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SUSTAINING A JURISDICTIONAL QUAGMIRE

Sustaining a Jurisdictional Quagmire(?)::
Analysis and Assessment of Clean Water Act Jurisdiction in the Third Circuit

The United States of America v. Donovan

I. INTRODUCTION

In United States v. Donovan, the Third Circuit addressed the appropriate legal standard for determining whether the U.S. Army Corps of Engineers ("Corps") has jurisdiction over wetland areas under the Clean Water Act ("CWA"). The case is significant in that it is the first Third Circuit opinion to address that question in the wake of Rapanos v. United States, wherein a plurality Supreme Court opinion established two different and competing legal standards. The practical implications of the decision involve the tension between building development and environmental protection, which gives the case particular significance vis-à-vis issues of sustainability. Moreover, the Third Circuit’s analysis and ultimate holding has noteworthy implications for the interpretation of plurality Supreme Court opinions.

This note begins by setting forth the facts and events that led to the Third Circuit’s review of Donovan. The second section then reviews the pertinent laws, court opinions, and historical events that shaped the Third Circuit’s analysis and holding in the case. Following that is an examination of the Donovan opinion detailing the Third Circuit’s legal analysis and holdings. The final section is a critical discussion of and commentary on Donovan, which examines and assesses the implications for sustainable land use practices, the strengths and weaknesses of the opinion, and the possible consequences of the legal analysis used to reach

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1 661 F.3d 174 (3d Cir. 2011).
3 Donovan, 661 F.3d at 176.

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the holding. Ultimately, the conclusion drawn is that Donovan was a missed opportunity because it failed to produce a legal standard faithful to the express intent of the Supreme Court and conducive to advancing sustainable land use practices.

II. FACTS AND HOLDING

The controversy in United States v. Donovan arose when the United States brought an enforcement action against David H. Donovan alleging he violated the CWA by adding fill material to wetlands on his property in Delaware. The enforcement action sought court-ordered removal of the fill material and assessment of a fine.

Donovan owned four acres of land in a tidal area near the Delaware Bay. Following inspection of the land in 1987, the Corps classified Donovan’s property as wetlands subject to regulation under the CWA. Because the inspection revealed Donovan had filled three-fourths of an acre of his property, the Corps informed Donovan that a permit would be required to fill more than a total of one acre of the property. Subsequent inspection in 1993 revealed additional filling, in excess of one acre, for which Donovan had not obtained the requisite Corps permit. The Corps sent Donovan a cease and desist notice, ordering removal of over three-fourths of an acre of fill material. Donovan refused, insisting the Corps had no authority to regulate his use of the land. The United States then filed suit in the United States District Court for the District of

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5 Donovan, 661 F.3d at 176.
6 United States v. Donovan, 661 F.3d 174, 175 (3d Cir. 2011).
7 Id. at 176.
8 Id.
9 Id.
10 Id.
11 Id.
Delaware alleging violations of the CWA. Ultimately, a final judgment was entered against Donovan.

Donovan appealed to the Third Circuit Court of Appeals; however, the Circuit Court remanded the case to the district court for further development of the record regarding the issue of whether the Corps had jurisdiction over Donovan’s land. The case was assigned to a Magistrate Judge for pretrial matters, at which time Donovan moved for judgment on the pleadings and the Government sought summary judgment. In support of its motion, the Government submitted two expert opinions. Both opinions indicated the channels on Donovan’s land were permanent with a continuous surface connection to a navigable body of water, and the water from Donovan’s land had a significant impact on downstream waters. In support of his motion, Donovan submitted no expert evidence, but did submit an affidavit indicating that, in the absence of rain, the channels on his property stayed completely dry. Giving no credit to Donovan’s affidavit, the Magistrate recommended the District Court of Delaware grant summary judgment for the Government and deny Donovan’s motion for judgment on the pleadings. These recommendations were based on the Magistrate’s analysis of the expert reports, which, the Magistrate concluded, offered sufficient evidence to support a finding that Donovan’s wetlands satisfied both tests for CWA jurisdiction articulated by the Supreme Court in *Rapanos v. United States*.

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13 Id. (citing 33 U.S.C. § 1311(a) (2006)).
14 Id. The district court ordered Donovan to remove of .771 acres of fill and imposed a fine of $250,000. Id.
15 Id. at 176-77. The order for remand was granted based on a motion filed by the United States. Id.
16 Id. at 177.
17 Id.
18 United States v. Donovan, 661 F.3d 174, 177 (3d Cir. 2011).
19 Id.
20 Id.
22 Donovan, 661 F.3d at 177.
Donovan objected to the Magistrate’s recommendations, arguing the Magistrate had misapplied the standard for summary judgment.\textsuperscript{23} Agreeing with the Magistrate and rejecting Donovan’s objection, the district court said the correct standard for summary judgment had been applied and held CWA jurisdiction exists when either of the tests articulated by the Supreme Court in \textit{Rapanos} is satisfied.\textsuperscript{24} Furthermore, the district court found the Government’s expert reports provided enough evidence to satisfy both \textit{Rapanos} tests, and deemed Donovan’s affidavit, without more, insufficient evidence to counter the prima facie case established by the reports, wherefore the district court ruled that Donovan had failed to adduce sufficient evidence to create a genuine issue of material fact.\textsuperscript{25} Accordingly, the district court granted summary judgment for the Government and denied Donovan’s motion for judgment on the pleadings.\textsuperscript{26} Donovan appealed to the Third Circuit arguing the district court had applied incorrect legal standards both for summary judgment and for the determination of whether a wetland area is subject to regulation under the CWA.\textsuperscript{27}

On appeal, the Third Circuit issued an opinion containing two holdings. First, the court held when wetlands fulfill \textit{either} the Kennedy \textit{or} the plurality test articulated in \textit{Rapanos}, federal jurisdiction to regulate those wetlands exists pursuant to the CWA.\textsuperscript{28} Further, when both \textit{Rapanos} tests have been satisfied, summary judgment granting jurisdiction under the CWA is appropriate unless countervailing evidence

\begin{flushleft}
\textsuperscript{23} \textit{Id.} at 177-78.
\textsuperscript{24} United States v. Donovan, 661 F.3d 174, 177, 178 (3d Cir. 2011). The \textit{Rapanos} plurality’s test grants Corps jurisdiction “if the wetlands have a continuous surface connection with waters of the ‘United States.’” \textit{Id.} at 184. Justice Kennedy’s test grants Corps jurisdiction if the wetlands have a “substantial nexus” with waters of the United States. \textit{Id.} These two tests are examined in greater detail in the Legal Background section \textit{infra}.
\textsuperscript{25} \textit{Donovan}, 661 F.3d at 178.
\textsuperscript{26} \textit{Id.}
\textsuperscript{27} \textit{Id.}
\textsuperscript{28} \textit{Id.} at 184.
\end{flushleft}
is provided which raises genuine questions of material fact under both tests.  

