
The Clean Water Act (CWA) extends federal protection to “navigable waters,” which it broadly defines as “the waters of the United States, including territorial seas.”1 In Rapanos v. United States,2 the Supreme Court attempted to define the standard for determining the CWA’s reach over wetlands but, unable to reach a majority opinion, issued a fragmented plurality decision setting forth conflicting legal standards.3 To identify Rapanos’s controlling legal standard, some courts invoke the narrowest ground formula while others adopt Justice Stevens’s instructions set forth in his Rapanos dissent.4 In United States v. Johnson,5 the First Circuit Court of Appeals considered which of these formulas it should invoke in construing Rapanos.6 The First Circuit adopted Justice Stevens’s instructions and directed lower courts to find CWA jurisdiction over wetlands that satisfy either standard set forth in Rapanos.7

1. 33 U.S.C. § 1362(7) (2006) (defining navigable waters); see also id. § 1342(a) (prohibiting discharge of pollutants into navigable waters without permit).
5. 467 F.3d 56 (1st Cir. 2006), cert. denied, 128 S. Ct. 375 (2007).
6. See id. at 60 (evaluating legal standards for determining CWA jurisdiction).
7. See id. at 66 (adopting Justice Stevens’s approach).
In 1999, the United States filed a civil action alleging that a group of cranberry farmers violated the CWA by discharging dredge and fill materials into federally regulated waters without a permit. The three wetlands at issue were linked to a navigable-in-fact river by non-navigable streams, creeks, or ditches. The United States District Court for the District of Massachusetts found that the hydrological connection between the three wetlands and the navigable water established a sufficient basis for CWA jurisdiction and granted summary judgment in favor of the government. The First Circuit affirmed the district court’s ruling and issued a panel decision upholding CWA jurisdiction over the wetlands.

Shortly after the First Circuit delivered its panel decision, the Supreme Court decided Rapanos v. United States, which also concerned CWA jurisdiction over wetlands. In response to the Rapanos decision, the Johnson litigants requested a rehearing and asked the First Circuit to apply the proper legal standard for determining CWA jurisdiction over wetlands. Perplexed by the Rapanos holding, the First Circuit, on rehearing, sought to decipher the fragmented decision and extract the controlling legal standard. The court considered various interpretations and ultimately adopted Justice Stevens’s instruction to find jurisdiction if the wetlands satisfy either the standard of the Rapanos plurality or its concurring Justice.

The United States Supreme Court has struggled to define the CWA’s reach

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8. See United States v. Johnson, 437 F.3d 157, 159-60 (1st Cir. 2006) (stating appellants discharged pollutants into wetlands in Carver, Massachusetts), vacated, 467 F.3d 56 (1st Cir. 2007).
9. United States v. Johnson, 437 F.3d 157, 161 (1st Cir. 2006) (describing wetlands in question “hydrologically connected” to navigable-in-fact Weweantic River), vacated, 467 F.3d 56 (1st Cir. 2007). The court explained that the three wetlands, which were adjacent to tributaries of the navigable-in-fact river, were hydrologically connected to the river because water from the wetland sites eventually drained into the river. Id. The court defined a “navigable-in-fact” water body as one on which navigation—boat or ship traffic—does or could take place. Id. at 161 n.3. For jurisdictional purposes, the CWA equates “navigable waters” with “waters of the United States.” Id. However, because some “waters of the United States” are not navigable-in-fact, “navigable waters” for CWA purposes may not be navigable-in-fact. Id.
10. See 467 F.3d at 58 (outlining district court’s decision).
11. See United States v. Johnson, 437 F.3d 157, 181 (1st Cir. 2006) (noting hydrological connection links nonadjacent wetlands with navigable-in-fact river), vacated, 467 F.3d 56 (1st Cir. 2007).
12. See Rapanos v. United States, 126 S. Ct. 2208, 2220 (2006) (plurality opinion) (considering whether wetlands constitute “waters of the United States” pursuant to CWA); see also 467 F.3d at 57 (indicating conflict between Johnson panel decision and Rapanos). Noting that Solid Waste Agency did not address nonadjacent wetlands, the Rapanos Court reviewed the standard for establishing CWA jurisdiction over wetlands which are not immediately adjacent to navigable waters. See Rapanos v. United States, 126 S. Ct. 2208, 2217-18 (2006) (plurality opinion).
13. See 467 F.3d at 60 (outlining appellants’ argument). The appellants noted that, like those in Rapanos, the wetlands in question were not immediately adjacent to navigable waters. See id. Appellants challenged the panel’s decision that a hydrological connection constitutes a significant nexus under Rapanos. Id.
14. Id. at 60-62 (characterizing lower courts’ inconsistent application of Rapanos). The court also detailed Rapanos’s split decision. Id. at 59-60.
15. Id. at 66 (vacating and remanding panel decision and invoking Justice Stevens’s instructions).
and has offered both liberal and narrow interpretations. In particular, the Court has struggled to devise a definitive legal standard for determining whether the CWA applies to wetlands. The Court attempted to resolve this ambiguity in Rapanos, but failed to render a majority opinion and instead issued a fragmented plurality decision. Justice Scalia authored the four-Justice plurality opinion limiting CWA jurisdiction to wetlands with a “continuous surface connection” to “relatively permanent, standing or continuously flowing” water bodies. In his lone concurring opinion, Justice Kennedy concluded that CWA jurisdiction should extend to wetlands that possess a “significant nexus” to navigable waters. Finally, authoring the four-Justice dissenting opinion, Justice Stevens directed courts to find CWA jurisdiction if the wetland at issue satisfies either the plurality’s or Justice Kennedy’s test.

