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How the Energy and Water Development Appropriations Act of 1993 Has. Impacted the Constitutional Dynamics of Federal Wetlands Delineation and Regulation

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How the Energy and Water Development Appropriations Act of 1993 Has Impacted the Constitutional Dynamics of Federal Wetlands Delineation and Regulation

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What is a wetland? How do you recognize a wetland when you see one? What do you look for — ducks, reeds, rushes, mire? "Can the rush [a hydrophytic plant] grow up without mire [hydric soil essential for wetlands]? Can the flag [reed] grow without water?"[1]

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[1] *Job* 8:11 (with modernized wetland-friendly translation added to the Holy Bible, 1611 King James Version) asks about wetlands. *Rush* is a word still associated with a family of wetland vegetation. For example, the soft rush, *Juncus effusus* is a wetland plant which thrives in the marshes and swamps throughout the northern United States. WILLIAM A. NIERING, WETLANDS, NATIONAL AUDUBON SOCIETY NATURE GUIDE 476, plate 324 (1985). *Flag* is *achu*, meaning reed. Reeds are a classic example of a hydrophytic wetland plant family. *Accord, see* NIERING, WETLANDS plates 219, 222, 229 (including yellow flag, sweetflag, anf blue flag as wetland plants). *Mire* is a translation of *bitstsah*, which is translated fen elsewhere (in Job 40:21, alluding to a wetland populated by *reeds*, another wetland hydrophyte). Both mire and fen refer to ground saturated or inundated with water, causing a wet land conducive for wetland vegetation. Today, in America, the federal government rules over the fens:

> Unfortunately for Mr. Jacobs, the federal government [*i.e., the U.S. Army Corps of Engineers*] considered his small [*residential*] plot of land in the suburbs a calcareous fen. For those unfamiliar with bureaucratic jargon, a fen is an area not quite wet enough to be a marsh but still wet enough to qualify as a wetland. Calcareous only means that it sits on top of limes-

Furthermore, of what use are wetlands? Wouldn't we be better off without swamps and their resident vermin?

> Not so long ago, Americans believed their marshes, swamps, and bogs were wastelands. These wetlands couldn't be farmed, and they harbored mosquitoes, cottonmouths, alligators, and other disagreeable creatures, to say nothing of malaria. Clearly, the best thing to do was to drain them, clear them, plow them, and control them.
>
> With the help of congressional bills like the Swamp Land Act of 1849, which virtually gave away vast tracts of submerged acreage to anyone who would reclaim them, Americans began to destroy their wetlands at a pace which has accelerated through the 20th century.[2]

The Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) have answered these questions with a set of regulatory criteria. Forget looking for ducks — look for reeds, rushes, and mire. Wetlands are federally defined and recognized as ecosystems which cannot exist apart from certain vegetation growing under certain soil-water conditions. The federal government now regulates wetlands such as swamps, marshes, bogs, fens, seasonally wet arroyos, and even prairie potholes.[3] But just what is a wetland?[4]

A reliable source of specific criteria for recognizing a wetland, as defined for federal regulatory purposes, would be valuable. In 1987 the Corps developed a technical manual (1987 Wetlands Manual) for identifying wetlands.[5] Later, in 1989, an interagency manual (1989 Wetlands Manual) was developed. This 1989 Federal

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tone, typical of much of Wisconsin.

Jonathan Tolamn, *Property Rights and Wrongs*, Wall St. J., Jan. 16, 1995, at A10.

Thus, this paper addresses an old topic with new problems.

[2] WILLIAM A. NIERING, WETLANDS OF NORTH AMERICA 15 (1991).

[3] The authors acknowledge aid provided by Dr. Donald L. Totusek (Adjunct Professor, LeTourneau University) regarding, *inter alia*, the current regulation of fens, a type of wetland.

[4] Answering this question incorrectly can have serious consequences — two defendants served 19 months in jail because of their unauthorized interference with a wetland by building on their own property. Both defendants were sentenced to incarceration for 21 months, plus fines of $5,250.00 per convicted defendant. *See* U.S. v. Mills, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993), *aff'd.*, 36 F.3d 1052 (11th Cir. 1994) (citing United States v. Mills, 904 F.2d 713 (11th Cir. 1990)).

[5] ENVIRONMENTAL LABORATORY (WATERWAYS EXPERIMENT STATION, VICKSBURG, MISSISSIPPI), U.S. ARMY CORPS. OF ENGINEERS, WETLANDS RESEARCH PROGRAM TECHNICAL REPORT Y-87-1 (1987) [hereinafter the 1987 WETLANDS MANUAL].

Manual for Identifying and Delineating Jurisdictional Wetlands attempted to provide a comprehensive and consistent set of criteria for wetlands identification.[6]

The 1989 Wetlands Manual has been used to recognize wetlands according to three evidentiary factors — vegetation, hydrology, and soil (VHS). Determinations based on the 1989 Wetlands Manual's VHS formula have been challenged on constitutional grounds. In upholding VHS-based wetland determinations, federal courts have considered delegation of powers doctrine, ripeness, and the Administrative Procedure Act (APA). The Energy and Water Development Appropriations Act of 1993 (the 1993 Act),[7] which became effective October 2, 1992, made the 1987 Wetlands Manual the only valid standard which the Army Corps of Engineers may use to decide jurisdictional wetland issues. Also, the 1993 Act moots several possible challenges regarding wetland adjudication — but only as to new wetland cases, and not as to preexisting wetland disputes.

This paper first addresses the development of criteria to delineate wetlands. Part II focuses on the *old cases* and describes the forensic logic used by federal courts to uphold the limited constitutional use of the 1989 Wetlands Manual. Finally, Part III discusses how the partially codified Energy and Water Development Appropriations Act of 1993 mandates the use of the 1987 Wetlands Manual and thereby avoids many of the constitutional challenges which have complicated the use of the 1987 and 1989 Wetlands Manuals.

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[6] U.S. ARMY CORPS OF ENGINEERS, U.S. ENVIRONMENTAL PROTECTION AGENCY, U.S. FISH AND WILDLIFE SERVICE, AND U.S. DEPARTMENT OF AGRICULTURE SOIL CONSERVATION SERVICE, FEDERAL INTERAGENCY COMMITTEE FOR WETLAND DELINEATION, FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS (1989) [hereinafter 1989 WETLANDS MANUAL]. The 1989 Wetlands Manual is an federal interagency publication by the Federal Interagency Committee for Wetland Delineation. The Manual represents a joint effort by the Environmental Protection Agency, the U.S. Army Corps of Engineers (Department of Defense), the U.S. Fish & Wildlife Service (Department of the Interior), and the Soil Conservation Service (Department of Agriculture).