III. LEGAL BACKGROUND

A. The Clean Water Act & Corresponding Regulations

A primary goal of the CWA\(^\text{30}\) is to stop the discharge of pollutants into "navigable waters." According to the CWA, the "discharge of any pollutant by any person" into navigable waters is illegal. \(^\text{32}\) Under the CWA, the term pollutant includes "rock, sand, cellar dirt and industrial... waste discharged into water" and navigable waters are defined as "the waters of the United States." \(^\text{33}\) Far from unambiguous, the term "navigable waters" and its corresponding definitional text have long been subject to regulatory interpretation by the Corps. \(^\text{34}\) The Corps' interpretation of "waters of the United States" has not been limited to those navigable in fact waters traditionally subject to regulation by Congress under the commerce clause. \(^\text{35}\) In fact, as defined and interpreted by the Corps, the phrase "waters of the United States" embraces an

\(^\text{29}\) Id. at 186-88.  
\(^\text{31}\) Id. at § 1251(a)(1).  
\(^\text{32}\) Id. at § 1311(a).  
\(^\text{33}\) Id. at § 1362(6-7).  
\(^\text{35}\) Cash, supra note 34, at 122. Waters "are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." The Daniel Ball, 77 U.S. 557, 563 (1870). For a detailed discussion of the test for and definition of water navigability see generally William W. Sapp et al., The Float A Boat Test: How to Use It to Advantage in This Post-Rapanos World, 38 ENVTL. L. REP. NEWS & ANALYSIS 10439, 10444 (2008).
expansive variety of waters including traditional navigable-in-fact waters and their tributaries as well as wetlands adjacent either of the foregoing.\footnote{36} This expansive interpretation of waters of the United States first received review and consideration by the Supreme Court in 1985.\footnote{37}

**B. Judicial Review of Corps Interpretation**

In *United States v. Riverside Bayview Homes, Inc.*, the Court reviewed whether the Corps' interpretation of waters subject to regulation under the CWA was overly broad insomuch as it included wetlands adjacent to navigable-in-fact waters.\footnote{38} Ultimately, the Court held inclusion of wetlands adjacent to navigable-in-fact waters under the interpretation of waters of the United States was reasonable.\footnote{39} This conclusion stemmed from the Court's recognition that identifying where water ends and dry land begins is difficult as it may not be an abrupt transition, wherefore agency determinations on the issue deserve considerable deference from the courts.\footnote{40} It also hinged on the fact that the wetlands in question abutted directly upon a navigable-in-fact waterway and had a significant nexus with that navigable-in-fact waterway.\footnote{41} Following the holding in *Riverside*, "the Corps adopted increasingly broad interpretations of its own regulations under the" CWA and eventually their interpretation of navigable waters subject to CWA jurisdiction came to include "virtually any land feature over which rainwater or drainage passes and leaves a visible mark."\footnote{42} The validity of this expansive interpretation came under scrutiny by the Supreme Court in

\footnote{36} 33 C.F.R. § 328.3(a)(7) (2011).
\footnote{38} *Id.* at 131.
\footnote{39} *Id.* at 139.
\footnote{40} *Id.* at 132; see also *Rapanos v. United States*, 547 U.S. 715, 740-41 (2006) (plurality opinion) (discussing the holding in Riverside).
\footnote{41} *Riverside*, 474 U.S. at 135.
\footnote{42} *Rapanos*, 547 U.S. at 725 (plurality opinion).
2001 when it reviewed *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*43 ("SWANCC").

In *SWANCC*, the Court reviewed whether the Corps' interpretation of "waters of the United States" was overbroad insomuch as it included an abandoned and isolated gravel pit that was subject to seasonal flooding.44 The Corps asserted its jurisdiction was proper under the CWA because the pit had developed into a habitat for a variety of migratory birds that cross state lines, making it subject to regulation by Congress under the Commerce Clause.45 Noting its decision in *Riverside* was founded on the "significant nexus" that existed between the wetlands and the abutting body of navigable water, the Court rejected the Corps' assertions that the agency's jurisdiction included ponds "not adjacent to open water."46 Giving effect to the word "navigable," the Court held the Corps' interpretation of "water of the United States" exceeded the statutory authority to the extent it included isolated bodies of water not adjacent to navigable bodies of water.47

The Court's holding in *SWANCC* not only limited federal environmental regulatory authority, but also continued a more general trend of Supreme Court decisions limiting federal authority to regulate under the auspices of the Commerce Clause.48 More specifically, the Court confirmed an emerging commitment to the principles of federalism and state's rights, which the decision in *SWANCC* demonstrated by constricting the Corps' jurisdiction under the CWA.49 Although the

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44 *Id.* at 163-67.
45 *Id.* at 164-65; see also *Final Rule for Regulatory Programs of the Corps of Engineers*, 51 Fed. Reg. 41217, (Nov. 13, 1986) (to be codified at 33 C.F.R. pt. 328.3) ("Migratory Bird Rule").
46 *SWANCC*, 531 U.S. at 167-68.
47 *Id.* at 171-72, 174.
49 *Id.* at 1083.
Supreme Court may have intended the *SWANCC* decision to limit the Corps' jurisdiction under the CWA, that did not happen.\(^{50}\)