When the Supreme Court issues a fragmented plurality opinion, lower courts often struggle to extract the controlling legal standard. One method of

16. See Fortin, supra note 3, at 1239-42 (analyzing period of liberal CWA construction). In the first years after the CWA’s enactment, the Supreme Court construed the Act’s jurisdictional boundaries to the broadest extent possible under the Commerce Clause. Id. at 1241; see also Taylor Romigh, Comment, The Bright Line of Rapanos: Analyzing the Plurality’s Two-Part Test, 75 FORDHAM L. REV. 3295, 3302 (2007) (illustrating Solid Waste Agency’s broad and narrow holdings). Under Solid Waste Agency’s narrow holding, the CWA covers isolated wetlands when a hydrological connection exists between the wetland and the navigable water, but not if the connection is purely ecological or based on migratory bird patterns. Romigh, supra, at 3302. A broad reading of Solid Waste Agency, however, calls for a “significant nexus” such that the wetland in question must either be navigable itself or directly adjacent to navigable water. Id.; see Kevin P. Pechulis, Scope of “Waters of the United States” Unclear After Rapanos v. United States, 38 A.B.A. TRENDS 4, 4 (2006) (asserting Solid Waste Agency undercut Riverside’s broad application of CWA jurisdiction). Compare United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133-34 (1985) (upholding CWA jurisdiction over adjacent wetlands bordering or in proximity to United States waters), with Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs, 531 U.S. 159, 167 (2001) (requiring “significant nexus” between wetlands and navigable waters). The Solid Waste Agency Court refused to extend CWA coverage to isolated ponds despite their indirect ecological impact on navigable waters. See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs, 531 U.S. 159, 168 (2001).

17. See Fortin, supra note 3, at 1258 (contending Solid Waste Agency did not define CWA jurisdictional limits). While the Solid Waste Agency Court held that bird migration between an isolated pond and a navigable water does not establish CWA jurisdiction over the isolated pond, it failed to set forth categorical limits of the CWA’s reach. See id.; see also Margaret B. Hinman, Clean Water Act Jurisdiction: Are the Muddy Waters Clearing?, 50 ADVOC. 13, 13 (2007) (explaining confusion over proper jurisdictional test).


19. See Rapanos v. United States, 126 S. Ct. 2208, 2213, 2221 (2006) (plurality opinion) (extending CWA jurisdiction to wetlands only if no clear demarcation between waters and wetlands).

20. See Rapanos v. United States, 126 S. Ct. 2208, 2249 (2006) (Kennedy, J., concurring) (setting forth case-by-case framework). Justice Kennedy suggested that a mere hydrological connection between wetlands and navigable waters is neither required nor sufficient in itself to establish jurisdiction. Id. He also explained that a significant nexus exists when the wetlands, either alone or in combination with the surrounding environment, “significantly affect the chemical, physical, and biological integrity” of navigable waters. Id. at 2248.