[7] Energy and Water Development Appropriations Act of 1993, October 22, 1992, Pub. L. No. 102-377, 1992 U.S.C.C.A.N. (106 Stat.) 1324-25, (not codified in U.S.C.). Although at first glance the October 1992 date may appear to be in error, the statute at issue is, in part, an appropriations act of 1993. The preamble to the Act states that funds are being appropriated for future use; i.e., in the fiscal year ending September 30, 1993. *Id.*

I. WETLAND DELINEATIONS: WHAT ARE THE DEFINITIONAL CRITERIA?

In the field of jurisdictional wetlands three primary factors identify and delineate a wetland: hydrophytic plants, hydric soils, and a wetland-type hydrology.[8] This three parameter approach test[9] can be abbreviated as a vegetation-hydrology-soils analysis, or VHS test.[10] The VHS test is central to the 1989 Wetlands Manual which has been used by both the U.S. Army Corps of Engineers (Corps)[11] and the U.S. Environmental Protection Agency (EPA).[12] Recently, the 1989 version of the VHS test has been challenged as the Corps' unconstitutional regulatory activity. However, due to the enactment of the Energy and Water Development Appropriations Act of 1993, a public law which is only partially codified in the U.S. Code,[13] the Corps may no longer use the 1989 Wetlands Manual for any wetlands-related regulatory determinations. Thus wetlands cases consist of the *old cases* (pre-1993 Act) which are separated by the new (1993) statute/new standard from the *new cases* (post-1993 Act).

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[8] Wetlands (in the federal jurisdictional wetland sense) are defined 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." Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 930-931 (%th Cir. 1983) (publishing, as an appendix to the 5th Circuit's affirmance, the trial court's Final Wetlands Determination and quoting 33 C.F.R. § 323.2(c)).

[9] Mulberry Hills Development Corp. v. United States, 772 F. Supp. 1553, 1555 (D. Md. 1991).

[10] It should be noted that the Fifth Circuit stressed that the VHS analysis is not a mere checklist, but is the factual basis for an expert opinion "based on the complex interrelationships among the three [VHS] factors." *See Avoyelles*, 715 F.2d at 918, N. 35.

[11] 33 C.F.R. § 328.3(b) (1993) (U.S. Army Corps of Engineers' definition of wetlands).

[12] 40 C.F.R. §230.3(t) (1993) (U.S. Environmental Protection Agency's definition of wetlands).

[13] This could be a nightmare for a litigator! Congress changed the law by an appropriations act which changed the substantive law on a regulated subject (in this case, wetlands), but the codifiers chose not to codify the relevant portions of the new statute. Thus, a litigator researching the U.S. Code (and its annotations), could easily miss the dispositive statutory amendment — even though a Public Law exists which is the authoritative standard on the regulatory subject!

A. Development of the Wetlands Manuals of 1987 and 1989

The delegation of wetland-related programs to federal agencies, by virtue of Congressional delegations of U.S. power to regulate commerce, fulfills regulatory goals of various federal statutes. For example, the EPA and the Corps have roles pursuant to the Clean Water Act amendments to the Federal Water Pollution Control Act, Title 33 U.S.C. section 1344, including permit issuance and regulation regarding wetlands. The Corps makes jurisdictional determinations pursuant to the Rivers and Harbors Act of 1899, Title 33 U.S.C. section 403. The Corps receives assistance in reviewing permits and receives environmental impact-related comments from the U.S. Fish & Wildlife Service (FWS) and the National Marine Fisheries Service, pursuant to the Fish & Wildlife Coordination Act. Finally, the Soil Conservation Service (SCS) has been involved in wetland identification since 1956 and has recently increased its involvement in wetland regulation due to the "Swampbuster" provision of the Food Security Act of 1985.

In 1987 the Corps developed a technical manual, 1987 Wetlands Manual, for wetland identifications;[14] during 1987-88 the EPA did likewise.[15] Prior to 1989 the SCS and the FWS had also developed their own procedures for wetland identifications.[16] Thus the federal agencies regulating wetlands had established non-identical standards and procedures for identifying and delineating wetlands, with the potential for inconsistent determinations.[17] In a welcome display of cooperation and common sense, the wetlands-regulating federal agencies agreed to work jointly toward the production and publication of interagency standards which would be adopted and applied the participating wetland-regulating federal agencies.[18] The result was the 1989 Wetlands Manual.

Some landowners and developers have opposed the 1989 Wetlands Manual, saying that it contains landowner-unfriendly amendments to prior wetland regulation law (*i.e.*, the 1987 Wetlands Manual. These litigants say that the Corps used an invalid procedure

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[14] 1987 WETLANDS MANUAL, *supra* note 5.

[15] 1, 2 W. S. SIPPLE, WETLAND IDENTIFICATION AND DELINEATION MANUAL (1987).

[16] 1989 WETLANDS MANUAL, *supra* note 6, at 1-2.

[17] *Id.*

[18] *Id.* at 2. The interagency manual was adopted by the EPA, the Corps, FWS, and SCS on January 10, 1989.

to arrive at the new standards. Therefore the new standards' expanded definition of what is a federal wetland is an invalid expansion of the prior law.[19] These landowners and developers have argued that just because a new standard makes better sense than the old standard or is more efficient or cheaper for the government's use does not mean that the new standard should be substituted for the old law. Rather, for a new standard to be valid it must be enacted or issued using the correct procedural process.[20] Of course, the gist of this challenge presumes that the 1989 standards for defining wetlands were, in reality, different and more expansive than that of the 1987 Wetlands Manual, a point not conceded by the Corps or the EPA.[21]

The 1989 standards were not part of legislation passed by Congress. Rather, the 1989 wetlands identification standards were "passed" by the four U.S. regulatory agencies noted above which regulate wetlands.[22] Perhaps, as a practical matter, the four U.S. regulatory agencies originally intended to use the 1989 standards as the law now governing wetland delineation (*i.e.*, the four agencies would use the 1989 Wetlands Manual internally and to determine the rights and responsibilities of the private sector). It is unlikely that the four U.S. agencies expected that their joint effort would ever result in controversy because the content of the 1989 Wetlands Manual is primarily technical in nature and because the Manual was drafted expressly to provide a uniform approach, using vegetation, soils, and hydrology to replace the four non-identical approaches to defining wetlands. This move, though deemed insignificant by many, provoked intense response in some.[23]

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[19] *See Mulberry Hills*, 772 F. Supp. at 1556. "Plaintiff contends that if the 1987 Manual, which preceded the 1989 Manual, were applied, the delineation would be different, and the wetlands area on its property would be . . . 14 acres, instead of the 21 . . . " *Id.*

[20] *Id.* at 1556-57.

[21] *Id.*

[22] 1989 WETLANDS MANUAL, *supra* note 6, at 1-3.