Following the decision in *SWANCC*, the Corps contemplated changing its regulatory interpretation of the CWA; however, to the displeasure of the Court, changes were never made.\(^{51}\) Construing the *SWANCC* decision narrowly, and arguing *SWANCC* had no effect on the Court's expansive and deferential holding in *Riverside*, the Corps continued to assert CWA jurisdiction over traditional navigable waters and their tributary systems, as well as waters and wetlands adjacent thereto.\(^{52}\) This practice was encouraged and advanced by the lower courts through broad interpretation of the words "tributaries" and "adjacent," thus further undermining any limit on federal authority the Supreme Court may have intended by its holding in *SWANCC*.\(^{53}\) Unhappy with what it viewed as "implausible"\(^{54}\) and even "absurd"\(^{55}\) judicial and administrative interpretations of the CWA, which had the effect of granting the Corps jurisdiction over "ephemeral channels and drains," the Supreme Court took up the issue again in 2006.\(^{56}\)

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\(^{51}\) *Id.* at 726 (plurality opinion); *see also id.* at 757-58 (Roberts, C.J., concurring) (expressing regret that the Corps did not respond differently to the *SWANCC* decision).


\(^{53}\) *Id.* at 726-28 (plurality opinion).

\(^{54}\) *Id.* at 727 (plurality opinion). "[A]nd (most implausibly of all) the washes and arroyos of an arid development site, located in the middle of the desert, through which water courses ... during periods of heavy rain." *Id.*

\(^{55}\) *Id.* at 727 n.2 (plurality opinion). "[T]he absurdity of finding the desert filled with waters." *Id.*

C. The Rapanos Decision and Tests

In *Rapanos v. United States*, the Supreme Court considered again whether the Corps' interpretation of "navigable waters" and "waters of the United States" exceeded the statutory authority granted by the CWA. However, a divided Court issued a 4-1-4 decision containing multiple legal standards, none of them controlling. Justice Scalia wrote the plurality opinion and focused on statutory interpretation through a common sense understanding based on the plain meaning of the text. Using those methods, the plurality articulated a standard under which:

[E]stablishing that wetlands . . . sites are covered by the [CWA] requires two findings: first, that the adjacent channel contains a "wate[...r] of the United States," (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.

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58 See generally *Rapanos*, 547 U.S. 715 (plurality opinion).

59 Mollerup, *supra* note 57, at 527.

60 *Rapanos*, 547 U.S. at 732-34 (plurality opinion) (use of Websters dictionary to provide a definition of statutory text and reference to a common sense understanding of terms); see also Brandon C. Smith, Note, *Jurisdictional Donnybrook Deciphering Wetlands Jurisdiction After Rapanos*, 73 BROOK. L. REV. 337, 354 (2007) (discussing Justice Scalia’s use of the Webster’s Dictionary to conduct statutory interpretation).

61 *Rapanos*, 547 U.S. at 742 (plurality opinion).
Finding no support for the plurality’s standard in the text of the CWA or in prior Supreme Court decisions interpreting the CWA, Justice Kennedy concurred only in the judgment, filing a separate opinion. In Justice Kennedy’s view, the proper test for determining CWA jurisdiction was a significant nexus standard previously articulated by the Court in Riverside and SWANCC. Synthesizing aspects of those two cases, Justice Kennedy provided for a test under which: “wetlands possess the requisite nexus, and thus come within [CWA jurisdiction as] ‘navigable waters,’ if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable’.” Thus, the Rapanos decision produced two possible standards for determining whether wetlands constitute “waters of the United States” subject to Corps regulation under the CWA.

While neither legal standard commanded a majority of votes, the judgment of the Court was clear, as was its intent; the intent of both the plurality and of Justice Kennedy was to narrow the circumstances under which the Corps could assert jurisdiction over wetlands under the CWA. For the plurality, the significant factors underlying that intent were the considerable delays and tremendous costs involved with the federal permitting process; the plurality felt a narrower standard would reduce those costs and delays. However, the fact that both tests failed to secure a majority vote did not go unnoticed by the dissenting justices.

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62 Rapanos v. United States, 547 U.S. 715, 768 (2006) (Kennedy, J., concurring in the judgment); see Mollerup, supra note 57, at 529.
63 Rapanos, 547 U.S. at 780 (Kennedy, J., concurring in the judgment).
64 Id. (Kennedy, J., concurring in the judgment).
66 Cash, supra note 34, at 128.
67 Rapanos, 547 U.S. at 719 (plurality opinion).
68 Rapanos v. United States, 547 U.S. 715, 810 (2006) (Stevens, J., dissenting) (discussing how the lower courts should apply the two different legal standards provided by the plurality and Justice Kennedy).
Justice Stevens wrote for the four justices who dissented in *Rapanos* on a variety of grounds, but he relied primarily on the doctrine of judicial deference to reasonable agency interpretations. In closing the opinion, Justice Stevens emphasized that the Court's split opinion produced two different standards for application by the lower courts on remand. However, Justice Stevens opined that because all four dissenting justices would have upheld Corps jurisdiction under either the Kennedy or plurality test, on remand, the lower courts should uphold Corps jurisdiction if the requirements of either test were fulfilled. In fact, the dissent stated it would uphold Corps jurisdiction in all future cases in which either of the two *Rapanos* tests is satisfied. Thus, the dissenters opined, "in ... future cases the United States may elect to prove [CWA] jurisdiction under either test."

**D. Fallout in the Wake of Rapanos**

In the wake of *Rapanos*, the circuits have struggled to determine which test is the controlling legal standard for determining Corps jurisdiction over wetlands. Indeed, a split has emerged among those circuits having directly addressed the issue. First to address the Corps' jurisdiction in the wake of *Rapanos* was the Seventh Circuit in *United States v. Gerke Excavating Inc.* In an effort to discern which of *Rapanos*'s tests was controlling, the Seventh Circuit looked to *Marks v.*

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70 *Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting).

71 Id. (Stevens, J., dissenting).

72 Id. (Stevens, J., dissenting).

73 Id. at 810 n.14. (Stevens, J., dissenting).

74 *Morrison, supra* note 65, at 407.

