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A murky ruling

Wednesday, June 21, 2006

With the U.S. Supreme Court's wetlands decision on Monday, the country has one foot back on the Constitution's solid ground and the other still somewhere in a legal bog. One sure consequence is that the court will have to revisit this issue. The other is that, in the meantime, the country is in for a boatload of confusion over where federal authority begins and where it ends. Courts and property owners, as Chief Justice John Roberts said, "will have to feel their way on a case-by-case basis."

It's an unfortunate outcome and one that could have been avoided. Wording in the Constitution and the Clean Water Act of 1972, on which the case turned, is plain enough.

The 5-4 decision emerged from two Michigan cases, each involving property owners' attempts to build on land that the U.S. Army Corps of Engineers deemed a wetland. In the lead case, Midland developer John A. Rapanos in the 1980s filled a 175-acre Bay County farm field which, after a heavy rain, could send water rippling into a drainage ditch and, from there, to a very small stream and then to Lake Huron. The second case involved a similar treatment of low-lying lands in Macomb County.

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Key words in the Clean Water Act, which the Army Corps administers, are

"navigable waters." In the law, Congress gave the regulators authority over releases of pollutants into "navigable waters." The ordinary meaning of the term is waters capable of carrying a boat or ship. That, in turn, would fit within the express meaning of the Constitution's commerce clause, giving to Congress the power to regulate trade between the states.

But the Rapanos land is 20 miles from the nearest open water, which is Saginaw Bay. In

the Macomb County case, the distance is about a mile. If such federal reaches can qualify under the commerce clause, then it would seem that any creek, pond, puddle or pothole would as well.

Five years ago, the high court approached a similar question of federal authority and issued a straight answer. The Corps was attempting to regulate use of a water-filled gravel pit in the Chicago area, arguing that it met the definition of interstate commerce because migratory birds landed there. The court found no basis for federal jurisdiction, which it said "would result in a significant impingement of the states' traditional and primary power over land and water usage."

In the new cases, Justice Anthony Kennedy, who wrote the decisive opinion for the split court, said "navigable waters" could include small and temporarily wet areas that have a "significant nexus" to open waters. "Significant," he said, would apply to the chemical, physical or biological effects on "navigable" waters.

This is a legal marsh, not really a decision at all. Real direction and a footing in the Constitution were found in the plurality opinion of Justice Antonin Scalia, whose reading of "navigable" and of the commerce clause line up with plain English.

The court sent the two Michigan cases back to lower courts for reconsideration using the new non-standard. The outcomes from there are anything but certain. The best that can be said for now is that the Army Corps has been reminded that its authority is not boundless.

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