court further concluded that Stoeco had been aware of the ACOE permit requirement as early as 1949, but despite this knowledge, had never received proper authorization.[28] Thus, the court found Stoeco Homes to be in violation of section 403 since it had obstructed navigable waters without prior authorization from the Secretary of the Army.[29]

In granting the injunction abating further construction without an ACOE permit, the court expressly concluded that section 406 authorized a statutory injunction to abate a section 403 violation.[30] Careful analysis of the specific provisions of the Act, however, reveals no specific

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20 *Id.* at 563.

21 *Id. See* note 18 *supra.*

22 311 U.S. 377 (1940).

23 *Id.* at 410-13.

24 *Id.* at 407-09.

25 The Submerged Lands Act, 43 U.S.C. § 1301 *et seq.* (1970), regards all lands permanently or periodically covered by tidewaters, and all lands formerly covered by tidewaters, as lands beneath navigable waters and thus the proper subject of federal regulation.

26 359 F. Supp. at 676-77.

27 *Id.* at 678.

28 *Id.* at 677. The court noted that Stoeco had received a federal permit to develop access channels in the area fronting on its development site. However, the court concluded that Stoeco "knew, or should have known, this permit to be of limited scope and duration." *Id.*

29 *Id.* at 678.

30 *Id.*

statutory provision to secure injunctive relief of such a violation by way of abatement. Section 406 provides *inter alia* that

> the *removal* of any structures or parts of structures . . . may be enforced by the injunction of any district court . . . .[31]

Thus, the express language of section 406 provides injunctive relief only for the removal of a structure erected in violation of section 403.

Despite the apparent limitation on the injunctive power authorized by section 406, the court's granting of relief by way of abatement may be sustained on the basis of its inherent power to infer a remedy in order to achieve the objective of a regulatory scheme which furthers the public interest.

The Supreme Court of the United States has recognized that the specific statutory remedies afforded by the Rivers and Harbors Act are not exclusive, and that appropriate remedies may be inferred from the regulatory nature of the Act. In *United States v. Republic Steel Corp.*,[32] the defendant steel company operated mills on the banks of a navigable waterway into which industrial solids were discharged, ultimately reducing the depth of the channel. The United States brought suit under sections 403 and 406 of the Act seeking injunctive relief for the removal of the waste material from the waterway and for the restoration of the channel to a navigable depth.[33]

The Court first concluded that such solid industrial wastes constituted an obstruction within the meaning of section 403.[34] Having found a violation of the statute, the Court next proceeded to consider the appropriate remedy. While section 406 of the Act expressly provided a statutory injunction for removal of structures erected in violation of section 403, no such express provision for injunctive relief was provided for removal of obstructions.[35] The Court, however, recognized that the Act manifested an important federal interest upon which appropriate relief could be fashioned. Detailed codification of remedies was found to be unnecessary in view of the congressional intent.

> Congress has legislated and made its purpose clear; it has provided enough federal law in § 10 [section 403] from which appropriate remedies may be fashioned even though they rest on inferences.

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31 33 U.S.C. § 406 (1970) (emphasis added). See note 17 *supra* for full text of the statute.

32 362 U.S. 482 (1960).

33 *Id.* at 483.

34 *Id.* at 489.

35 *Id.* at 491.

> Otherwise we impute to Congress a futility inconsistent with the great design of this legislation.[36]

Relying on the broad purpose of the Act, the Court concluded that injunctive relief could be inferred even in the absence of express statutory authorization.[37]

Notwithstanding the majority's view, not all members of the Court were inclined to disregard the express injunctive remedy provided in section 406. In a vigorous dissenting opinion, Justice Harlan, joined by three other members of the Court, argued that even if a violation of section 403 were established, injunctive relief was not authorized.[38] Strictly construing section 406, Justice Harlan concluded that the waste from the respondent's mills did not constitute "structures" within the meaning of section 406, and thus their removal could not be enforced by way of injunction in the absence of an express statutory authorization.[39]

The Court had occasion to consider the remedial provisions of the Rivers and Harbors Act in *Wyandotte Transportation Co. v. United States*,[40] where once again it fashioned a remedy not specifically authorized by the statute. A barge owned by Wyandotte, laden with chlorine, had been negligently sunk in the Mississippi River. The federal government raised the barge and sought reimbursement from the defendant for its expenses. While section 409 of the Act authorizes the removal by the United States of negligently sunken vessels, there is no provision for the reimbursement of costs occasioned by such removal.[41] Analogizing to *Republic Steel*, the Court concluded that the remedies and procedures specified by the Act were not intended

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36 *Id.* at 492.