75 Id. at 407-408.

76 *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006).
United States,77 where the Supreme Court stated the controlling opinion in a plurality decision is the one decided on the narrowest grounds.78 The Seventh Circuit felt language in the plurality’s opinion established the Kennedy test as the narrower.79 Moreover, the Seventh Circuit noted:

[A]ny conclusion that Justice Kennedy reaches in favor of federal authority over wetlands in a future case will command the support of five Justices (himself plus the four dissenters), and in most cases in which he concludes that there is no federal authority he will command five votes (himself plus the four Justices in the Rapanos plurality), the exception being a case in which he would vote against federal authority only to be outvoted 8-to-1 because there was a slight surface hydrological connection.80

Thus, in the Seventh Circuit’s opinion, the Kennedy test represented the lowest common denominator making it the controlling legal standard. Citing the Seventh Circuit’s extensive analysis with approval, the Ninth Circuit joined its sister circuit, holding that the Kennedy test is the controlling standard under Rapanos.81

In United States v. Robison,82 the Eleventh Circuit refused to disregard the precepts articulated by the Supreme Court in Marks.83 Thus, the Eleventh Circuit also found the Kennedy test to be the narrowest of the Rapanos standards because it was less far reaching than the plurality test insomuch as it was the least restrictive of Corps jurisdiction under the CWA.84 Consequently, the Eleventh joined the Ninth and Seventh

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78 Gerke Excavating, Inc., 464 F.3d at 724.
79 Id.
80 Id. at 725.
81 See N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 999-1000 (9th Cir. 2007).
82 505 F.3d 1208 (11th Cir. 2007).
83 Id. at 1221.
84 Id. at 1221-22.

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Circuits in concluding that, under *Rapanos*, the controlling legal standard is the Kennedy test.\(^8\)

The First and Eighth Circuits declined to follow their sister circuits.\(^6\) Rather, these two circuits felt *Marks* failed to provide a workable solution because, in their opinion, neither *Rapanos* test was decided on narrower grounds.\(^7\) The First Circuit noted, however, that if followed, Justice Stevens’ instruction from the dissent “ensures that lower courts will find jurisdiction in all cases where a majority of the [Supreme] Court would support such a finding,” since doing so resulted in majority combinations of the various judges from the dissent, plurality, and concurrence.\(^8\) The First Circuit found particular credence in combining votes from the various opinions to form a Supreme Court majority, because that practice had been endorsed in several previous Supreme Court opinions.\(^9\) Consideration of the opinions from these Circuit Courts, and the reasoning contained in their opinions, formed the basis of the Third Circuit’s review when *United States v. Donovan* came before it on appeal.

IV. INSTANT DECISION

A. The Controlling Legal Standard From *Rapanos*

On appeal to the Third Circuit Court of Appeals, Donovan argued the district court committed reversible error by applying both *Rapanos*

\(^{85}\) *Id.*

\(^{86}\) United States v. Donovan, 661 F.3d 174, 181 (3d Cir. 2011).

\(^{87}\) United States v. Johnson, 467 F.3d 56, 64 (1st Cir. 2006); United States v. Bailey, 571 F.3d 791, 799 (8th Cir. 2009).

\(^{88}\) Johnson, 476 F.3d at 64.

\(^{89}\) *Id.* at 65. “Since *Marks*, several members of the Court have indicated that whenever a decision is fragmented such that no single opinion has the support of five Justices, lower courts should examine the plurality, concurring and dissenting opinions to extract the principles that a majority has embraced.” *Id.* (citing Waters v. Churchill, 511 U.S. 661, 685 (1994) (Souter, J., concurring)).
tests. Donovan asserted that, as a plurality decision, *Rapanos* provided no governing standard, wherefore the district court should have applied pre-*Rapanos* standards from within the Third Circuit. While acknowledging circuit courts were split over the correct interpretation of *Rapanos*, the Third Circuit disagreed with Donovan, pointing out that no circuit had adopted his position. The court then discussed the reasoning and rationale underlying decisions in the Eleventh and Seventh Circuits, which had held the Kennedy test was controlling. Next, the Third Circuit analyzed decisions from the First and Eighth Circuits, which had held both of the *Rapanos* tests were valid and controlling legal standards. Ultimately, the panel agreed with the First and Eighth circuit for a multitude of reasons.

To begin, the Third Circuit explained that because neither the Kennedy test nor the plurality test relied on narrower grounds, traditional methods for determining which was the controlling opinion were inapplicable. The court explained that, when analyzing a plurality opinion of the Supreme Court, its goal is to identify a legal standard that produces results “with which a majority of the Supreme Court Justices . . . would agree.” In doing so, the Third Circuit explained its practice is to see whether the votes of dissenting Justices can be combined with votes from the plurality or concurring opinions to form a majority on the issue in question. The panel defended this methodology by pointing to decisions

90 Donovan, 661 F.3d at 180.
91 Id.
92 United States v. Donovan, 661 F.3d 174, 180 (3d Cir. 2011).
93 Id. at 180-81 (citing United States v. Gerke Excavating, Inc., 464 F.3d 723, 724-25 (7th Cir. 2006); United States v. Robison, 505 F.3d 1208, 1221-22 (11th Cir.2007)).
94 Donovan, 661 F.3d at 181-182 (citing United States v. Johnson, 476 F.3d 56, 62-64 (1st Cir. 2006); United States v. Bailey, 571 F.3d 791, 799 (8th Cir. 2009)).
95 Donovan, 661 F.3d at 182.
96 Id. “The traditional standard for analyzing plurality opinions was established by the supreme court in *Marks v. United States*, 430 U.S. 188, 193 (1977).” Id. at 181.
97 Donovan, 661 F.3d at 182 (citing Planned Parenthood of Southeastern Pa. v. Casey, 947 F.2d 682, 693 (3rd Cir. 1991), modified on other grounds, 505 U.S. 833 (1992)).
98 United States v. Donovan, 661 F.3d 174, 182 (3d Cir. 2011) (citing United States v. Richardson, 658 F.3d 333, 340 (3d Cir. 2011)).
in which the Supreme Court itself had done the same.\footnote{Id. (discussing United States v. Jacobsen, 466 U.S. 109, 111 (1984)).} Turning to the Supreme Court’s opinion in \textit{Rapanos}, the Third Circuit focused on language in Justice Stevens’ dissent.\footnote{\textit{Donovan}, 661 F.3d at 183.}

