

**FEDERAL APPEALS COURTS STRIKE BLOW FOR COMMON SENSE WHEN COURT OVERTURNS CRIMINAL CONVICTION FOR WETLANDS VIOLATION; AND TRIMS BACK FEDERAL REGULATION OF “ISOLATED WETLANDS” UNDER SECTION 404 CLEAN WATER ACT**

In one of the most important departures from Alice in Wonderland’s tea party, where words are not what they mean, but what we say they mean, The United States Court of Appeals for the Fourth Circuit applied common sense to interpretation of the Clean Water Act and overturned a criminal conviction for violating the wetlands program (Clean Water Act, §404). In *US v. Wilson* (Dec. 23, 1997, 4th Circ. 45 Environmental Reporter Cases 1801), the Fourth Circuit overturned the criminal conviction of two land development companies and Mr. Wilson, their chief executive officer, for knowingly discharging fill material without a permit. Prior to the Court’s decision on the defendants’ appeals, the defendants had been sentenced to fines of up to \$3,000,000.00, and Mr. Wilson had been sentenced to 21 months imprisonment. The Court, thankfully, required the government to prove that the defendants knew the actual legal status of wetlands or knew the actual legal status of the materials discharged into the wetlands, as well as that the defendants knowingly discharged a *pollutant*, prior to conviction for violating the Act when it overturned these convictions.

Those involved in land development and farming activities are aware that the Corps and the EPA regulate “discharges” of “pollutants” into “navigable waters of the United States”; interpreted by these agencies to include not only navigable, recognizable, rivers, streams and harbors, but also “wetlands.” These agencies claim an ever-expanding definition of wetlands through its rule making authority, including “isolated wetlands,” and define “pollutants” *to include among other things, native soil dumped onto wetlands regardless of its contaminated condition*. “Isolated wetlands” are intrastate, non-adjacent wetlands, the use, degradation or destruction of which “could affect” interstate commerce.

The Court questioned the Corps’ authority over “isolated wetlands,” noting that the Constitution empowers Congress to regulate activities that *substantially affect interstate commerce*, and found that the Corps had exceeded its statutory authority under the Clean Water Act. As the Court explained: “[e]ven as a matter of statutory construction, one would expect that the phrase ‘waters of the United States’ when used to define ‘navigable waters’ refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters.” The court further determined that wetlands without a direct surface connection to navigable waters “intolerably stretches the ordinary meaning of the word ‘adjacent’ and the phrase ‘waters of the United States’ to include remote wetlands.” The Court specifically questioned whether Congress intended to authorize the Corps to assert its jurisdiction in “such a constitutionally troubling manner.”

The Court also agreed with defendants that “sidecasting” [redepositing soil excavated during the digging of a drainage ditch beside the excavation] is not “pollution” where the sidecasting is the native soil originally deposited there, and does not involve adding any soil not originally located near the wetland area.

Similarly, the U.S. Court of Appeals for the District of Columbia appears to be coming

down on the side of common sense in *National Mining Association v. National Wildlife Federation* (D.C. Cir. Filed 4/30/97 No. 97-5099), where the Corps was challenged by the three-judge panel during oral argument January 23, 1998, who questioned how there could be the addition of a pollutant to waters if, for example, one ton of material is dredged from an area but only some fraction thereof falls back. This case was appealed by the government against the lower court holding. The Appeals court determined that Congress meant to regulate “discharges” which involve the addition of a pollutant into waters, but not the incidental fallback that accompanies the removal of material from waters during excavation activities.