37 *Id. See* Comment, *Substantive and Remedial Problems in Preventing Interferences With Navigation: The Republic Steel Case*, 59 COLUM. L. REV. 1065, 1079 (1959).

38 362 U.S. at 494 (Harlan, J., joined by Frankfurter, Whittaker, and Stewart, J.J., dissenting).

39 *Id.* at 508.

> What has happened here is clear. In order to reach what it considers a just result the Court, in the name of "charitably" construing the Act, has felt justified in reading into the statute things that actually are not there. However appealing the attempt to make this old piece of legislation fit modern-day conditions may be, such a course is not a permissible one for a court of law, whose function it is to take a statute as it finds it.

Id. at 510.

40 389 U.S. 191 (1967).

41 33 U.S.C. § 409 (1970) states in pertinent part:

> [I]t shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States . . . .

to be exclusive and therefore inferred a right of reimbursement on the part of the United States.

> We do not believe that Congress intended to withhold from the Government a remedy that ensures the full effectiveness of the Act.[42]

Thus, in granting the relief sought, the Court once again inferred the existence of a remedy to insure the enforcement of a congressional regulatory scheme.

Although the Rivers and Harbors Act was enacted to insure the free flow of commerce on the nation's navigable waterways,[43] the Act has seen more recent application in the environmental context. In *United States v. Joseph G. Moretti, Inc.*,[44] the defendant building contractor was engaged in the filling and bulkheading of a portion of Florida Bay in preparation of the site for a trailer park. Unlike previous cases prosecuted under section 406 for removal, the government in *Moretti* sought abatement of the defendant's filling and dredging activities and such other relief as the court might find appropriate.[45] Since the defendant failed to secure prior approval from the Corps of Engineers, the court found a clear violation of section 403. By way of injunctive relief, the court ordered Moretti to remove the fill, and enjoined further land sales pending restoration of the property to its original condition. The court found that the filling of Florida Bay constituted the creation of a "structure" subject to removal under section 406's express provision for injunctive relief.[46] As a logical and incidental consequence of the remedy of removal, the court abated further dredging and filling activities on the part of the defendant. Thus the court was able to afford the remedy of abatement in the absence of specific statutory authority by invoking the express injunc-

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42 389 U.S. at 204. Justice Harlan, in a concurring opinion, disclaimed the position that he had earlier taken in his dissenting opinion in *Republic Steel* concerning inferred relief.

> Insofar as that dictum might be taken to encompass the present case, where, contrary to my view in *Republic Steel*, I do believe that the relief afforded by this Court is fairly to be implied from the statute, candor would compel me to say that the dictum was ill-founded.

Id. at 211.

43 *See* note 15 *supra*.

44 331 F. Supp. 151 (S.D. Fla. 1971). *See generally* Note, *The Rivers and Harbors Act of 1899—A New Remedy for Illegal Dredge and Fill Operations*, 24 U. FLA. L. REV. 795 (1972).

45 331 F. Supp. at 153.

46 *Id.* at 157.

tive provision of section 406 and reading the Act charitably in light of the purpose to be served.[47]

In *United States v. Brookhaven*,[48] a federal district court was once again called upon to grant the government's prayer for injunctive relief. The case involved the town of Brookhaven, which had contracted to build wharves and piers in a harbor on Long Island Sound. Piles had been sunk into the harbor bottom without prior approval of the Corps of Engineers.[49] Following the issuance of a temporary restraining order, the court considered the plaintiff's motion for a preliminary injunction to abate further construction and dredging activities in the harbor. Although the government contended that the defendant's activities would damage the sea bottom, the court found it unnecessary to consider the extent of the injury in fashioning appropriate relief.[50] The court concluded that

> the government need not show irreparable injury in order to obtain injunctive relief when the right to an injunction has been specifically conferred by statute.[51]

The court recognized that section 406, by its terms, authorized injunctive relief for removal of unlawful structures, however it deferred removal of the piles upon consideration of the expense to the town. Pending application for the necessary permit, the court enjoined the town from further construction.[52] While prior decisions had relied on the inferred remedy of abatement after considering the broad purpose of the Act, the *Brookhaven* court considered it within its inherent discretion to defer removal of the existing piles and to abate further construction in the absence of specific statutory provisions.[53]

In *United States v. Underwood*,[54] the government moved for summary judgment declaring the defendant liable for injuries resulting from the excavation and dredging of a river in violation of section 403. The court, in holding Underwood liable to the United States, broadly interpreted the mandate of the Act, and citing *Wyandotte*, observed that the relief to which the government was entitled is the "remedy that ensures the full effectiveness of the Act."[55] The court

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47 *Id.* at 158.