The court quoted extensively from the dissent, which would have upheld the Corps’s jurisdiction in a much broader range of cases including “all . . . cases in which either the plurality’s or Justice Kennedy’s test is satisfied.”\footnote{Id. (quoting \textit{Rapanos v. United States}, 547 U.S. 715, 810 (2006) (Stevens, J., dissenting)).} In fact, the Third Circuit felt that by stating, “in these and future cases the United States may elect to prove jurisdiction under either test,” the dissent provided a clear instruction which eliminated any confusion as to the proper legal standard.\footnote{\textit{Donovan}, 661 F.3d at 183 (quoting \textit{Rapanos}, 547 U.S. at 810 n.14 (Stevens, J., dissenting)).} According to the Third Circuit, this statement provided a mandate for the Courts of Appeals, and to disregard that mandate would be to ignore the directive of the dissenters.\footnote{\textit{Donovan}, 661 F.3d at 183.} Moreover, the panel pointed out that the position taken by the dissenters meant any time one of the tests was satisfied a 5-4 or an 8-1 majority in favor of Corps jurisdiction would exist, and when neither test was satisfied a 5-4 majority against Corps jurisdiction would exist.\footnote{United States v. Donovan, 661 F.3d 174, 184 (3d Cir. 2011).} Because it felt both \textit{Rapanos} tests had received the explicit endorsement of a majority of Supreme Court Justices, the Third Circuit held Corps jurisdiction under the CWA exists any time either \textit{Rapanos} test is satisfied.\footnote{Id.} Based on this holding, the panel rejected Donovan’s assertion that the district court committed reversible error by applying both \textit{Rapanos} tests and moved on to analyze the summary judgment issue.\footnote{Id.}
B. Deciding Summary Judgment

Donovan argued the magistrate and district court judges had misapplied the summary judgment standard by placing the burden of proof on him to demonstrate his lands were not subject to CWA jurisdiction.\textsuperscript{107} The Third Circuit began its \textit{de novo} review of this issue by establishing the standard for granting summary judgment.\textsuperscript{108} According to the court, the party seeking summary judgment bears the initial burden of producing evidence demonstrating the absence of a genuine issue of material fact for trial.\textsuperscript{109} If the moving party succeeds, then the nonmoving party must adduce "specific facts showing" the existence of "a genuine issue for trial."\textsuperscript{110} That showing, the court said, must create "more than a 'metaphysical doubt as to the material facts.'"\textsuperscript{111} Having laid out these standards, the panel began its analysis by determining whether the evidence provided by the Government was sufficient to carry the initial burden in relation to the \textit{Rapanos} tests.\textsuperscript{112}

Based on the scientific findings underlying the Government's expert reports, the Third Circuit was satisfied that the channels on Donovan's land fulfilled the requirements of the plurality test because they connected to navigable-in-fact waters, were relatively permanent, and had a continuous surface connection to a body of water covered by the CWA.\textsuperscript{113} From additional scientific findings contained in the expert reports, the panel further concluded that Donovan's wetlands satisfied the Kennedy test because they affected the "chemical, physical, and biological

\begin{thebibliography}{99}
\item \textsuperscript{107} \textit{ld.} at 186 n.9.
\item \textsuperscript{108} \textit{ld.} at 180 n.5; see \textit{Fed. R. Civ. P.} 56.
\item \textsuperscript{109} \textit{Donovan}, 661 F.3d at 184-85 (quoting \textit{Fed. R. Civ. P.} 56(a); \textit{Celotex Corp. v. Catrett}, 477 U.S. 317, 323 (1986)).
\item \textsuperscript{110} \textit{United States v. Donovan}, 661 F.3d 174, 184-85 (3d Cir. 2011) (quoting Matsushita Elec. Indus. Co. v. \textit{Zenith Radio Corp.}, 475 U.S. 574, 586-87 (1986)).
\item \textsuperscript{111} \textit{Donovan}, 661 F.3d at 184-85 (quoting \textit{Matsushita}, 475 U.S. at 587.)
\item \textsuperscript{112} \textit{Donovan}, 661 F.3d at 184-85.
\item \textsuperscript{113} \textit{ld.} at 185-86 (citing \textit{Rapanos v. United States}, 547 U.S. 715, 723-33 (2006) (plurality opinion)).
\end{thebibliography}
integrity” of other navigable-in-fact waters.\footnote{114} In light of these findings, the Third Circuit held the Government had met its initial burden for summary judgment and turned to analyze whether Donovan had alleged specific facts substantial enough to create a genuine issue for trial.\footnote{115}

The panel noted the only evidence Donovan proffered was his own affidavit.\footnote{116} Because the affidavit consisted entirely of assertions designed to establish that the channels on Donovan’s land were not permanent and did not have a continuous surface connection, the court felt the affidavit was only intended to prove Donovan’s lands did not satisfy the plurality test.\footnote{117} The appellate court noted, however, that analysis of the plurality test was unnecessary because the affidavit failed to raise a genuine issue about whether the Government’s evidence satisfied the Kennedy test.\footnote{118} Donovan’s primary argument regarding the Kennedy test was that by lumping Donovan’s wetlands in with over 700 acres of neighboring wetlands, the Government reports exaggerated the effect of his wetlands on downstream waters.\footnote{119}

In response, the Third Circuit discussed findings from within the expert reports that dealt with the chemical, biological, and physical impact of Donovan’s wetlands alone, without any consideration of the surrounding lands.\footnote{120} In light of those findings, the panel held the factual evidence in the record “show[ed] Donovan’s wetlands alone” satisfied the Kennedy test without even accounting for the effect of his wetlands when aggregated with surrounding wetlands.\footnote{121} In a footnote, the Third Circuit expressly declined to set out a list of specific factors relevant for finding jurisdiction under the Kennedy test; the footnote also made clear that the opinion in no way addressed the portion of the Kennedy test involving

