Appeal No. 05-1444

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES,
Plaintiff-Appellee,

v.

CHARLES JOHNSON; FRANCIS VANER JOHNSON; GENELDA JOHNSON; JOHNSON CRANBERRIES LIMITED PARTNERSHIP, A MASSACHUSETTS LIMITED PARTNERSHIP,
Defendants-Appellants.

On Appeal from the United States District Court for the District of Massachusetts
Honorable Edward F. Harrington, District Judge
Civil Action No. 99-12465-EFH

SUPPLEMENTAL AMICI CURIAE BRIEF OF NATIONAL WILDLIFE FEDERATION, ASSOCIATION OF STATE WETLAND MANAGERS, ENVIRONMENTAL LEAGUE OF MASSACHUSETTS, MASSACHUSETTS PUBLIC INTEREST RESEARCH GROUP and SIERRA CLUB IN SUPPORT OF PLAINTIFF – APPELLEE

[LIST OF COUNSEL APPEAR
ON THE FOLLOWING PAGE]

September 19, 2006

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amici National Wildlife Federation, Association of State Wetland Managers, Environmental League of Massachusetts, Massachusetts Public Interest Research Group, and Sierra Club state that they are all not-for-profit corporations and they have no parent companies, subsidiaries, or affiliates who have issued shares to the public.

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INTRODUCTION

In the wake of the U.S Supreme Court's fragmented decision in *Rapanos v. United States*, __ U.S. __, 126 S. Ct. 2208 (2006)("*Rapanos*"), the Johnsons' have renewed their petition for rehearing en banc.[2] The United States opposes rehearing and moves to vacate the panel's decision and remand the case to the district court for the limited purpose of applying the "new standards" for determining Clean Water Act (CWA) jurisdiction announced in *Rapanos*. *See* United States' Motion to Vacate and Remand and Response In Opposition to Petition for Rehearing *En Banc* ("Motion to Remand") at 1. *Amici* National Wildlife Federation, et al. submit this brief in support of the United States and in opposition to rehearing. Amici respectfully suggest, however, that a remand is unnecessary because a majority of the justices in *Rapanos* would agree with this court's conclusion that the wetlands and streams at issue are within the jurisdiction of the Act. Alternatively, if there is to be a remand it should be narrowly focused on

2 The Johnsons' base their petition for rehearing on a flawed reading of *Rapanos*, asserting that "five justices of the Supreme Court—four voting for the plurality opinion authored by Justice Scalia and Justice Kennedy concurring separately—held that the hydrological connection rule is not permissible under the statute." *See* Appellants' Supplemental Petition for Rehearing *En Banc* ("Supplemental Petition") at 2. However, a majority of the Court—the four justices who joined Justice Stevens in dissent and Justice Kennedy—disagreed with the plurality's rationale. In fact, Justice Kennedy decisively rejected the plurality's interpretation as "inconsistent with the Act's text, structure and purpose." 126 S. Ct. at 2245. Thus, there was no majority holding invalidating a so-called "hydrological connection rule." Moreover, this court is not bound in any way by a jurisdictional rule rejected by a majority of the Supreme Court. *Triplett Grille, Inc. v City of Akron*, 40 F.3d 129, 133-34 (6th Cir. 1994) (the articulated standard must "necessarily produce results with which a majority of the Court from that case would agree.").

supplementing the record regarding the significance of the ecological and hydrological functions of these wetlands within the context of the Act's central purpose of "restoring and maintaining the chemical, physical and biological integrity of the nation's waters." 33 U.S.C. 1251 (a). As *Amici* have previously noted, much of this evidence already exists and was presented to the District Court, but was not included in the Joint Appendix. *See* Brief *Amicus Curiae* of National Wildlife Federation et al in Support of Appellees, at 12-14 (August 29, 2005). Further review will undoubtedly confirm that these wetlands, in combination with other wetlands in the watershed, significantly affect the chemical, physical and biological integrity of the Weweantic River and Buzzard's Bay.