48 2 E.R.C. 1761 (E.D.N.Y. 1971).

49 *Id.* at 1761.

50 *Id.* at 1762.

51 *Id.*

52 *Id.*

53 *Id.*

54 344 F. Supp. 486 (M.D. Fla. 1972).

55 *Id.* at 494 (quoting from Wyandotte Transp. Co. v. United States, 389 U.S. 191, 204 (1967)).

recognized that when the public interest is manifested by the enactment of statutes seeking to protect the navigable and ecological aspects of federal waterways, the power to grant injunctive relief is far greater. Where the government brings suit to protect these interests it is not bound by traditional equitable considerations.[56]

In contrast, an injunction sought by a private party in an ordinary equitable proceeding requires a more substantial showing by the aggrieved litigant. In such an interlocutory proceeding, the moving party must demonstrate that he is likely to prevail in a trial on the merits, that he is in danger of irreparable harm, that the damage to him outweighs the forseeable harm to the plaintiff if the relief is not granted, and that he has no adequate remedy at law.[57] Where, however, a prayer for injunctive relief is brought pursuant to a statute specifically authorizing such a remedy, it need only be shown that the statutory provisions have been violated.[58] For example, upon a finding that section 403 of the Rivers and Harbors Act has been violated, injunctive relief for the removal of structures pursuant to section 406 need not be predicated upon a showing of consequent irreparable harm, since the mere violation of the Act will sustain the remedy.[59] It is clear, moreover, that where the United States as a moving party seeks to protect an impor-

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56 344 F. Supp. at 494-95.

57 7 J. MOORE, FEDERAL PRACTICE ¶ 65.04[1], at 65-39 to -45 (2d ed. 1948).

58 *See, e.g.*, Shafer v. United States, 229 F.2d 124 (4th Cir. 1956) (suit to enforce the Agricultural Adjustment Act of 1938); FTC v. Rhodes Pharmacal Co., 191 F.2d 744 (7th Cir. 1951) (action to enforce the Federal Trade Commission Act); Shadid v. Fleming, 160 F.2d 752 (10th Cir. 1947) (action to enforce the Emergency Price Control Act of 1942).

59 United States v. Brookhaven, 2 E.R.C. 1761, 1762 (E.D.N.Y. 1971). *See also* United States v. Lewis, 5 E.R.C. 1198 (S.D. Ga. 1973), an action brought by the United States not only to enjoin the defendant from filling a marshland with refuse material as part of a causeway project, but to compel removal of the fill as well. *Id.* at 1199. After noting that the defendant's construction activities violated the obstruction section of the Act since an ACOE permit had not been issued, the court, without considering the element of irreparable harm, said:

> In cases such as this, relief may include grant of an "injunction for removal of obstructions and restoration of the area surrounding a navigable water to its original condition."

Id. at 1204 (quoting from United States v. Underwood, 344 F. Supp. 486, 494 (M.D. Fla. 1972)); United States v. Sunset Cove, Inc., 5 E.R.C. 1023 (D. Ore. 1973). *But see* United States v. Baker, 2 E.R.C. 1849 (S.D.N.Y. 1971), an action for abatement and removal under section 403, in which the court first found that the defendant had in fact committed the acts specified, and then went on to find that continued filling would result in irreparable harm:

> There is no doubt, to proceed to a further factor, that the marsh has been damaged by the fill and that if it were to continue in its present condition the damage would be literally irreparable.