[23] "This case presents the disturbing implications of the expansive jurisdiction which has been assumed by the United States Army Corps of Engineers under the Clean Water Act. In a reversal of terms that is worthy of Alice in Wonderland, the regulatory hydra which emerged from the Clean Water Act mandates in this case that a landowner who places clean fill dirt on a plot of subdivided dry land may be imprisoned for the statutory felony offense of 'discharging pollutants into the navigable waters of the United States.'" *Mills*, 817 F. Supp. at 1548. *Cf. also* United States v. Phelps Dodge Corp., 391 F. Supp. 1181 (D. Ariz. 1975) (noting that "normally dry arroyos" may be jurisdictional "wetlands").

Because it appeared that the 1989 standards significantly expanded the federal definition of what was a jurisdictional wetland, it soon became a very important issue as to whether the new standards were valid.[24] The validity of the new 1989 standards regarding the technical identification and delineation of federal wetlands depended upon whether the issuance of those new standards was issued via a valid quasi-legislative process of administrative agency rule-making. In order for the new standards to be universally applicable and authoritatively binding on the public, they must have been promulgated through the proper process.[25] Litigants challenging the propriety of the 1989 definitions argued that any change in standards used by the Corps or the EPA for defining wetlands could be adopted only by the amendment procedure defined in the enabling statute by which Congress delegated quasi-legislative powers or by the rule-making process defined in the Administrative Procedure Act (APA), the statute that governs rule-making by administrative regulatory governmental bodies in the event that there is no other more specific procedural statute.[26]

The Congress had not then provided a specialized enabling statute.[27] Accordingly, the procedures of the Administrative Procedures Act controlled.[28] Challenging the use of the 1989 Wetlands Manual appeared to be a sure win for landowners since the 1989 Wetlands Manual itself states that it resulted from a negotiated committee meeting between four U.S. agencies, as opposed to originating from any notice and comment procedure.[29] This docu-

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[24] "Dolgos [a VHS wetland delineator] apparently instructed Schwarm . . . that this delineation must follow the standards set forth in the Federal Manual for Identifying and Delineating Jurisdictional Wetlands published in 1989. . . . Plaintiff contends that the 1989 Manual is not simply an interpretive tool, as the government maintains, but that it substantially changed the rules for defining wetlands without notice and other procedures required for rulemaking by the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 *et seq.*" *Mulberry Hills*, 772 F. Supp. at 1556.

[25] *Id.* at 1562.

[26] *Id.*

[27] "Since the Clean Water Act does not set forth the standards for reviewing the EPA's or the Corps' decisions, we look to the Administrative Procedures Act (APA), 5 U.S.C. §§ 701 *et seq.* (1976), for guidance. . . . [T]he APA provides that a court shall set aside agency findings, conclusions, and actions that are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' or that fail to meet statutory, procedural or constitutional requirements. . . ." Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 904 (5th Cir. 1983). In October 1993 the legislature largely mooted this, however, as is shown in Part III, *infra*.

[28] *Id.*

[29] The APA "notice and comment" process involves publication in the Federal

mentary admission[30] could have been outcome-determinative in the litigation due to the APA's requirement for public notice and comment prior to a federal regulatory agency's quasi-legislative rule-making.[31] However, the agencies's actions were protected by the interpretive rule exception.[32]

Under this exception the APA authorizes a regulatory agency to issue its own internal policy-oriented interpretive rule, whereby a federal agency[33] adopts a uniform approach to interpreting its own enabling statute and/or its own regulations. The exception is allowed because such interpretive rules may be necessary and convenient for an agency to execute its statutory mission.[34] Since an interpretive rule is not considered the same as public rule-making, it need not follow the same notice and comment process to be valid.[35] If the Corps or the EPA used the 1989 Wetlands Manual only as an interpretive rule the agency need not have used the APA's notice and comment rule-making process to legitimize its interpretive use of the 1989 Wetlands Manual.[36]

An interpretive practice is not quasi-legislative in the sense that it is not recognized as an absolute standard by which the public must act. However, an interpretive rule can function like a promulgated regulation in that it will likely become a statistically dominant standard by which the agency usually acts.[37] Therefore, although an interpretive rule about how the Corps defines wetlands for its own administrative purposes is not the same as the law on how wetlands must be defined for the private sector, the interpretive rule

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Register, etc.

[30] *i.e.*, the implicit admission that at an interagency committee produced the 1989 Wetlands Manual apart from the public "notice and comment" process.

[31] This presumes that there is no other Congressional statute which provides a different (non-APA) method of quasi-legislative rule-making for a given regulatory agency, a point not seriously debated in wetland litigation.

[32] *Mulberry Hills*, 772 F. Supp. at 1557 (explaining the Administrative Procedures Act's interpretive rule exception, codified at 5 U.S.C. § 553(b)(3)(A)).

[33] This general principle applies to federal regulatory agencies but not necessarily to state regulatory agencies. *See*, Mary Reagan, *Contesting Agency Action Based on Informal Agency Policies*, 2 TEX. ADMIN. L.J. 28, 74-85 (1993) (contrasting the legality of internal policy-making within federal agencies under the federal Administrative Procedures Act (APA) with the illegality of the same conduct by a state agency, under Texas' statutory APA-counterpart, the Administrative Procedure and Texas Register Act).

[34] *Mulberry Hills*, 772 F. Supp. at 1557 (citing the APA).

[35] *Id.*

[36] *Id.*

[37] *See generally*, *Avoyelles*, 715 F.2d at 907-914 (discussing a challenge to the Corps wetland definitions based on APA issues).

is the standard interpretation which the Corps (and EPA) could have administratively used and applied regarding the law of wetlands.[38]

In practice, what is the difference? Aren't the Corps' and the EPA's own interpretations *about* wetland law effectively the same *as* wetland law? The significance of the difference is that a quasi-legislated standard, if it was properly issued after notice and comment, would be the legal standard which determines what formula must be used to delineate a wetland's boundaries, and thus what evidence can be admitted as being relevant in an administrative evidentiary hearing.[39] However, if the 1989 standards are only allowed to be used interpretively, they cannot be used to disallow proof which could otherwise be proffered and admitted as probative evidence, assuming such proffered proof would be relevant and admissible under 1987 standards.[40] The importance of this distinction is illustrated by the controversies in *Avoyelles Sportsmen's*[41] and *Mulberry Hills*[42] where this issue was argued.

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[38] *Id.*

[39] *Id.*

[40] *See Mulberry Hills*, 772 F. Supp. at 1556-59.