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\begin{itemize}
  \item \footnote{114} Donovan, 661 F.3d at 186 (quoting Rapanos, 547 U.S. at 780 (Kennedy, J., concurring)).
  \item \footnote{115} Donovan, 661 F.3d at 186 (citing Matsushita, 475 U.S. at 586-87).
  \item \footnote{116} United States v. Donovan, 661 F.3d 174, 186 (3d Cir. 2011).
  \item \footnote{117} Id. at 186-87.
  \item \footnote{118} Id. at 187.
  \item \footnote{119} Id.
  \item \footnote{120} Id.
  \item \footnote{121} Id. (emphasis in original).
\end{itemize}
jurisdiction based on combination with similarly situated lands.\textsuperscript{122} In summary, the appellate court felt the factual evidence contained in the expert reports supported a finding that Donovan's wetlands, standing alone, fulfilled the requirements for CWA jurisdiction under the Kennedy test.\textsuperscript{123} Consequently, summary judgment was appropriate absent countervailing evidence tending to create a genuine issue for trial, of which there was none.\textsuperscript{124}

The panel also noted Donovan's assertions that the Government reports were indeterminate and approximate such that a fact finder might not be convinced of Corps jurisdiction over his wetlands.\textsuperscript{125} Dismissing this line of argument summarily, the Third Circuit pointed out Donovan had offered no facts to contradict those set forth in the Government's expert reports.\textsuperscript{126} Without factual evidence, the court felt Donovan's second argument relied entirely on the possibility a fact finder would not be persuaded by the Government's evidence, which the summary judgment standard does not permit.\textsuperscript{127} Accordingly, the Third Circuit held granting summary judgment in favor of the Government was proper because the Government had submitted sufficient factual evidence to establish CWA jurisdiction under both \textit{Rapanos} tests, while Donovan had failed to provide specific factual evidence creating a genuine issue of fact as to jurisdiction under the Kennedy test.\textsuperscript{128}

In summary, the Third Circuit held both the Kennedy and plurality tests constitute valid legal standards by which to determine jurisdiction under the CWA because both tests commanded the support of a majority of Supreme Court Justices.\textsuperscript{129} In this case, because the Government had adduced specific factual evidence that satisfied the requirements for

\textsuperscript{122} United States v. Donovan, 661 F.3d 174, 187 n.10 (3d Cir. 2011).
\textsuperscript{123} Ibid.
\textsuperscript{124} Ibid.
\textsuperscript{125} Ibid. at 187.
\textsuperscript{126} Ibid. at 188.
\textsuperscript{127} Ibid. (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)).
\textsuperscript{128} United States v. Donovan, 661 F.3d 174, 188 (3d Cir. 2011).
\textsuperscript{129} Ibid. at 182, 184.
jurisdiction under both *Rapanos* tests, and because Donovan failed to come forward with evidence tending to create a genuine issue of fact as to jurisdiction under both tests, the Third Circuit held that granting the Government’s motion for summary judgment was proper.

V. COMMENT

As Chief Justice Roberts pointed out in his concurrence, *Rapanos* and all of the negative legal ramifications that followed were avoidable, including the Third Circuit’s decision in *Donovan*. In response to the displeasure expressed by the Supreme Court in *SWANCC*, the Environmental Protection Agency and Corps began a rule-making session, the result of which would have been new regulatory interpretations of the CWA reflective of the sentiments expressed by the Court in *SWANCC*. Ultimately, that proposed rule-making process was scrapped and the Corps instead decided to construe the *SWANCC* decision narrowly. This allowed the Corps to continue asserting CWA jurisdiction in a manner so broad the Supreme Court felt compelled to step in – again. However, the second time around, the Supreme Court was unable to accomplish its goal of narrowing the Corps’ CWA jurisdiction.

In *Rapanos*, the Court produced a fractured opinion that failed to provide a controlling legal standard. In this sense, the Supreme Court shares in the blame for the current state of the law regarding jurisdiction under the CWA. By issuing a fractured plurality opinion, the Court destabilized the existing legal standards governing CWA jurisdiction in each circuit and left the lower courts to make determinations on a case-by-

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130 Id. at 185-86.
131 Id. at 188. In light of these holdings, the Third Circuit concluded the opinion by affirming the decision of the district court. Id. at 189.
133 *See* Tanabe, *supra* note 48, at 1083 (*SWANCC* decision constricted Corps CWA jurisdiction).
135 Id.
136 Id. at 758 (Roberts, C.J., concurring).
137 *Morrison, supra* note 65, at 402.
That, in turn, has produced the current circuit split as to which *Rapanos* test is the controlling legal standard. In short, both the Corps and the Supreme Court contributed to the creation of uncertainty and instability regarding jurisdiction under the CWA. The result is a quagmire, which the circuit courts have been left to slog through as best they can. Examining the *Donovan* opinion makes the difficulties caused by this quagmire apparent.

Despite asserting that application of *Marks* in interpreting the *Rapanos* decision would have been inappropriate, the Third Circuit’s holding in *Donovan* produces a result consistent with *Marks*. Indeed, the circuit court’s approach creates a legal standard which is technically the narrowest possible grounds provided by the *Rapanos* opinions; by using the dissent to justify adoption of both *Rapanos* tests, the Third Circuit creates a legal standard that is the least restrictive of the Corps’ jurisdictional authority. Thus, while the Third Circuit indicated *Rapanos* did not lend itself to *Marks* analysis, the result produced by *Donovan* is exactly what *Marks* requires. However, the technique used to reach that result is not consistent with *Marks*, as *Marks* arguably does not authorize circuit courts “to consider the positions of those who dissented.”

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139 *Id.* at 407-09.

140 *Id.* (describing the *Rapanos* decision as a “train wreck”).

141 United States v. Donovan, 661 F.3d 174, 182 (3d Cir. 2011).

142 *Id.* at 184.

143 See Cash, *supra* note 34, at 129 (adoption of either-or approach by Eighth Circuit, which is the same as that adopted by the Third Circuit here, expands federal jurisdiction, and thus is the least restrictive option as required by *Marks*).