ARGUMENT

I. A MAJORITY OF THE JUSTICES IN *RAPANOS* WOULD AGREE THAT THE STREAMS AND WETLANDS AT ISSUE HERE ARE JURISDICTIONAL.

This court has already ruled that 'there is no factual dispute that the target sites contain wetlands that are adjacent to tributaries that hydrologically connect those wetlands to the Weweantic River via a series of tributaries and adjacent wetlands." *United States v Johnson*, 437 F.3d 157, 178 (1st Cir. 2006)("*Johnson*"). Thus, the four justices who joined Justice Stevens' dissent in *Rapanos* would unquestionably agree that the wetlands at issue here are jurisdictional. *See* 126 S.Ct. at 2262 ("I think it is clear that wetlands adjacent to tributaries of navigable

waters generally have a 'significant nexus' with traditionally navigable waters downstream.").[3] Justice Kennedy parted company with the dissent only to the extent that he wanted a more rigorous determination of "significant nexus," for wetlands adjacent to tributaries. *Id.* at 2249. Justice Kennedy clearly contemplated, however, a broad, ecological test for determining significant nexus: "[W]etlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, alone or in combination with similarly situated lands within the region, significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 2248. Thus, if the wetlands at issue meet Justice Kennedy's test then a majority of the Court would find them jurisdictional, *Id.* at 2265 (Stevens, J., dissenting, stating that "all four Justices who have joined [the dissent] would uphold the Corps' jurisdiction . . . in all [] cases in which . . . Justice Kennedy's test is satisfied . . ."). Amici submit that the wetlands do meet Justice Kennedy's test.

This court has already found that there is a "significant nexus" between the navigable-in-fact Weweantic River and the tributary system that drains into it. Moreover, this court has found that 'any pollutants discharged on or from the

3 It is important to note that Justice Stevens does not require a "significant nexus" test. He states that, "[w]hile I generally agree with Parts I and II-A of Justice Kennedy's opinion, I do not share his view that we should replace regulatory standards that have been in place for over 30 years with a judicially crafted rule distilled from the term 'significant nexus' as used in *SWANCC*. To the extent that our passing use of this term has become a statutory requirement, it is categorically satisfied as to wetlands adjacent to navigable waters or their tributaries." *Rapanos*, 126 S. Ct. at 2264.

target sites would reach the Weweantic River through this hydrological connection." *Johnson*, 437 F.3d at 161. Further this court has determined that the "target sites are inseparably bound up with the Weweantic River." *Id.* at 181. Finally, this court has properly assessed the significance of the entire tributary system to downstream water quality, exactly as Justice Kennedy required. In short, unlike the decisions of the Sixth Circuit in *Rapanos*, which Justice Kennedy found wanting because their characterizations of the significance of the wetlands and tributaries were too "imprecise" and "conditional" (*Id.* at 2251), this court has performed the kind of careful, searching scrutiny that Justice Kennedy is seeking.

Given the focus of Justice Kennedy and the Justice Stevens dissent on the importance of achieving the Act's purpose as the proper basis of a test to determine jurisdiction, there is no question that the significant nexus test is the "common denominator" that unites a majority of the justices in *Rapanos*. Contrary to the Johnsons' argument, the case *Marks v. United States*, 430 U.S. 188, 193 (1977), does not require that the court look to the plurality – whose decision ignores the Act's purpose – for guidance. As the D.C. Circuit said in *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991)(*en banc*), "*Marks* is workable...only when one opinion is a logical subset of other, broader opinions." Here, Justice Kennedy's opinion is a "logical subset" of the dissent rather than the plurality. *See Student Public Interest Research Group of New Jersey, Inc. v. AT & T*, 842 F.2d 1436, 1451 (3d

Cir.1988)(Noting that in a 4-1-4 decision, "Because the four dissenters would allow contingency multipliers in all cases in which Justice O'Connor would allow them, her position commands a majority of the court.")

