No. 07-1195

In the Supreme Court of the United States

C. LYNN MOSES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the creek segment at issue in this case is part of "the waters of the United States" within the meaning of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 886, as amended by Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) (Clean Water Act or CWA); 33 U.S.C. 1362(7).

2. Whether petitioner's activities, which involved the use of heavy equipment to move and redeposit thousands of cubic yards of dredged materials within the creek bed and to deposit log structures into the creek bed, constituted a "discharge of a pollutant" within the meaning of the CWA, 33 U.S.C. 1362(12)(A).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 496 F.3d 984.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2007. A petition for rehearing was denied on September 14, 2007 (Pet. App. 20a). On November 30, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 11, 2008, and the petition was filed on January 9, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial, petitioner was found guilty of three counts of knowingly discharging, or causing to be dis-

charged, dredged or fill material into "waters of the United States" without a permit, in violation of 33 U.S.C. 1319(c)(2)(A). He was sentenced to 18 months of imprisonment on each count, to be served concurrently; a $9000 fine ($3000 on each count); a $300 special assessment ($100 on each count); and one year of supervised release on each count, to be served concurrently. Pet. App. 21a-36a. The court of appeals affirmed. *Id.* at 1a-19a.

1. Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) (Clean Water Act or CWA), "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Section 301(a) of the CWA prohibits the "discharge of any pollutant by any person" except in compliance with the Act. 33 U.S.C. 1311(a). The term "discharge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). A knowing violation of Section 301(a) is a criminal offense. See 33 U.S.C. 1319(c)(2)(A).

The United States Army Corps of Engineers (Corps) and the United States Environmental Protection Agency (EPA) share responsibility for implementing and enforcing Section 404 of the CWA, 33 U.S.C. 1344, which authorizes the issuance of permits for the discharge of dredged or fill material into waters covered by the Act. See, *e.g.*, 33 U.S.C. 1344(a)-(c). The Corps and EPA have promulgated substantively equivalent regulatory definitions of the term "waters of the United States."

See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). Those definitions encompass, inter alia, traditional navigable waters, which include waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1), 40 C.F.R. 230.3(s)(1); "[t]ributaries" of traditional navigable waters, see 33 C.F.R. 328.3(a)(5), 40 C.F.R. 230.3(s)(5); and wetlands "adjacent" to other covered waters, see 33 C.F.R. 328.3(a)(7), 40 C.F.R. 230.3(s)(7).[1]

2. This Court has recognized that Congress, in enacting the CWA, "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (*Riverside Bayview*); see *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987) ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense."). In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001), the Court held that use of "isolated" nonnavigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. *Id.* at 166-174. The Court noted, and did not cast

[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C. 1362(7) and 33 C.F.R. 328.3, and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

doubt upon, its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See *id.* at 172.

Most recently, the Court again construed the CWA term "waters of the United States" in *Rapanos* v. *United States*, 547 U.S. 715 (2006). *Rapanos* involved two consolidated cases in which the CWA had been applied to wetlands adjacent to nonnavigable tributaries of traditional navigable waters. See *id.* at 729-730 (plurality opinion). All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. See *id.* at 731 (plurality opinion); *id.* at 767-768 (Kennedy, J., concurring in the judgment); *id.* at 793 (Stevens, J., dissenting).

Four Justices in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water," 547 U.S. at 739 (plurality opinion), that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a continuous surface connection to such water bodies, *ibid.* The *Rapanos* plurality noted that its reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id.* at 732 n.5. Justice Kennedy interpreted the term "waters of the United States" to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in

the judgment); see *id.* at 779-780.[2] In addition, Justice Kennedy concluded that the Corps' assertion of jurisdiction over "wetlands adjacent to navigable-in-fact waters" may be sustained "by showing adjacency alone." *Id.* at 780. The four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, also concluded that the term "waters of the United States" encompasses, inter alia, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. See *id.* at 810 & n.14 (Stevens, J., dissenting).