144 United States v. Robison, 505 F.3d 1208, 1221 (11th Cir. 2007).
While perhaps technically consistent with Marks, the Third Circuit’s method in achieving that consistency is troubling because the Donovan opinion disregards the express intent of a majority of the Supreme Court justices voting in Rapanos. By adopting both Rapanos standards, Donovan continues to provide the Corps with broad jurisdictional authority under the CWA while the obvious intent of the Supreme Court majority in Rapanos was to narrow and restrict that authority. In so doing, the Third Circuit seems to have flouted the intent of a majority of Supreme Court justices, and arguably undermined a basic and fundamental principle of this country’s legal system. That is, the result reached by the Third Circuit creates doubt as to whether the obvious intent of a majority of Supreme Court justices will be the controlling legal interpretation. This concern was deftly illustrated by a recent Sixth Circuit decision in which the panel interpreted Rapanos’s plurality test in a manner that “deviated from the entire purpose” and intent of the plurality, thus defying the Supreme Court. Moreover, Donovan establishes a precedent under which the legal community must attempt to discern whether the dissenting justices on the Supreme Court have exploited the frailties of a plurality opinion to undermine the intent of those justices commanding a majority of the votes.

The fault, however, cannot be attributed entirely to the circuit court. Donovan is the result of the Third Circuit’s attempt to make a meadow out of the metaphorical Rapanos marshland. Circuit courts have a duty and responsibility to clarify and interpret the legal standards established by the Supreme Court, but it is not surprising that circuit courts have struggled to provide such guidance when the Supreme Court failed to provide a controlling legal standard in Rapanos. Nor is it

145 Cash, supra note 34, at 128.
146 Id. at 128-29.
147 Id. at 130.
148 Id.
149 See United States v. Cundiff, 555 F.3d 200 (6th Cir. 2009).
surprising that what guidance circuit courts have provided has been less than satisfactory. Indeed, given the realities of the various and seemingly incompatible opinions expressed in *Rapanos*, the result reached in *Donovan* is pragmatic and logically sound insomuch as it creates a legal standard which will consistently command a majority of the votes as they were cast in *Rapanos*. Moreover, the Third Circuit's decision to utilize both legal standards may have some positive sustainability impacts.

By allowing use of the Kennedy test to establish jurisdiction, the *Donovan* decision will serve to protect and promote biological diversity and other ecological concerns, which is imperative to maintaining and improving the overall long-term quality of the environment and is a key goal in achieving sustainable land use. This will occur insomuch as the Kennedy test requires a holistic evaluation and analysis of both the land to be developed and the potential impact that such localized development will have on similarly situated lands. Unfortunately, *Donovan*’s refusal to provide guidance regarding similarly situated lands gives rise to problems in that it limits the comprehensive aspect of the Kennedy test and leaves its ability to affect sustainable land use outcomes uncertain. Moreover, by adopting both *Rapanos* tests, the *Donovan* decision creates a broad legal standard for determining CWA jurisdiction, which allows the Corps to continue expansive regulation of wetland areas, as was the case before the *Rapanos* decision.

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152 United States v. Donovan, 661 F.3d 174, 184 (3d Cir. 2011).
153 Mollerup, supra 57, at 533 (environmentally friendly outcomes produced by application of the Kennedy test).
154 See Morrison supra note 65, at 410; Mollerup, supra note 57, at 535 (upholding ecological issues).
156 See Chwee, supra note 150, at 261-64 (discussing the various scientific environmental factors considered in determining significant nexus).
157 *Donovan*, 661 F.3d at 187.
158 See Cash, supra note 34, at 129.
159 Id.; see Rapanos v. United States, 547 U.S. 715, 722 (plurality opinion) (discussing immense expansion of federal regulation of land use).
While expansive environmental regulation and protection may seem like a positive in the eyes of sustainability proponents, such is not necessarily the case. A key aspect of sustainability is the idea that laws should "protect and restore the environment at the same time as they help grow the economy, create jobs, and protect national security."\(^{160}\) Faced with the cost-prohibitive permitting process required by the CWA,\(^{161}\) developers may seek opportunities elsewhere. This raises several concerns. First, it has the potential to deprive impoverished communities in wetland areas—such as exist in much of the southeastern United States\(^ {162}\)—of much needed economic development and job opportunities. Denial of such opportunities raises issues as to social justice and sustainability, particularly if lower permitting costs would have allowed the development to go forward in a manner consistent with sustainable land use principles. In short, it is socially unjust to deprive a community of development opportunities to protect a wetlands area when preservation of that wetlands area is, according to scientific data, not essential for achieving the environmental aspects of sustainable land use.\(^{163}\)

Furthermore, if developers choose to pursue alternative sites for development in order to avoid the costs and delay inherent to developing in a wetlands area,\(^ {164}\) the development may end up going forward in a different area where more damage to the environment is done than would have occurred had the development gone forward on the initial wetland site. In other cases, the development may be abandoned all together, thus

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\(^{161}\) *Rapanos*, 547 U.S. at 719 (discussing the delays and substantial costs involved with permitting under the CWA); see Stephen Louthan & Steve Dougherty, *EPA and Corps Guidance on Clean Water Act Jurisdiction*, 37 COLO. LAW. 39, 43 (2008)(projects involving wetlands will likely encounter increased costs and delays after *Rapanos*).


\(^{163}\) Dernbach, *surpa* note 160, at 502 (integration of environmental and development goals).

\(^{164}\) *Rapanos*, 547 U.S. at 719 (discussing delays and costs involved with permitting); see Louthan, *supra* note 161, at 43.
depriving society of the benefits that flow from development. The better result would be for the development to go forward, but under restrictions that reflect a sustainable outlook and using sustainable development practices. However, courts are not capable of effectively or efficiently achieving these sustainable goals on their own. Indeed, the most effective strategy for the development of sustainable practices must start with those in charge of making and implementing the laws.

That being the case, it is clear the Corps failed to capitalize on an opportunity to advance a sustainable agenda when it scrapped its post-SWANCC rule-making process and failed to modify the existing interpretations with an eye towards sustainable land use. Furthermore, the fractured nature of the Rapanos decision undermined any chance that it would produce sustainably beneficial change in the regulatory interpretation of CWA jurisdiction. These problems have been exacerbated by circuit court decisions like Donovan, which, by adopting both Rapanos standards, continue to provide the Corps with broad jurisdictional authority to regulate wetland areas under the CWA.