Further, as the Ninth Circuit ruled in *United States v. Williams*, "[c]ourts need not find a legal opinion in which a majority joined but merely a legal standard which, when applied, will necessarily produce results with which a majority of the Court would agree." 435 F.3d 1148, 1157 (9th Cir. 2006)(interpreting *Missouri v. Seibert*, 542 U.S. 600 (2004)); *see also Planned Parenthood v. Casey*, 947 F.2d 682, 693 (3d Cir. 1991)(interpreting *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) and *Hodgson v. Minnesota*, 497 U.S. 417 (1990)).

Similarly, this Court recently refused to apply a Supreme Court plurality opinion on an Establishment Clause issue because a majority of the Supreme Court, comprised of three concurring and two dissenting Justices, rejected the plurality's approach. *Knights of Columbus, Council No. 94 v. Town of Lexington*, 272 F.3d 25, 33 n.4 (1st Cir. 2001).

In sum, Justice Kennedy's significant nexus test is controlling and the plurality opinion cannot be the source of any controlling legal principles in this case.

II. ANY REMAND SHOULD TAKE INTO ACCOUNT THE CUMULATIVE EFFECT OF THE TARGET SITES, IN COMBINATION WITH OTHER WETLANDS IN THE WATERSHED, ON THE CHEMICAL, PHYSICAL, AND BIOLOGICAL INTEGRITY OF THE WEWEANTIC RIVER AND BUZZARDS BAY.

Justice Kennedy's test affirmed *Riverside Bayview's* "broader focus on wetlands' 'significant effects on water quality and the aquatic ecosystem," *Id.*. at 2244 (quoting *Riverside Bayview*, 474 U.S. 121,135 n. 9), such as "pollutant trapping, flood control, and runoff storage" as proper bases for asserting the Act's jurisdiction. Moreover, in sharp contrast to the plurality, Justice Kennedy does not require a "continuous surface connection" between the wetland and navigable in fact waters. 126 S.Ct. at 2251. Contrary to the Johnsons' argument that a hydrological connection is a "necessary but insufficient condition" for jurisdiction Supplemental Petition at 3, Justice Kennedy said that a "mere hydrologic connection should not suffice in all cases." *Id.* at 2250 (emphasis added). Indeed, Justice Kennedy noted that "it may well be the absence of hydrological connection (in the sense of interchange of waters) that shows the wetlands significance for the aquatic system." *Id.* at 2251. The key factor in Justice kennedy's mind is the "significance of the connection for downstream water quality." *Id.* Thus, the importance of wetlands to the water quality of the Weweantic River should be the focus of a remand.

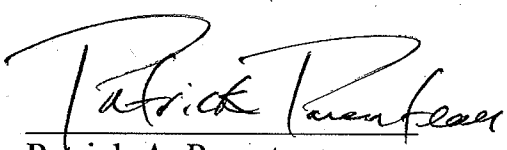
As explained by amici's previous brief[4] and the government's expert,[5] the record already contains considerable evidence on the importance of the target sites for the water quality and biological integrity of the Weweantic River and Buzzards Bay. The district court should review the record, and any supplemental information, in order to further document the ecological and hydrological significance of the wetlands in the Weweantic watershed including those filled by the Johnsons.

CONCLUSION

For the above reasons, Appellants' Petition for Rehearing En Banc should be DENIED.

Dated: September 19, 2006

Respectfully submitted,

By: 

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4 *See Amici Curiae* Brief of National Wildlife Federation, et. al.

5 Cited in *Id.*. at 12-14.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1698 words (less than one-half the length allowed for appellants' and appellees' briefs), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X3 in 14 point, Times New Roman font.

September 19, 2006
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of September, 2006, I served two true and correct copies, of the foregoing *Amici Curiae* Brief of National Wildlife Federation et al. in Support of Plaintiff-Appellee on the following parties, by U.S. Mail, postage prepaid, addressed as follows:

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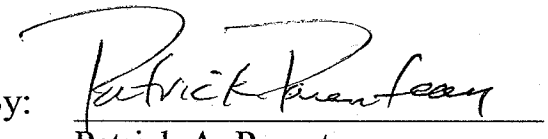
By: 

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