3. Petitioner is a real estate broker and developer in Teton County, Idaho. Pet. App. 2a. For more than 20 years, he has worked to develop a residential subdivision on an approximately 50-acre parcel of land that lies in the flood plain of Teton Creek. *Ibid.* The court of appeals' opinion describes Teton Creek as follows:

> Because of an irrigation diversion structure installed in Alta, Wyoming, upstream of the subdivision, water actually flows in the portion of Teton Creek adjacent to the subdivision only during the spring run-off, which lasts about two months per year. * * * When it does flow, the volume and power of the flow are high, even torrential. Teton Creek is a tributary of the Teton River, which flows into the Snake River. Water continues to flow year-round in Teton Creek above the diversion, and also from a point below the subdivision until it reaches the Teton River. There

[2] Justice Kennedy explained that wetlands "possess the requisite nexus" to traditional 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.'" *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment).

> is no claim that the Snake River, the Teton River, and Teton Creek, apart from the segment that flows only during the spring runoff, fail to qualify as waters of the United States.

Ibid.; see *id.* at 9a.

Beginning in the 1980s, and continuing until the government brought this prosecution in 2005, petitioner directed heavy-equipment operators to reroute and reshape an approximately half-mile-long segment of Teton Creek in an effort to control the flow of the creek during spring runoff. Pet. App. 2a-4a. During the periods covered by each of the three counts in the indictment (fall 2002, spring 2003, and spring 2004), petitioner hired heavy-equipment operators to re-contour Teton Creek by using bulldozers to, inter alia, dredge and redeposit the material within the creek bed. *Id.* at 3a-5a. He also directed operators to place fill material such as log structures in the creek using other heavy equipment. *Ibid.* Through those activities, petitioner attempted to convert the original three channels of Teton Creek into one broader and deeper channel. *Id.* at 2a-3a. Those activities have "greatly disturbed" and destabilized Teton Creek. *Id.* at 4a-5a; see *id.* at 15a-16a. Petitioner undertook those activities despite repeated warnings from the Corps and EPA that his activities required a CWA permit and were unlawful if conducted without one. *Id.* at 3a-4a.

Petitioner was charged with three counts of knowingly discharging, and causing to be discharged, pollutants into Teton Creek without a permit, in violation of the CWA. See 33 U.S.C. 1311(a), 1319(c)(2)(A); 18 U.S.C. 2; Pet. App. 5a. A jury found petitioner guilty on all three counts. *Ibid.* Petitioner was sentenced on June 19, 2006, the day this Court issued its decision in *Ra-*

panos. At the sentencing hearing, the parties and the district court discussed the plurality and concurring opinions in *Rapanos*. See Gov't C.A. Supp. App. 369-376. The court concluded that, "at least under Justice Kennedy's view, * * * this is a matter that is within the jurisdiction of the United States and would constitute waters of the United States." *Id*. at 376.

4. The court of appeals affirmed. Pet. App. 1a-19a.

a. The court of appeals held that the evidence was sufficient to support the jury's determination that the portion of Teton Creek into which petitioner discharged pollutants is part of "the waters of the United States." Pet. App. 7a-15a. The court first observed that Teton Creek is an interstate tributary of traditional navigable waters, and that the creek had flowed year-round until the construction of the irrigation diversion in Alta, Wyoming. *Id*. at 2a, 9a. The court of appeals noted this Court's statement, with respect to traditional navigable waters, that "[w]hen once found to be navigable, a waterway remains so." *Id*. at 10a (quoting *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940)). Concluding that a similar rule should apply to tributaries, the court stated that it "d[id] not see how a mere man-made diversion, however long ago undertaken, could change Teton Creek from a water of the United States into something else." *Ibid*.

The court of appeals further held that, even if the historical events described above were disregarded, and the statutory inquiry were limited to the "present conditions" of Teton Creek, the portion of the creek into which petitioner discharged pollutants was covered by the CWA under the standards announced in all of the opinions in *Rapanos*. Pet. App. 10a; see *id*. at 10a-14a. The court of appeals observed that all Members of the

Rapanos Court had "agreed that intermittent streams (at least those that are seasonal) can be waters of the United States." *Id.* at 14a. The court then explained:

> The man-made severance of Teton Creek at Alta, Wyoming, may have made the portion in question here dry during much of the year, but when the time of runoff comes, the Creek rises again and becomes a rampaging torrent that ultimately joins its severed lower limb and then rushes to the Teton River, the Snake River, and onward to the Columbia River and the Pacific Ocean. Indeed, it is that very rush of water that induced [petitioner] to take action.

