

First Circuit Interprets Rapanos to Determine Which Test to Apply

United States v. Johnson, 2006 U.S. App. LEXIS 27042 (1st Cir. 2006).

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The United States filed a civil action against the Johnsons for allegedly discharging pollutants into federally-regulated waters without a permit in violation of the Clean Water Act (CWA).¹ The Johnsons are the owners of three parcels of land that contain wetlands which are connected to the Weweantic River through various streams, ponds, channels, and ditches. Between 1979 and 1999, the Johnsons have discharged dredged and fill material at these sites in order to construct, expand, and maintain their cranberry bogs. The district court held that there was a sufficient basis for the United States to exercise jurisdiction over the Johnsons' cranberry farms and the Johnsons appealed to the First Circuit. The First Circuit held the appeal in abeyance pending the Supreme Court's decision in *Rapanos v. United States*, 126 S. Ct. 2208 (2006).

In *Rapanos*, the Supreme Court issued a split decision vacating the Sixth Circuit's decision which attempted to interpret the phrase "waters of the United States" as found in the CWA. The plurality, which consists of Justices Scalia, Thomas, Alito, and Chief Justice Roberts, remanded the case back to the Sixth Circuit to apply a test where "only those wetlands with a continuous surface connection to bodies that are waters of the United States in their own right" are "adjacent to" such waters and covered by the CWA.² Justice Kennedy, writing the concurrence, viewed the "significant nexus" test to be the proper test and "to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are navigable in fact or could reasonably be so made."³ While the dissent disagreed with the judgment and would have given deference to the agency's determination, Justice Stevens noted that "all four justices who have joined this [dissenting] opinion would uphold the Corps' jurisdiction... in all other cases in which either the plurality's or Justice Kennedy's test is satisfied..."⁴

When no clear majority exists, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."⁵ In *United States v. Gerke*,⁶ the Seventh Circuit equated the narrowest opinion with the one least restrictive of federal authority to regulate. But the *Rapanos* plurality deems it just as plausible to conclude that the narrowest ground is the ground most restrictive of government authority "because that ground avoids the constitutional issue of how far Congress can go in asserting jurisdiction under the Commerce Clause."⁷ The First Circuit settled on the idea that the narrowest grounds are simply understood as the "less far-reaching-common ground."⁸ Basically, the less sweeping opinion would require the same outcome in a subset of the cases that the more sweeping opinion would.⁹ But this standard is still difficult to apply to the facts of the Johnson case. In most situations, Justice Kennedy's "significant nexus" test would be the least sweeping opinion. But there may be circumstances when a body of water has a slight "surface connection" to a navigable waterway but no "significant nexus" exists. Thus, Justice Kennedy's "significant nexus" test would not be met but Justice Stevens and the dissenters in *Rapanos* would uphold jurisdiction because it met the plurality's test. Essentially, "Justice Kennedy would [be voting] against federal authority only to be outvoted 8-to-1."⁹

In order to provide for all circumstances that may arise regarding the hydrological connection between a wetland and navigable waters, the First Circuit chose to follow Justice Stevens' dissent in *Rapanos* and apply either the plurality's "surface connection" test or Kennedy's "significant nexus" test. It chose not to follow a sole opinion; but rather, find "common ground" shared by five or more justices. By applying either test, the First Circuit will ensure that federal jurisdiction exists such that all of the *Rapanos* majority would have supported such a finding. Regardless of the test applied, it would have the support of the four dissenters plus the plurality or Justice Kennedy. There will not be a situation where Kennedy's test is applied and no jurisdiction is found even though a slight surface connection exists and Kennedy would have been outvoted by the plurality plus the dissent.

The First Circuit has remanded the Johnson case to see if either the plurality's "surface connection" test or Kennedy's "significant nexus" test can be applied.

Endnotes

1. See 33 U.S.C. §§ 1311, 1352.

2. *Rapanos v. United States*, 126 S. Ct. 2208, 2226 (2006).

3. *Id.* at 2236.
4. *Id.* at 2265.
5. *Marks v. United States*, 430 U.S. 188, 193 (1977).
6. 2006 WL 2707971 (7th Cir. 2006).
7. *United States v. Johnson*, 2006 U.S. App. LEXIS 27042, at *19 (1st Cir. 2006).
8. *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1247 (11th Cir. 2001).
9. *Johnson*, 2006 U.S. App. LEXIS 27042 at *21.