22. See Murphy, supra note 3, at 364 (explaining Rapanos lacks majority opinion). Although five justices
deciphering a fragmented decision is to invoke the formula set forth in Marks v. United States, which treats the controlling legal standard as the “position taken by those Members who concurred in the judgments on the narrowest grounds.” Depending on the court, the “narrowest ground” may be the opinion least restrictive of federal regulation, the opinion based on less far-reaching grounds, or the opinion that is a subset of another opinion. Justice Stevens’s approach, however, is an alternative method that instructs lower courts to find CWA jurisdiction when the wetland satisfies either the Rapanos plurality’s or Justice Kennedy’s test. According to Justice Stevens, this approach ensures a working majority of at least five voting Justices. That is, all four dissenting Justices would uphold CWA jurisdiction under either the plurality’s or Justice Kennedy’s test.

agreed on a judgment in Rapanos, the Court lacked a majority consensus because Justice Kennedy’s rationale drastically differed from that of the plurality. Id.


25. See, e.g., United States v. Gerke Excavating, Inc., 464 F.3d 723, 725 (7th Cir. 2006), construing narrowest ground as ground least restrictive of federal authority); King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) (treating narrowest ground as least common denominator or logical subset); United States v. Evans, No. 3:05 CR 159 J 32HTS, 2006 WL 2221629, at *19 (M.D. Fla. Aug. 2, 2006) (considering less far-reaching opinion as narrowest ground).


28. Rapanos v. United States, 126 S. Ct. 2208, 2265 (2006) (Stevens, J., dissenting) (presuming Justice Kennedy’s approach will control in most cases). In most cases, Justice Kennedy’s test will permit more extensive CWA regulation so that any situation satisfying the plurality’s test will also satisfy Justice Kennedy’s test. Id. In the rare case, where the circumstances satisfy the plurality’s test but not Justice Kennedy’s test, Justice Stevens advises lower courts to uphold jurisdiction. Id.; see also Matthew A. MacDonald, Comment, Rapanos v. United States and Carabell v. United States Army Corps of Eng’rs, 31 HARV. ENVTL. L. REV. 321, 328 (2007) (explaining rare situation where wetland satisfies plurality’s test but not Justice Kennedy’s test). Where a wetland is connected to navigable waters through a relatively permanent stream with an insignificant flow, the plurality and the dissent would find jurisdiction, but Justice Kennedy may not. MacDonald, supra, at 328. To resolve this unusual result, Justice Stevens advises lower courts to find jurisdiction if the wetland in
Lower courts have employed both the Marks formula and Justice Stevens’s instructions to decipher Rapanos and extract a legal standard for establishing CWA jurisdiction over wetlands. Using the Marks formula, the Seventh and Ninth Circuit Courts of Appeals concluded that Justice Kennedy’s significant nexus test was the narrowest ground and therefore the controlling legal standard. Because the plurality and concurring opinions do not overlap in Rapanos, other courts find the Marks formula inapposite as applied to the Rapanos decision. Those courts have adopted Justice Stevens’s instructions and consider both the plurality’s and Justice Kennedy’s test to determine CWA jurisdiction.

In United States v. Johnson, the First Circuit Court of Appeals adopted Justice Stevens’s instructions and held that the government may prove CWA jurisdiction using either Justice Kennedy’s or the Rapanos plurality’s test. According to the court, Justice Stevens’s instructions provide a useful alternative to the Marks formula, which does not easily translate to the Rapanos decision. In fact, the court cited several cases in which the Supreme Court

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29. See infra notes 30-31 and accompanying text (describing cases using Marks formula or Justice Stevens’s test). See generally MacDonald, supra note 28, at 328 (observing lower courts’ split but favoring Justice Kennedy’s or Justice Stevens’s opinion).

30. See United States v. Gerke Excavating, Inc., 464 F.3d 723, 724-25 (7th Cir. 2006) (using Marks “narrowest ground” test); N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023, 1025 (9th Cir. 2006) (following Justice Kennedy’s test). The Gerke court concluded that Justice Kennedy’s opinion prescribing the significant nexus test was “narrower” than the plurality’s opinion with respect to limiting federal authority because, in most cases, Justice Kennedy’s significant nexus test would confer greater federal authority over wetlands and nonnavigable waters. United States v. Gerke Excavating, Inc., 464 F.3d 723, 724-25 (7th Cir. 2006). The court reasoned that as applied in future cases, Justice Kennedy’s opinion will command the support of five Justices. Id. at 725. If Justice Kennedy finds CWA jurisdiction, at a minimum, the four dissenting Justices will also find jurisdiction; in most cases, if Justice Kennedy rules against federal authority, he will garner the support of the four plurality Justices. Id. The court noted, however, that in the rare case that a slight and insignificant, but continuous surface connection links a wetland to a navigable water, this foregoing result may not follow. Id. at 725. In that case, the four dissenting Justices and the four plurality Justices would find CWA jurisdiction and outvote Justice Kennedy eight to one. Id.