Id. at 1850.

tant public interest, it need not comport with the usual requirements of private litigants when seeking injunctive relief.[60]

In *Stoeco Homes,* the United States sought by way of a permanent restraining order, the abatement of dredging, filling, and construction operations at the defendant's Ocean City building site.[61] The court correctly recognized that Stoeco's activities had clearly constituted a violation of section 403 since a Corps of Engineers permit had never been obtained. In fashioning appropriate relief, however, the court misconstrued the statutory remedy afforded by section 406. In analyzing the relationship between the enforcement provisions of section 406, and the regulatory provisions of section 403, the court concluded that the "statute specifically authorizes the district court to order injunctive relief to abate such violations."[62] As has been indicated in the preceding analysis, however, while section 406 specifically authorizes injunctive relief, the express terms of that section limit such relief to *removal* of structures and make no mention of *abatement.*[63]

Although the court viewed the remedy sought as though it were expressly provided by statute, a similar result could have been achieved by relying upon the inferred remedy rationale developed through the broad judicial construction of the Act beginning with *Republic Steel.* Rather, proceeding on the premise that section 406 specifically authorized abatement, the court reasoned that the public interest dictated a slackening of the customary equitable criteria so that the government need not demonstrate irreparable injury to secure an injunction. Thus, the court concluded that the United States was required only to prove a violation of section 403 in order to secure an injunction to abate Stoeco's activities.[64]

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60 *See* Hecht Co. v. Bowles, 321 U.S. 321 (1944). In construing the Administrator's right to injunctive relief as provided by section 205 (a) of the Emergency Price Control Act of 1942, the Supreme Court reasoned that the trial court below, in considering whether to grant relief, must exercise its discretion in conformance with the broad objectives of the Act.

> For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases.

Id. at 331. *See also* Virginian Ry. v. System Federation No. 40, 300 U.S. 515, 552 (1937):

> Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.

61 359 F. Supp. at 674.

62 *Id.* at 678.

63 33 U.S.C. § 406 (1970). See note 17 *supra* for full text of the section.

64 359 F. Supp. at 679. The court stated:

> The Government has proven defendant's repeated violations of 33 U.S.C. § 403 and is, therefore, entitled to a permanent statutory injunction interdicting a continuation of defendant's dredge, fill and construction activities in Plan Six.

Id.

Seeking to ground its decision on the broadest base possible, the court alternately held that Stoeco's activities constituted a public nuisance in violation of the federal common law, and were therefore subject to abatement at the instance of the government.[65] Finally, the court concluded that Stoeco's activities would in fact result in irreparable injury to the environment if injunctive relief were denied.[66] Accordingly, the court permanently enjoined Stoeco from engaging in dredging, filling, or construction operations without the prior recommendation of the Corps of Engineers and approval of the Secretary of the Army.[67]

Stoeco Homes represents the application of a revitalized statute, originally intended to safeguard navigation, now construed in the context of an emergent federal interest in protecting the environment. The enactment of the National Environmental Protection Act (NEPA) has mandated that the environmental impact of any proposed project be an essential consideration in all federal agency decisions.[68] The

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65 *Id.*

66 *Id.*

67 *Id.* at 679-80.

68 42 U.S.C. § 4332 (1970). The statute states in pertinent part:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
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> . . . .
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> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
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> (i) the environmental impact of the proposed action,
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> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
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> (iii) alternatives to the proposed action,
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> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
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> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The enactment of NEPA has already had a substantial impact upon permit applications under the Rivers and Harbors Act. In Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), for example, a landowner sued to compel the Secretary of the Army to issue a dredge and fill permit pursuant to section 403. In sustaining the Secretary's denial of the permit on environmental grounds, the court said:

> [W]e hold that while it is still the action of the Secretary of the Army on the recommendation of the Chief of Engineers, the Army must consult with, consider and receive, and then evaluate the recommendations of all of these other agencies articulately on all these environmental factors. In rejecting a permit on non-navigational grounds, the Secretary of the Army does not abdicate his sole ultimate responsibility and authority. Rather in weighing the application, the Secretary of the Army is acting under a Congressional mandate to collaborate and consider all of these factors.

Id. at 213 (footnote omitted).