165 See Dembach, supra note 16060, at 502. Sustainably tailored laws will “protect and restore the environment at the same time as they help grow the economy, create jobs, and protect national security.” Id.


169 Dernbach & Mintz, supra note 167, at 534 (achieving sustainability across the federal government is achievable by modifying, strengthening, or extending existing laws).

170 Morrison, supra note 65, at 410 (critics calling post-Rapanos regulations unnecessarily over and under inclusive)

171 See Cash, supra note 34, at 129.
result of that broad jurisdiction is that developers will continue to face significant deterrents to development in wetland areas in the form of added costs and delays created by CWA permitting. This, in turn, potentially deprives impoverished wetland communities of the economic benefits such development creates.

Moreover, the Third Circuit expressly declined to provide critical guidance regarding the specifics of what constitutes similarly situated lands under the Kennedy test. This leaves district courts without guidance regarding a critical aspect of the legal standard established by the decision. In this way, the Third Circuit is little better than the Supreme Court, as Donovan does nothing to eliminate the ambiguity and uncertainty contained in the Kennedy test. The consequences of that failure are felt broadly; without clear consistent legal standards not only are the lower courts left adrift, but the public faces the prospect of expensive litigation, risking an uncertain outcome anytime there is a question regarding jurisdiction under the CWA. Faced with those risks, businesses are more likely to delay development and construction projects while seeking a Corps permit. Such delays along with the permitting expenses drive up costs and serve as disincentives to development. These increased costs may prevent some developers from using higher

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172 Id. at 187.
173 See Morrison, supra note 65, at 405; Mollerup, supra note 57, at 534 (Kennedy’s opinion in Rapanos provided little guidance as to the practical application of his test); Springer, supra note 138, at 90-91 (case-by-case application of Rapanos tests causes uncertainty and inconsistency).
175 Id. at 405; see also Rapanos v. United States, 547 U.S. 715, 719 (2006) (discussing the costs of federal permitting and the risks of failing to obtain a permit).
176 Rapanos, 547 U.S. at 719 (discussing delays and costs involved with permitting); see Lakshmi Lakshmanan, Note, The Supreme Court Wades Through the Clean Water Act to Determine What Constitutes the “Waters of the United States”, 14 Mo. Envtl. L. & Pol’y Rev. 371, 391-92 (2007)(“An increase in the cost to develop land including building homes and industrial and commercial buildings could potentially lead to less development and growth of our economy. Thus, if the Corps’ jurisdiction over the “waters of the United States” is expanded, this could have a stifling affect on the growth of our cities and towns.”)
priced sustainable materials in an attempt to cut costs and minimize expenses.

It is also significant that the Donovan court relied so heavily on the expert reports provided by the United States, and that it granted summary judgment because Donovan failed to provide any countervailing expert evidence. These facts suggest that citizens challenging Corps jurisdiction under the CWA must now hire and pay for expensive scientific experts to provide rebuttal evidence. This will only add to the expense involved with the federal permitting process under the CWA, and thus acts as a further disincentive to development.

It seems the best result, in terms of sustainable land use vis-à-vis wetlands, would have been adoption of the Kennedy test alone. This would have been slightly more restrictive of Corps jurisdiction, thereby reducing some of the permitting costs and delays and, in turn, promoting development. However, the holistic nature of the assessment under the Kennedy test would also ensure that those barriers to development would only be lowered in cases where the wetland to be developed has little ecological or environmental impact on the larger ecosystem. In short, the Third Circuit should have adopted the Kennedy test as the controlling legal standard. In so doing, the Donovan court would have established a test that would reduce the barriers inherent to the CWA permitting process while still protecting the environment, thereby achieving a sustainable balance between development and environmental protection. Furthermore, adoption of the Kennedy test alone would have been in accord with the restrictive intent expressed by the Supreme Court majority in Rapanos.

178 Smith, supra note 60, at 370-72.
179 Morrison, supra note 65, at 405.
180 See Mollerup, supra note 57, 537-38 (the Kennedy test is a compromise between environmental advocates and land owners); see also Lakshmi, supra note 178, at 391-92 (the potential for higher housing costs and less economic development due to CWA permitting must be compared to the impacts on aquatic lands).
VI. CONCLUSION

Achieving sustainability will be a gradual process; thus, the regulatory agencies in charge of enforcing and interpreting environmental laws should do so erring on the side of achieving a sustainable balance rather than extreme environmental protection or unchecked development. The courts, as interpreters of the law, will be at the heart of this process. Indeed, Donovan illustrates how imperative it is for the judiciary to consider the sustainability implications of its decisions as they review agency interpretations of laws, particularly environmental laws. With an eye towards sustainable outcomes and long-term impacts, the courts can play an important role in achieving a more sustainable future.

Unfortunately, the Third Circuit’s decision in Donovan leaves much to be desired. Because it validates both Rapanos tests, Donovan does little if anything to reduce the barriers to sustainable land use created by broad Corps jurisdiction under the CWA. Moreover, Donovan exacerbates those cost barriers by requiring expensive expert testimony in order to prevail at summary judgment when challenging Corps jurisdiction under the CWA. Additionally, the Third Circuit failed to provide any guidance regarding similarly situated lands under the Kennedy test leaving the lower courts to make those determinations on an ambiguous and unpredictable case-by-case basis. That being said, use of the Kennedy test seems likely to have ecological benefits important to achieving long-term environmental sustainability because it achieves a balance between building development and environmental protection. However, Donovan’s adoption of both Rapanos tests raises the unsettling possibility that circuit courts may begin to flout and defy the express intent communicated in a Supreme Court decision when that decision is a fractured plurality. Had the Third Circuit instead limited the legal standard to the Kennedy test, it would have achieved both fidelity to the intent of the Supreme Court and maximized the goals of sustainability.

181 See Dernbach & Mintz, supra note 167, at 532 (“The central action principle of sustainable development is integrated decision-making – the incorporation of environmental, social, and economic considerations and goals into decisions.”).
Instead, by validating both *Rapanos* tests, *Donovan* sustained the jurisdictional quagmire.

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