33. 467 F.3d at 65, 66 (deeming Justice Stevens’s instructions both “simple and pragmatic”).

34. See id. at 63-64 (explaining narrowest ground test only resolves decisions containing overlapping
disregarded the *Marks* formula altogether.\textsuperscript{35} The First Circuit also reasoned that Justice Stevens’s approach ensures that lower courts will find CWA jurisdiction in all cases where a majority of the *Rapanos* Court would find jurisdiction.\textsuperscript{36} It rejected the notion that in extracting a legal standard, lower courts should ignore dissenting opinions.\textsuperscript{37} Instead, the First Circuit held that with respect to *Rapanos*, lower courts must examine the points of commonality among all Justices, and concluded that Justice Stevens’s approach best serves this objective.\textsuperscript{38}

In *United States v. Johnson*, the First Circuit sensibly deviated from the *Marks* norm by invoking Justice Stevens’s instructions in *Rapanos*.\textsuperscript{39} As applied to the *Rapanos* decision, Justice Stevens’s instructions afford a logical and pragmatic approach to extracting the decision’s controlling legal standard.\textsuperscript{40} Though most courts that follow the *Marks* formula conclude that Justice Kennedy’s opinion is the narrowest ground, their reasoning is flawed and illogical.\textsuperscript{41} While *Marks* is logical in cases involving overlapping opinions, it does not translate to the *Rapanos* decision, which sets forth distinct legal standards.\textsuperscript{42} In contrast, Justice Stevens’s rationale, which purports to find a
common ground that at least five Justices share, logically applies to *Rapanos*.43

Interestingly, whether a court uses Justice Stevens’s instructions or the *Marks* formula, the result will often compel the application of the significant nexus test to determine CWA jurisdiction over wetlands.44 The *Marks* formula inevitably leads courts to apply Justice Kennedy’s test, while Justice Stevens’s instructions allow courts to apply both the plurality’s and Justice Kennedy’s legal standards.45 Yet, whether a court uses the *Marks* formula or Justice Stevens’s approach, in most cases, Justice Kennedy’s significant nexus test will play at least some role in determining CWA jurisdiction.46 As a result, while the rationale underlying Justice Stevens’s test is more logical than that underlying *Marks*, both methods will render the same result: lower courts will at least consider the significant nexus test in determining CWA jurisdiction.47 Ultimately, Justice Kennedy’s lone concurring opinion will play a significant role in defining the CWA’s reach.48

In *United States v. Johnson*, the First Circuit undertook the daunting task of deciphering the fragmented *Rapanos* opinion. Mindful of the limitations of the *Marks* formula, it adopted the more reasonable approach to extracting the legal standard set forth in *Rapanos*. While the reach of the CWA remains unclear, Justice Stevens’s instructions provide a workable starting point from which to evaluate the complicated issue.

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43. See *467 F.3d* at 64-65 (explaining Justice Stevens’s rationale). Justice Stevens’s approach easily translates to the *Rapanos* decision because it considers all arguments in order to find the common ground and to command a majority of votes. *Id.* at 64.

44. Compare *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006) (using *Marks* formula and holding Justice Kennedy’s significant nexus test controlling), and *N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006) (employing *Marks* test and requiring courts only use Justice Kennedy’s test), with *United States v. Cundiff*, 480 F. Supp. 2d 940, 944 (W.D. Ky. 2007) (invoking Justice Stevens’s instructions and applying both plurality’s and Justice Kennedy’s test), and *Simsbury-Avon Preservation Soc’y v. Metacomet Gun Club, Inc.*, 472 F. Supp. 2d 219, 226-27 (D. Conn. 2007) (following Justice Stevens’s instructions and applying both plurality’s and Justice Kennedy’s test).

45. See supra note 28 and accompanying text (describing various outcomes of Justice Stevens’s instructions); supra note 30 (discussing cases applying *Marks*).

46. See supra note 44 and accompanying text (pointing out courts using Justice Stevens’s approach or *Marks* formula both apply significant nexus test); see also supra note 41 (describing courts using *Marks* formula and applying significant nexus test).

47. See supra note 32 and accompanying text (describing applications of Justice Stevens’s approach); supra note 36 and accompanying text (discussing outcomes using Justice Stevens’s approach).

48. See *Mank*, supra note 3, at 328-30 (discussing impact of Justice Kennedy’s test in future cases).