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Dale G. Young / The Detroit News

The U.S. Supreme Court has developed a new but complicated legal test for wetland and clean water rules in a case involving Midland developer John Rapanos.

Editorial: Supreme Court bungles Michigan wetland

In split ruling, U.S. justices leave the law unclear

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More than 200 years ago, Chief Justice John Marshall said it is "emphatically" the duty of the court "to say what the law is." But in its decision on two Michigan wetlands cases, the high court has failed to do so.

Instead, primarily because of an opinion written by Justice Anthony Kennedy, the Corps of Engineers and ultimately the courts will determine on a "case-by-case" basis whether wetlands are under the corps' jurisdiction. A Supreme Court ruling that leaves government officials and judges to decide how to apply the law case by case is worthless in providing the guidance that it should.

This is no minor matter. At issue are fundamental property rights, which are expressed

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protected in the Constitution. And the ruling will continue to impose costs on American citizens.

As Justice Antonin Scalia noted in the court's plurality decision, more than \$1.7 billion is spent annually in obtaining wetlands permits. The typical applicant for such a permit, Scalia noted, spends 788 days and \$271,596 in pursuing a wetlands permit through the approval process. This is a significant tax on economic development.

And if the corps or the U.S. Environmental Protection Agency won't allow an owner to develop his own property because it contains a federally protected wetland, it has essentially seized his land.

The decision involved the appeals of two families, the Rapanos family of Midland and the Carabell family in Macomb County, who either are seeking permission to fill in wetlands or have already done so.

John Rapanos in particular has been hounded by the federal government for moving some soil around on what is essentially dry land that, as Scalia noted, sometimes gets soggy. Scalia's opinion also noted that the nearest body of "navigable water" is 11 to 20 miles away.

The Carabell family has sought to fill in some wetland in Macomb County about a mile from Lake St. Clair. Scalia's opinion notes that a drainage ditch runs alongside but it is separated from it by a four-foot-wide berm that almost always prevents any

The corps or the EPA have asserted jurisdiction over these lands on the ground that either navigable waters or adjacent to navigable waters and thus subject to regulation under the federal Clean Water Act.

Scalia has called the corps' assertion of jurisdiction over land that so marginally touches anything that could be called a navigable water to be "beyond parody."

Scalia called for the Rapanos and Carabell cases to go back to lower courts in light of the fact that the corps had over-interpreted its power.

What muddies up the issue is that Kennedy joined in the result of the Scalia ruling, created a new test. Acknowledging that the Clean Water Act only allows the federal government to assert jurisdiction over "navigable waters," Kennedy said the test must be whether particular wetlands have a "significant nexus" to navigable water so that it affects those waters.

The Kennedy ruling somewhat limits the corps' power, but creates a hugely subjective determination of whether lands or wetlands have a "significant nexus" to navigable water. The determination of whether lands or wetlands have a "significant nexus" to navigable water will be applied by agencies that four justices of the Supreme Court acknowledged, in Scalia's opinion, to be entirely too eager to impose regulations where they have no jurisdiction. But this test is now the law, even though only one Supreme Court justice is responsible for it.

The best outcome now would be for Congress to step in and clear up the issue since



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justices of the Supreme Court have failed to do so.

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