[41] Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983). A 1983 case, *Avoyelles* predates the Wetlands Manuals discussed in this article. However, the court's approach is instructive. In this case the private defendants, owners of property in the Bayou Natchitoches basin area of Louisiana, had sought to clear the forest from the property and begin agricultural production. *Id.* at 901. The plaintiffs brought a citizens' suit against the private defendants and the Corps and EPA. *Id.* The plaintiffs maintained that the property was a wetland, "that the private defendants could not engage in their landclearing activities without obtaining a permit from the EPA or the Corps, and that the federal defendants had failed to exercise their 'mandatory duty. . . .'" *Id.* at 902. "After examining the vegetation, soil conditions, and hydrology of the tract, the EPA concluded that approximately eighty percent of the land was a wetland. *Id.* at 903. The trial court then found that "over ninety percent of the [land] was a wetland. *Id.* The Court of Appeals for the Fifth Circuit held that the agency's decision should have been reviewed under the arbitrary and capricious standard and that the trial court could not substitute its own wetlands determination for the EPA's. *Id.* at 907. Furthermore, the court held that "the EPA's wetlands methodology was not void for failure to comply with the [Administrative Procedure Act] section 553 notice and comment requirements because the methodology was an interpretative application. . . ." *Id.* at 910.

[42] 772 F. Supp. 1553.

II. PROLOGUE: *OLD CASES* - CONSTITUTIONAL CHALLENGES TO WETLAND DELINEATION

A. Factual Background of *Mulberry Hills*

Mulberry Hills Development Corp. v. United States[43] is a noteworthy example of a federal case in which a private developer challenged the constitutionality of the Corps' use of the 1989 Wetlands Manual to make wetland determinations. In *Mulberry Hills*, the main parties were the Mulberry Hills Development Corporation (a subdivision developer) and the United States, especially in relation to the U.S. Army Corps of Engineers. The Mulberry Hills Development Corporation had received zoning authority to develop 62 acres of land[44] for construction of 161 single family homes. However, early in the stages of land development, a Corps examiner found indicators of jurisdictional wetlands: cattails (an obligate hydrophytic plant) and standing water (an example of wetlands hydrology). Moreover, soil sampling determined that the site included "Pocomoke and Fallsington Series" soil, a hydric soil.[45] The Corps, analyzing the empirical data by the delineation formulas provided in the 1989 Wetlands Manual, concluded that about one-third of the 62-acre tract was a wetland.[46] The Corps promptly issued a cease-and-desist letter stating:

> A recent field investigation disclosed that fill material has been placed on wooded nontidal wetlands. . . . Records in this [Corps] office indicate that neither a Department of the Army permit nor a letter of permission authorizing this work was issued by this office. The placement of fill material in Waters of the United States of an adjacent wetlands without prior approval of plans by the [Army] Department constitutes a violation of Section 404 of the Clean Water Act. No further work is to be performed at this or any other location in a waterway or on wetlands without compliance with the laws. . . .[47]

In response to the cease-and-desist letter and prior to litigation the developer initially agreed to investigate the Corps' position to

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[43] 772 F. Supp. at 1556 (identifying the 1989 Wetlands Manual as the authority for delineating jurisdictional wetlands).

[44] These 62 acres of land were purchased in 1988 for $600,000.00. *Id.* at 1555.

[45] *Id.*

[46] *Id.* at 1556.

[47] *Id.* at 1555-56.

see if the wetland issue could be resolved. Specifically, the developer agreed to retain an environmental consultant in order to respond to the Corps' cease-and-desist letter. The developer's environmental consultant did an on-site inspection to see if any of the land was a federally defined wetland, and, if so, to delineate what part of the land was such a wetland.[48] The Corps demanded that the developer's consultant use the three parameter (VHS) approach as defined within the 1989 Wetlands Manual. However, the developer wanted to use the criteria in the 1987 Wetlands Manual. He argued that the 1987 standards would lead to less of the site, perhaps none, being classified a wetland than if the criteria from the 1989 Wetlands Manual were used. "In particular, [Mulberry Hills Development Corporation] argue[d] that the 1989 Manual relaxed the definition of wetlands so that only two of the three [VHS] parameters established by the regulation are necessary to characterize lands as wetlands if the property has been disturbed by human agency."[49] In fact, the developer would later argue in court that the 1989 Wetlands Manual was so broad that, if applied literally, "perhaps 50 percent of the Eastern Shore of Maryland, including farmlands, could be defined as wetlands."[50]

The developer disagreed with the Corps' demand to use the 1989 Wetlands Manual, claimed that the 1987 Wetlands Manual was the only proper standard, and refused to submit to the Corps' permit process. In effect, the developer challenged the Corps' legal, scientific, and evidentiary process as invalid, and thus challenged the foundation for the Corps' authority to issue the cease-and-desist letter ruling.[51] The developer then sued the Unites States, seeking a declaratory judgment that the Corps' cease-and-desist letter ruling was invalid and that the Corps' existing regulatory process regarding wetlands determination was unconstitutional.[52]

B. Legal Framework for the *Mulberry Hills* Decision

When the federal trial court ruled upon the developer's legal challenges, the court needed to address several questions. Does

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[48] *Mulberry Hills*, 772 F. Supp. at 1556.

[49] *Id. But see Id.* at 1558 (noting that the Corps officially used the 1989 Wetlands Manual only as an interpretive tool).

[50] *Id.* at 1556.

[51] *Id.* at 1558.

[52] *Id.* at 1556, 1561-62.

Congress have the authority to define and regulate wetlands? If so, can the regulatory authority be delegated to an agency such as the Corps? If the authority can be delegated, what criteria may be used by the agency to delineate wetlands? These questions have been answered recently by several other federal courts[53] so the jurisprudential answers provided in *Mulberry Hills* don't stand alone. In fact, the cases show a trend of forensic logic similar to that used in *Mulberry Hills* and stand as informative precedents to those who are concerned with wetland determinations.[54]

C. The Forensic Logic of *Mulberry Hills*, *Mills*, and Similar Cases

Mulberry Hills and similar cases provide a ten-point syllogism of forensic logic which is useful in analyzing wetland-related constitutional challenges: (1) Congress has constitutional power to define and regulate interstate commerce; (2) U.S. waters are part of the interstate commerce; (3) wetlands are included in such waters; (4) thus, Congress may define and regulate wetlands; (5) Congress may delegate its power to define and regulate wetlands; (6) Congress has done so; (7) Congress' delegation allows regulations promulgated by

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[53] *E.g.*, Slagle v. U.S., 809 F. Supp. 704, 709 n.6 (D. Minn. 1992); Golden Gate Audubon Society v. Army Corps of Engineers, 700 F. Supp. 1549, 1555-1556 (N.D. Calif. 1988); *Avoyelles*, 715 F.2d at 903, 910-13, 931.

[54] Sometimes, however, this issue is not reached in court because other factors must be addressed first. Such was the case in *Mulberry Hills* where the ripeness doctrine prevented the federal district court from reaching the issue.

