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## Local comment: U.S. Supreme Court ruling puts protection of isolated ponds into states' hands

*February 13, 2001*

BY CHRISTOPHER J. DUNSKY

Critics of a recent decision by the U.S. Supreme Court that limits federal authority to regulate the filling of isolated ponds and wetlands claim that it will leave those areas completely unprotected. That is an overstatement.

The decision simply means citizens will have to look to their state and local governments to protect these areas, as Michigan has been doing for many years.

The Supreme Court case involved the efforts of 23 Chicago-area municipalities to turn a 500-acre former sand and gravel mine outside Chicago into a municipal landfill. The property included about 17 acres of small ponds which were not connected to any body of water outside the property. After the mining ceased, blue herons and other migratory birds protected by federal law nested on the property.

The local governments acquired the property and invested approximately \$30 million in their efforts to obtain approval for the project from Cook County, the Illinois Environmental Protection Agency, and the Illinois Department of Conservation. However, the project ground to a halt when the U.S. Army Corps of Engineers refused to issue a permit to fill the ponds because that would adversely affect federally protected migratory birds.

The majority decision, written by Chief Justice

William Rehnquist, held that Congress had not clearly indicated that it intended federal authority to extend to isolated ponds with no connection to navigable waters. However, the Court left open the possibility that Congress could amend the act to clearly grant such authority, but it does not appear likely that Congress will do so.

Carol Browner, then administrator of the U.S. Environmental Protection Agency, declared that the decision weakens America's ability to protect its wetlands. Leaders of private environmental organizations also criticized the decision. Some estimate that the decision may leave 20 percent of all water bodies unprotected from development.

These critics ignore the fact that the federal government is not the only level of government that can protect ponds and wetlands. The court has effectively invited state and local governments to take whatever actions they consider appropriate for such areas.

Concerned citizens should demand that their state and local governments fulfill their responsibility to provide for the use, preservation, and/or development of the isolated ponds no longer subject to federal regulation. State and local governments are in a better position than single-purpose federal agencies to make such decisions, because they usually involve balancing a variety of public and private needs.

The Illinois case is a prime example of two state agencies and numerous local governments weighing the need for a safe, efficient means of disposing of nonhazardous municipal waste against the desirability of preserving an abandoned mining area as habitat for birds and wildlife. And, as the Illinois case shows, this will sometimes result in the conversion of ponds and wetlands to other uses.

Fortunately, the state of Michigan has administered its own wetlands protection program for many years. Michigan's wetland protection statutes include:

The Goemaere-Anderson Wetland Protection Act (now Part 303 of the Natural Resources and Environmental Protection Act), which prohibits the filling, dredging or draining of wetlands without permits issued by the state Department of Environmental Quality.

The Inland Lakes and Streams Act (Part 301 of the same act), which prohibits dredging or filling bottomland or inland lakes or streams in Michigan without a permit.

The Michigan Environmental Protection Act (now Part 17 of the act), which authorizes citizens to sue to protect the environment when they believe state statutes provide insufficient protection.

These state protections were enacted long before the federal Migratory Bird Rule, which enabled the Corps of Engineers to regulate isolated ponds and wetlands. The EPA and the Corps were so impressed by Michigan's wetland protection program that in 1984 they allowed Michigan to regulate the dredging and filling of nonnavigable ponds and wetlands in Michigan in place of the federal program.

At the time, the EPA and the Corps reserved the right to review, and approve or disapprove, each permit issued by the state. The court's decision means that such federal oversight will no longer take place. This should enable the state to process permit applications more quickly and allow the Corps to concentrate its resources on other permit applications. The public will probably be better served by this new division of responsibility.

Many other states may decide to enact laws like Michigan's. There is no reason to believe that responsible state regulation will be any less acceptable than regulation by federal agencies.

**CHRISTOPHER DUNSKY**, *an EPA official from 1975-88, is an attorney with Honigman Miller Schwartz and Cohn in Detroit. Write to him in care of the Free Press Editorial Page,*

*600 W. Fort St., Detroit, MI 48226.*

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