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# Kalamazoo Gazette

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## Supreme Court muddies the waters

Wednesday, June 21, 2006

We were under the impression that one job of the U.S. Supreme Court is to clarify the law and ensure that it is applied evenly.

Apparently we were misinformed.

That's certainly the impression we came away with after Monday's 4-1-4 ruling on two Michigan cases involving wetlands.

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This was to have been an important environmental case that pitted private property rights against the need for environmental protection. Justices were to decide just how much authority the federal government has in deciding what is a wetland.

Instead, the court's ruling attempts to define what a wetland is and ends up defining nothing. The two Michigan cases now will be returned to lower courts for further consideration.

The four conservatives on the court wanted to sharply restrict the definition of a wetland. Justices Samuel Alito, John Roberts, Antonin Scalia and Clarence Thomas agreed that the government is allowed to regulate land that is adjacent to a 'relatively permanent body of water' with 'continuous surface connection with that water, making it difficult to determine where the water

ends and the wetland begins."

Four liberal justices – Stephen Breyer, Ruth Bader Ginsburg, David H. Souter and John Paul Stevens – wanted to define a wetland as adjacent to "all identifiable tributaries that ultimately drain into large bodies of water" that also would include manmade drains and ponds.

Justice Anthony Kennedy further complicated the ruling with an opinion of his own, disagreeing with the conservatives that only permanent bodies of water are to be regulated. But he added that even remote tributaries with a "significant nexus" to navigable water can be regulated as well.

The two cases involve property in Macomb County and in Midland and address their owners' desire to develop them without interference from the Army Corps of Engineers.

The property owners argue that the Army Corps of Engineers had been granted so broad a jurisdiction by Congress in the Clean Water Act as to be unconstitutional.

It is not uncommon for state legislatures or Congress to pass laws that are vaguely worded or unclear, leaving it to the judiciary to decide what the law really means. What to do when the judiciary issues a ruling that is unclear?

Now it is up to lower courts and federal regulators to figure out how the ruling applies. Even Chief Justice Roberts said the lower courts and regulated agencies "will now have to feel their way on a case-by-case basis."

Gee, thanks. A decision such as this coming from such a divided court feels like no decision at all.

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