> In particular, Plaintiff argues that the 1989 Manual relaxed the definition of wetlands so that only two out of the three [VHS] parameters established by the regulation are necessary to characterize lands as wetlands if the property has been disturbed by human agency. . . . In fact, for a time Mulberry refused access to its land to the Corps for making a delineation while at the same time refusing to conduct its own wetlands delineation, as the Corps requested, under either the 1989 Manual or [the] pre-existing [1987] regulations. . . . Here, however, there is no "regulation" that has been promulgated pursuant to the APA, which, of course, is precisely the basis for Mulberry Hills' challenge. In response, the Corps has denied that the 1989 Manual would be used in delineating Plaintiff's property. This is all a matter of conjecture until such delineation actually takes place. Indeed, until such a delineation takes place using the 1989 Manual, it could be argued that review of the legality of the [1989] Manual by this Court would constitute an improper advisory opinion. . . . Until the use of the 1989 Manual is challenged on the administrative level, there can be no final agency action ["ripe" for review on appeal] in this case.

Mulberry Hills, 772 F.Supp. at 1556, 1558-59. Accordingly, it is clear that courts will require a final agency ruling before they will consider whether any wetlands delineation manual was or was not used improperly.

agencies such as the Corps. and the EPA to be used to define wetlands; (8) the process of jurisdictional delineation of a specific wetland must be consistent with the APA; (9) some federal uses of specific tools such as the 1989 Wetlands Manual have been held constitutionally valid; and (10) a protesting party must exhaust administrative remedies before challenging the wetlands determination in court. The 1989 Wetlands Manual's VHS approach has been useful for wetland determinations if APA compliance was documented. A recent appellate ruling by the Eleventh Circuit Court of Appeals, *Mills v. United States*,[55] accords with the forensic logic of the *Mulberry Hills* syllogism.

This syllogism is especially useful as a guide for analyzing future cases involving wetlands determinations where the 1989 Wetlands Manual was used in part of the process of defining wetlands, particularly those wetland determinations which antedate the Energy and Water Development Appropriations Act of 1993.

1. Congress has constitutional power to define and regulate interstate commerce.

This bedrock point is derived from Article I, Section 8, of the United States Constitution which provides that:

> Congress shall have Power to . . . regulate Commerce with foreign Nations, and among the several States, . . . [a]nd [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

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[55] Mills v. United States, 36 F.3d 1052 (11th Cir. 1994), *affirming* United States v. Mills, 817 F. Supp. 1546 (N.D. Fla. 1993) (holding that Congress provided sufficiently precise standards for defining the "waters of the United States" so that the Army Corps of Engineers permissibly included "wetlands" as part of that jurisdictional definition, and thus the Corps could permissibly regulate such jurisdictional wetlands, even to the point of prosecuting wetland "polluters" as felons imprisoned for 21 months with one year of supervised release). In *Mills*, a portion of the property purchased by the appellants had been designated a wetland by the U. S. Army Corps of Engineers. *Mills*, 36 F.3d at 1053. The prior owner had placed some fill material on the property. *Id.* at 1054. The Corps notified the prior owner that be would need a permit to place fill material on land designated a wetland. *Id.* The appellants purchased the property and continued to place fill on the property "despite receiving two additional cease and desist letters." *Id.* The appellants were convicted of violating the Clean Water Act and the Rivers and Harbors Act. *Id.*

This constitutional provision, the Commerce Clause, is sometimes cited in wetland cases where the extent and/or use of Congress' regulatory power over interstate commerce is used as the jurisdictional springboard for reaching wetlands.[56]

2. U.S. waters are part of the interstate commerce.

In *Mills*, a Florida federal district court noted that the phrase "waters of the United States" was to be interpreted to stretch as far as the Constitution's Commerce Clause would permit. During October of 1994 the Eleventh Circuit Court of Appeals affirmed this position.[57] Other federal courts have agreed on this point.[58]

3. Wetlands are included in U.S. waters because wetlands are inextricably intertwined with the waters of the United States.

Just because Congress may regulate the "waters of the United States" does not guarantee that Congress may regulate wetlands. However, since some wetlands are *adjacent to* "U.S. waters" and since such wetlands share their contents with waters that touch and blend with "waters of the United States" such wetlands are sufficiently "inextricably intertwined" with U.S. waters, so that such wetlands are legislatively included with the U.S. waters which Congress may regulate.[59]

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[56] *E.g.*, *Mills*, 817 F. Supp. at 1553 (noting that Congress uses the Commerce Clause to regulate the U.S. waters, and that wetlands thus get regulated due to the relationship of wetlands to U.S. waters).

[57] *See generally Mills*, 36 F.3d 1052.

[58] U.S. v. Mills, 817 F. Supp. at 1553 (citing appellate cases from the 11th Circuit, 7th Circuit, 9th Circuit, and 6th Circuit Courts of Appeals). *See, accord, Slagle*, 809 F. Supp. at 709; *Avoyelles*, 715 F.2d at 915.

[59] *Mills.*, 817 F. Supp at 1553 (citing U.S. v. Riverside Bayview Homes, 474 U.S. at 121, 139 (1985)). Both the EPA and the Corps define "waters of the United States" to mean:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

This relationship between U.S. waters and their adjacent wetlands has been scrutinized with the result that the term, adjacent wetland, means, in hydrologic effect, that the water of the wetland ultimately drains into a tributary of a tributary of a navigable river or seashore of the United States.[60]

4. Congress may define and regulate wetlands.

Based on points #1, #2, and #3, *supra*, Congress is within its constitutional power to define and regulate wetlands if the wetlands are hydrologically connected to a navigable water or territorial sea of the United States. Because most wetlands will drain into some tributary whose waters ultimately flow into some navigable river or territorial water (ocean, gulf, etc.), the hydrological connection is established and the wetlands are deemed adjacent wetlands.[61]

5. Congress may delegate its power to define and regulate wetlands so long as Congress provides a recognizable standard for measuring the valid breadth of delegated authority.

It is one thing for Congress, a body politick comprised of popularly elected officials, to define and regulate wetlands; it is quite another thing for Congress to delegate its constitutional power to a governmental body like the EPA or the Corps. Various statutes

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> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
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> (4) All impoundments of waters identified in paragraphs (a)(1) through (6) of this section.
>
> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA [Clean Water Act] (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

Id. at 1551, N. 5 (quoting 33 C.F.R. § 328.3(a) (1986), Corps' regulatory definition, *which mirrors* 40 C.F.R. § 230.3(s) (1980), EPA's definition, *both cited in Mills*, 817 F. Supp. at 1551, note 5).

[60] *Mills*, 817 F. Supp. at 1550-53; *Slagle*, 809 F. Supp. at 708-09, esp. at 709 (noting that 33 C.F.R. § 328.3(5) includes tributaries which allow an inland body of water to be hydrologically connected to a U.S. navigable water body or territorial sea, and thus fit the jurisdictional definition of U.S. waters).