For a more recent case involving a challenge to a permit issued under section 403 on the grounds that the requirements of section 4332(2)(c) were not met, see Citizens for Clean

congressional purposes sought to be achieved by this enactment are reflected in recent amendments to the Corps of Engineers' regulations governing the issuance of permits pursuant to section 403.[69] The general policies for the issuance of permits were previously confined to issues of navigation.[70] As amended, however, the regulations set forth additional environmental criteria:

> The decision as to whether a permit will be issued must rest on an evaluation of all relevant factors, including the effect of the proposed work on navigation, fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest . . . .[71]

Additionally, the regulations provide that a permit will not issue in the face of state or local opposition to the proposed project.[72] This facet of the regulations is of particular significance in New Jersey in light of the legislature's recent enactment of a comprehensive coastal area protection statute which also establishes a permit filing requirement as well as an environmental impact statement.[73]

Air, Inc. v. Corps of Engineers, 349 F. Supp. 696 (S.D.N.Y. 1972). *See also* Puro, *Water Pollution Legislation and the Rivers and Harbors Act of 1899: The Environmentalist Point of View*, 16 ST. LOUIS U.L.J. 63 (1971); Note, *Ecology Held Valid Criterion for Denying Dredge and Fill Permit Under Section 10, Rivers and Harbors Act of 1899*, 1970 DUKE L.J. 1239; Note, *Denial of Dredge and Fill Permit Under Rivers and Harbors Appropriation Act of 1899 on Ecological Grounds*, 19 KAN. L. REV. 539 (1971).

69 33 C.F.R. § 209.120(d)(1) (1972).

70 United States v. Lewis, 5 E.R.C. 1198, 1201 (S.D. Ga. 1973) (quoting from House Committee on Government Operations, H.R. REP. No. 91-917, 91st Cong., 2d Sess. 2 (1970)):

> Until the mid-1960's "public notices announcing the filing of applications for permits to fill, dredge or construct works in navigable waters, defined the Corps' interest as being confined to issues of navigation, and requested comments from the public only on such issues."

71 33 C.F.R. § 209.120(d)(1) (1972).

72 *Id.* The regulation states in pertinent part:

> In cases where the structure is unobjectionable but when State or local authorities decline to give their consent to the work, it is not usual for the Corps of Engineers to issue a permit. It practically becomes of no value in the event of opposition by State or local authority and may be regarded by such authority as an act of discourtesy.

73 Coastal Area Facility Review Act, ch. 185, 3 N.J. SESS. LAW SERV. 325 (1973). The statute, which became effective on June 20, 1973, provides in pertinent part:

> 5.
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> No person shall construct or cause to be constructed a facility in the coastal area until he has applied for and received a permit issued by the commissioner . . . .
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> 6.
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> Any person proposing to construct or cause to be constructed a facility in the coastal area shall file an application for a permit with the commissioner, in such form and with such information as the commissioner may prescribe. The application shall include an environmental impact statement as described in this act.
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> 7.
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> The environmental impact statement shall provide the information needed

As a result of recent federal and state legislation, and the revitalization of the Rivers and Harbors Act in the environmental context as typified by the *Stoeco Homes* decision, the public's interest in the preservation of its coastal wetlands and waterways has been given additional safeguards. *Stoeco Homes* must be read as a reaffirmation of the court's broad power to fashion appropriate remedies to insure the protection of the environment.

Joel B. Gottlieb

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to evaluate the effects of a proposed project upon the environment of the coastal area.

The statement shall include:

a. An inventory of existing environmental conditions at the project site and in the surrounding region which shall describe air quality, water quality, water supply, hydrology, geology, soils, topography, vegetation, wildlife, aquatic organisms, ecology, demography, land use, aesthetics, history, and archeology; for housing, the inventory shall describe water quality, water supply, hydrology, geology, soils and topography;

b. A project description which shall specify what is to be done and how it is to be done, during construction and operation;

c. A listing of all licenses, permits or other approvals as required by law and the status of each;

d. An assessment of the probable impact of the project upon all topics described in a.;

e. A listing of adverse environmental impacts which cannot be avoided;

f. Steps to be taken to minimize adverse environmental impacts during construction and operation, both at the project site and in the surrounding region;

g. Alternatives to all or any part of the project with reasons for their acceptability or nonacceptability;

h. A reference list of pertinent published information relating to the project, the project site, and the surrounding region.

In addition, New Jersey's Coastal Wetlands statute, N.J. STAT. ANN. § 13:9A-1 *et seq.* (Supp. 1973-74) provides further protection for the "estuarine zone," that tidal area between the land and the sea. As an expression of legislative intent, section 13:9A-1(a) declares:

> [I]t is necessary to preserve the ecological balance of this area and prevent its further deterioration and destruction by regulating the dredging, filling, removing or otherwise altering or polluting thereof . . . .

Regulation of such activities is achieved through the requirement of an application and permit to be issued upon consideration of environmental factors. N.J. STAT. ANN. § 13:9A-4 (Supp. 1973-74).