[61] *Mills*, 817 F.Supp. at 1550-53; *accord*, Niering, WETLANDS, NATIONAL AUDUBON SOCIETY NATURE GUIDE, *supra* note 1 at 19-35; Niering, WETLANDS OF NORTH AMERICA, *supra* note 2, at 15-25.

have been challenged as improper delegations of federal constitutional authority — though few such challenges have persuaded the U.S. Supreme Court to void the delegations.[62]

In connection with the Clean Water Act amendments to the Federal Water Pollution Control Act, the U.S. Supreme Court has recognized a broad power in Congress to delegate water quality control issues to regulatory agencies (such as the EPA and the Corps) so long as the delegation is done via an enabling statute which contains some kind of discernible criteria that allows a reviewing court to decide whether the agency was acting within the proper scope of its congressional delegation.[63]

6. Congress has delegated the power to define and regulate wetlands to the EPA and to the Corps.

The U.S. Supreme Court has ruled that the defining and regulating of adjacent wetlands provides a sufficient legal basis for Congress' delegation of jurisdictional wetland determinations to the Corps and the EPA.[64] Thus, the Corps' and the EPA's administrative regulations of wetlands (by permit issuances and denials), as well as the fundamental power to declare what is and what is not a jurisdictional wetland, is solidly approved by the U.S. Supreme Court.[65] This power to define the parameters of the very regulations which the Corps and the EPA legislate, prosecute, and adjudicate, appears to be such a broad delegation that it knocked the constitutional breath out of the *Mills* trial court.[66]

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[62] *E.g., see* Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (ruling that Congress' revised version of federal bankruptcy court system involved an unconstitutional delegation of powers to non-tenured Article I bankruptcy judges). *See generally, Mills*, 817 F.Supp. at 1552. "The principle that the Constitution prohibits Congress from delegating its legislative authority is essentially nugatory, for little is required of Congress when it want to obtain the assistance of its coordinate branches [such as EPA and DOE, parts of the Executive branch]." *Id.* "So long as Congress 'lay[s] down by legislative act an intelligible principle to which the person of body authorized to act is directed to conform, such legislative action is not a forbidden delegation of legislative power.'" Touby v. U.S., 111 S.Ct. 1752, 1759 (1991) (quoting J.W. Hampton, Jr. & Co. v. U.S., 276 U.S. 394, 409, 48 S.Ct. 348, 352 (1928)).

[63] In the case of wetlands, the U.S. Supreme Court has ruled that the delegation Congress made to the EPA and to the Corps is a proper delegation in light of the discernible statutory language and policies of the Clean Water Act as viewed against the legislative history of the Clean Water Act amendments. *Mills*, 817 F. Supp. at 1553 (reluctantly following *Riverside Bayview Homes*, 474 U.S. at 139).

[64] *Id.*

[65] *Id.*

[66]

7. Congress' delegation of wetland regulation to the EPA and the Corps allows the regulations promulgated by the Corps and EPA to be used to define, identify, and delineate jurisdictional wetlands.

Which regulations may be used and how are the regulations to be implemented in 1995? In answering these questions we must distinguish between an *old case* involving a wetland-related determination made prior to October 2, 1992, and a *new case* involving a wetland-related determination made after October 2, 1992, since a federal statute enacted in 1993 provides different answers to these time-frames.

In an *old case* situation an administrative evidentiary hearing might typically involve the Corps, which is authorizing a limited land-use permit (or refusing any disruptive filling in or dredging in such a wetland) and a protesting landowner (or developer), who is protesting the Corps' position. The landowner's opposition may stem from the desire to have none of his or her land designated as a jurisdictional wetland or, what is more likely, because the landowner

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> Thus, the broad purpose of the [Clean Water] Act was to protect water quality and aquatic ecosystems. It was this broad purpose which guided the Army Corps [of Engineers] when it defined "waters of the United States" to include wetlands adjacent to what are commonly thought of as waters — bays, lakes, rivers, etc. . . .
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> . . . . Of course, to a layman, a "wetland" is land that is most often, if not mostly, under standing water or so saturated that it is, in fact, wet. That type of wetland is a logical extension of the adjacent body of water. Despite its blanket approval of the Corps' regulatory authority over "wetlands," it is doubtful that the Supreme Court realized that the Corps' definition extends to land that appears to be dry, but which may have some saturated-soil vegetation, as is the situation here, or that it would define the elements of a felony offense.
>
> . . . .
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> A jurisprudence which allows Congress to impliedly delegate its criminal lawmaking authority to a regulatory agency such as the Army Corps [of Engineers] — so long as Congress provides an "intelligible principle" to guide that agency — is enough to make any judge pause and question what has happened. Deferent and minimal judicial review of Congress' transfer of its criminal lawmaking function to other bodies, in other [governmental] branches, calls into question the vitality of the tripartite system established by our [U.S.] Constitution. It also calls into question the nexus that must exist between the law so applied and simple logic and common sense. Yet that seems to be the state of the law. Since this court must apply the law as it exists, and cannot change it, there is nothing further that can be done at this level.

817 F. Supp. at 1554-55.

doesn't want as much[67] of his or her land delineated as jurisdictional wetland.

If the protesting landowner wanted to introduce into evidence some expert testimony by a qualified wetland delineator using the 1987 Wetlands Manual's technical standards, and if the Corps hearing officer refused to allow that evidence in because it wasn't based on the exact formula of the 1989 Wetlands Manual, the landowner could appeal this evidentiary ruling (and all administrative rulings tainted thereby) on the basis that 1989 standards were used as the Corps' quasi-legislative standard, and not just as an interpretive rule for the Corps' internal purposes.[68]

Thus, evidentiary proceedings conducted before the Corps or the EPA should not treat the exact formula of VHS technicalities as set forth in the 1989 Wetlands Manual as some kind of quasi-legislative standard because doing so is admitting that the 1989 standards were used and applied as the legal authority on how a wetland *must* be identified and delineated. If this occurs, the regulatory agency has invited an appeal based on the defective promulgation of the 1989 standards as the law of wetland regulations.[69]

What is a more prudent approach for the Corps or the EPA when processing a disputed wetland matter? The agency should conduct its fact-findings and other official proceedings in a way that considers any technical evidence fitting all three of the VHS categories as defined in the 1987 Wetlands Manual. This consideration should include the technical insights and concepts set forth in the 1989 Wetlands Manual, since the 1987 VHS categories are inextricably intertwined with the 1989 evidence categories.[70]

Whatever technical evidence is gained by interpretive use of the 1989 Wetlands Manual should be admissible as relevant evidence, i.e., having probative value, for establishing the wetland identifications which are made using the 1987 Wetlands Manual

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[67] *E.g., see Id.* at 1556.

[68] *Mulberry Hills*, 772 F. Supp. 1553 (where the Corps avoided this error).

[69] The appellate review is dominated by deference to the agency's scientific expertise, yet qualified by a search of the evidence in the whole administrative record, to ensure that the administrative agency's ruling followed a consideration of all the relevant factors and can be viewed as a rational conclusion thereupon. *See, accord,* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-416 (1971) and Save Our Wetlands v. Sands, 711 F.2d 634, 635-642 (5th Cir. 1983), *followed in Avoyelles Sportsmen's League*, 715 F.2d at 907.

[70] *Mulberry Hills*, 772 F. Supp. 1553 (noting that the Corps maintained that the 1989 Wetlands Manual was merely an interpretive tool).

criteria, because the evidence is routinely used by wetlands experts. To the contrary, the fact that Congress, by virtue of what it said in the Energy and Water Development Appropriations Act of 1993, has indicated its dissatisfaction with the 1989 Wetlands Manual could be *persuasive* evidence that the 1989 Wetlands Manual should not have been used by the Corps even as an interpretive rule.

8. Applying the jurisdictional wetland definition to a specific property must be done in accord with the APA.

Compliance with the APA includes development of an evidentiary record to fulfill due process requirements and to provide a court with a record which is sufficient to permit meaningful review. The forum of first instance, i.e., the agency acting as a chancellor/trial court, must provide the higher court with a written record of the contested issues and evidence so that the reviewing court can determine whether the quasi-adjudicating agency has committed error so plain that the agency's ruling must be reversed.[71]

Judicial review of the administrative agency's final decision will be in federal district court pursuant to the Administrative Procedures Act (APA).[72] The district court must be able to discern from the written record what the legal issues are, whether the litigants had proper notice in order to satisfy Constitutional Due Process[73] requirements, and whether the evidentiary record supports the agency's factual findings and legal conclusions.

The reviewing court gives deference to the regulatory agency's expertise and its determinations, and looks only to see if they are supported by the evidence in the administrative trial record. The agency's determinations will be overturned only if they appear "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[74] The reviewing "court is not empowered to substitute its judgment for that of the agency."[75] The fact that the record may also possess evidence to support a different set of con-

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[71] *Mulberry Hills*, 772 F. Supp. at 1558-62.

[72] *Slagle*, 809 F. Supp. at 711.

[73] The U.S. Supreme Court has recognized that the APA does not list formal details on *how* the initial evidentiary hearing must be processed, *Overton Park*, 401 U.S. at 415-16, although fundamental fairness traditions, as recognized in 5th Amendment Due Process cases, are a constitutional minimum.

[74] Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

[75] *Avoyelles*, 715 F.2d at 904 (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)).

clusions than those reached by the regulatory body is irrelevant. Likewise, the fact that the reviewing court might have decided the case differently is irrelevant. In effect, the reviewing court defers to the agency's decision in a manner like a traditional trial judge confronted with a j.n.o.v. motion challenging a jury verdict. As long as the evidence can permissibly support the verdict, the verdict is to be left as is.[76]

9. Interpretive use of the 1989 Wetlands Manual is valid so long as APA procedures are followed when the jurisdictional wetland definition is applied to a specific property.

The Corps and the EPA may make wetland identifications and delineations using the 1989 Wetlands Manual as an interpretive guide to discovering and describing technical evidence since such evidence is relevant to the overall evidentiary goal of determining what is and what is not a jurisdictional wetland. Of course, some kind of evidentiary record should clarify that these constitutional considerations were prudently observed.

The 1989 standards have some technical evidentiary value for the initial evidentiary proceedings before the Corps or EPA hearing officers due to standards' use by expert witnesses, so long as that use is consistent with the federal wetland definition.[77] The Federal Rules of Evidence recognize the domain of expert witnesses.[78] Because expert witnesses reasonably could use the 1989 Wetlands Manual to gather relevant information about wetlands[79] the use of the 1989 standards should be relevant and admissible. Furthermore, such use of the 1989 Manual should not be outcome-determinative of whether a particular *old case* wetland identification was defective. But, in any event, all wetland experts (especially wetland delineators) should be careful to link their factual observations and their expert opinions[80] to the 1987 Wetlands Manual standards.[81]

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[76] FED. RULE CIV. P. 50.

[77] *See supra* note 8.

[78] FED. R. EVID. 702-705.

[79] This argument can be based on FED. R. EVID. 703, regarding facts or data "of a type reasonably relied upon by experts in the particular field [e.g., delineating wetlands] in forming opinions or inferences upon the subject. . . ."

[80] Again, it should be stressed that the VHS analysis is *not* a mere checklist, but is the factual *basis* for an expert opinion on whether particular acreage is or is not a "wetland" by the federal definition — "based on the complex interrelationships among the three [VHS] factors." *See Avoyelles*, 715 F.2d at 918, note 35.

[81] *Cf.* FED. R. EVID. 704-705 (on opinion testimony about ultimate issues and

10. A protesting party must exhaust the administrative process for making challenges to wetland determinations as a prerequisite to filing a ripe protest suit in federal district court; moreover, the federal district court litigation will most likely be a non-jury trial in which the court defers to the agency's expertise.

Since the wetlands issues are to be tried first before the regulatory agency in question, i.e., the Corps or the EPA, a court challenge against agency action will be dismissed as not ripe for district court adjudication until a final ruling has been made at the agency level.[82]

Agencies don't utilize juries. Some never give this a second thought; others may be troubled, thinking that jury trial rights are constitutionally guaranteed for such cases.[83] The U.S. Constitution's Seventh Amendment does not guarantee a jury trial to *everyone* who files a civil action in federal court. The Seventh Amendment only guarantees the procedural right to a jury to those litigants who could have litigated their controversy in a common law court[84] as of 1789, the year when jury trial rights were frozen

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underlying grounds therefore).

[82] *Mulberry Hills*, 772 F. Supp. 1553.

[83] *But see* U.S. CONST. Amend. VII.

It often appears that the greater concern over environmental regulations is not so much the juristic integrity or soundness of the governmental regulatory program as it is the economic impact. If environmental regulation negatively affects a person's assets the person subject to the regulation is inclined to challenge the regulation as improper.

> The concept of a trustee-like stewardship is not new to Anglo-American culture, due to the Biblical principle that "the earth is the LORD's, and the fullness thereof . . . " (*Psalms* 24:1). The seed-form of environmental law, *i.e.*, the concept that the government regulates specially protected natural resources — is also not new to Anglo-American jurisprudence: England's "forest law" . . . [dates from the Dark Ages] . . .
>
> Environmental responsibility concepts, as well as environmental regulation, are not wholly new to Anglo-American thought or law, as . . . [both are respectively demonstrated above, in the Holy Bible and in England's forest laws].
>
> What is "new", however, is the magnitude of money [$$$] involved in environmental liabilities and in the insolvencies produced thereby . . . [quoting from 1992 pleadings filed in the consolidated *Insilco* bankruptcy, where "the claims filed by some 1200 environmental creditors exceed $9 billion"].

James Johnson & William Logan, *Environmental Claims and the Bankruptcy Process: Claims Advocacy for Private Environmental Torts — Balancing Environmental Restitution Policy with the Debtor's Fresh Start*, BANKRUPTCY BRIEFS, Spring 1993, at 8-9, notes 1-2 (citing *Psalms* 24:1). *Accord, see also* Francis Schaeffer, POLLUTION AND THE DEATH OF MAN: THE CHRISTIAN VIEW OF ECOLOGY 47-93 (1970).

[84] "In suits at common law, . . . the right to trial by jury shall be pre-

in time. The determinative question is how one's litigation rights could have been litigated, historically speaking.[85] This may require the use of analogy, since 1789 represents a time when English courts were largely unconcerned with environmental concerns of today, such as nuclear reactors, cormorant extinction, coastal marsh wetlands, and the like.[86]

Someone who challenged the British government's decision to issue or not to issue a dredging permit in 1789 did not then have a cognizable legal right to assert in an English common law court. Accordingly, a similarly situated American, in 1995, has no constitutional right to a jury trial to assert in challenging a permit ruling today.[87] Likewise, no English landowner in 1789 could challenge the Crown in a common law court regarding the forest laws which regulated the use of England's woodlands. No jury trial was available for a declaratory judgment suit then so none is constitutionally guaranteed now. In sum, unless and until the Congress legislates a statutory right to a jury trial[88] for wetland regulation-protesting civil litigants, there will be an administrative bench trial for litigants disputing jurisdictional wetland issues, followed by a deferential review (of the quasi-adjudication's ruling) by a federal district court. When the federal district court judicially reviews the quasi-adjudication results, which presupposes a final agency action, the federal district court will be predisposed to show deference to any agency ruling which is supported by evidence in the record. Although the administrative agency may use the 1989 Wetlands Manual as probative evidence of the VHS indicator categories, the "u-

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served. . . ." U.S. CONST. amendment VII. The U.S. Supreme Court has pointed out that the Seventh Amendment is to be construed using a historical preservation test.

[85] *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 37 (1989) (stating that the 7th Amendment is to be construed using a historic preservation test); Langenkamp v. Culp, 498 U.S. 42, 44 (1990) (using waiver theory to recognize loss of jury trial rights).

[86] This is not to say that our present century invented the concept of environmental stewardship. Environmental stewardship obligations are at least as old as Moses, as Deuteronomy 22:6-7 shows. (Isn't that fitting? Note that Moses, when he was three months old, floated among the reeds [*obligate hydrophytes*] on the littoral edge of an Egyptian wetland!)

[87] This is different from an individual who is sued by the federal government due to wetland-related activities for civil penalties which are analogous to common law damages; such a defendant can claim a jury trial right as to whether the land is a wetland. *See* Tull v. United States, 481 U.S. 412, (1987).

[88] If Congress's actions in the Energy and Water Development Appropriations Act of 1993 are an indication, a statutory mandate for a jury trial in agency actions is unlikely.

ltimate" questions answered by the expert witnesses, out of an abundance of caution, will most likely be associated with the standards of the 1987 Wetlands Manual.

III. NEW STATUTE/NEW STANDARD

A. The Energy and Water Development Appropriations Act of 1993

On October 2, 1992, the Energy and Water Development Appropriations Act of 1993 became federal law. One of the provisions of the Act involved the Corps' regulation of wetlands:

> None of the funds in this Act shall be used to identify or delineate any land as a "water of the United States" under the Federal Manual for Identifying and Delineating Jurisdictional Wetlands that was adopted in January 1989 or any subsequent manual adopted without notice and public comment.
>
> Furthermore, the Corps of Engineers will continue to use the Corps of Engineers 1987 Manual, as it has since August 17, 1991, until a final wetlands delineation manual is adopted.[89]

The Corps now has explicit direction from Congress to use the 1987 Wetlands Manual as the standard for identifying and delineating jurisdictional wetlands until further contrary notice from Congress. Thus, the delegation doctrine issues evaporate and become moot as to all wetland determination issues that originate after October 2, 1992.

B. Epilogue: *New Cases*

Congress has explicitly directed the Corps, until further notice, to use the 1987 Wetlands Manual in all wetlands-related matters, thus establishing the 1987 Wetlands Manual as the statutory standard[90] for defining federal jurisdictional wetlands. Due to the direction Congress has provided in the Energy and Water Development Appropriations Act of 1993,[91] for new wetland controversies aris-

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[89] Energy and Water Development Appropriations Act of 1993, October 22, 1992, Pub. L. No. 102-377, 1992 U.S.C.C.A.N. (106 Stat.) 1324-25, (not codified in U.S.C.).

[90] This is as opposed to any quasi-legislative standard, arising from a legislative delegation, and promulgated by an administrative body after the APA's "notice and comment" process is followed.

[91] The authors express thanks to Presley B. Hatcher, a biologist with the U.S.

ing after October 2, 1992, the dispositive issue is whether the Corps or the EPA has properly used the 1987 Wetlands Manual, not whether the 1987 or the 1989 manual is a valid standard for regulatory purposes.

However, as the *Mills* litigation illustrates, wetland-related litigation can be in the pipeline for years before final adjudication and appeal exhaustion is completed.[92] The Appropriations Act of 1993 is not to be applied retroactively. If *Mills* is representative of what kind of cases may be in the adjudicatory or appellate pipelines, it may be that Congress' mandate in the 1993 Act will not govern some of the next eight or so years' worth of dockets involving disputed wetland determinations. In sum, the above analysis of wetland-related determination litigation issues, including constitutional challenge issues, will continue to be relevant for several years to come.[93]

Army Corps of Engineers (Fort Worth District), for helpful information he provided regarding this uncodified statute.

[92] The Mills' appeal before the Eleventh Circuit Court of Appeals was decided October 27, 1994, many years after the focal events (in 1985) which gave rise to the felony convictions, and even years after the first appellate cycle (in 1990). *See Mills*, 36 F.3d 1052, 1054 (11th Cir. 1994).

[93] Also, if Congress were to directly or indirectly repeal the Energy and Water Development Appropriations Act of 1993, the public and private sectors both "return to square one" so that the 1987 and 1989 manuals remain without the APA "notice and comment" processing needed for either manual to be an adequate quasi-legislative regulatory standard.