Ibid. Based on the record evidence, the court concluded that the relevant segment of Teton Creek "constitutes a water of the United States" that is covered by the CWA. *Ibid.*

b. The court of appeals also held that the evidence was sufficient to show that petitioner's activities constituted pollutant discharges proscribed by the CWA, except as specifically authorized by a permit. Pet. App. 15a-17a. The court rejected petitioner's contention that the discharges were lawful because petitioner "did not run his heavy equipment and engage in his assault on Teton Creek while the water was actually rushing between its banks." *Id.* at 15a. The court explained that acceptance of petitioner's argument "would countenance significant pollution of the waters of the United States as long as the polluter dumped the materials at a place where no water was actually touching them at the time." *Ibid.* The court further observed that the purpose of petitioner's discharges was to "create a situation where pollutants—disturbed and moved materials as well as

log structures—remained in Teton Creek when the water rose within it." *Id.* at 15a-16a.

The court of appeals also rejected petitioner's contention that his activities involved "incidental fallback" rather than "discharges" regulated by the CWA. Pet. App. 16a-17a. The court explained that "[i]ncidental fallback is the redeposit of small volumes of dredged material that is incidental to excavation activity," and that "[e]xamples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket." *Id.* at 16a. The court concluded that petitioner's activities, which involved "massive movement and redistribution of materials within Teton Creek," were not "similar to a small volume of dirt that happened to fall off a bucket and back to the approximate place of removal." *Id.* at 17a.

ARGUMENT

1. Petitioner contends (Pet. 5-9) that the tributary at issue in this case is not part of "the waters of the United States" within the meaning of the CWA. That argument lacks merit.

a. Teton Creek is a major tributary carrying large volumes of water, and it has a significant nexus to the traditional navigable waters into which it flows. In the one segment of Teton Creek that does not flow year-round, the water volume during runoff is so substantial and powerful that it (1) causes flooding, which petitioner sought to prevent; (2) causes annual displacement of large volumes of gravel, which petitioner repeatedly dredged and redeposited with bulldozers; and (3) transports downstream very sizable debris, including trees approximately 30-50 tall. See Pet. App. 14a, 16a; Gov't C.A. App. 237-240, 254, 312-315, 321-324, 350-353; Gov't

Exh. 9-1 (video of Teton Creek showing the water flow in June 2005). The evidence also showed that the stretch of Teton Creek near petitioner's subdivision flows every year during spring runoff. Pet. App. 2a; Gov't C.A. App. 237. Although the duration of such flow varies from year to year depending on the weather and snowpack, water typically flows in this segment from approximately mid-May into July. *Id.* at 254. At peak runoff, Teton Creek "can be a raging torrent" (*ibid.*), flowing "hard enough, it would take a pickup truck down it" (*id.* at 192-193, 202), with flow rates of 900-2000 cubic feet per second (*id.* at 315, 353).

Thus, the evidence introduced at trial showed that Teton Creek contributes substantial volumes of water to the traditionally navigable Teton, Snake and Columbia Rivers, into which it flows; that the creek flows perennially both upstream and downstream of the artificially-seasonal stretch near petitioner's subdivision; and that the creek is capable of carrying pollutants and flood waters to traditional navigable waters. That evidence supports the conclusion that Teton Creek as a whole, including the segment into which petitioner discharged pollutants, has a significant nexus to traditional navigable waters. That finding would in turn support a determination that the creek was part of "the waters of the United States" as that term was construed in the opinions in *Rapanos*.[3]

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[3] Petitioner did not object at trial to the jury instruction pertaining to the meaning of "the waters of the United States" or the meaning of "discharge of a pollutant." See Gov't C.A. App. 363 (petitioner objected only to one unrelated instruction, on the ground that it was cumulative). Hence, as the government argued in the Ninth Circuit, any claim that the instruction was erroneous in light of *Rapanos* should be reviewed for plain error under Rule 52(b) of the Federal Rules of Criminal Pro-

b. Petitioner's contention (Pet. i, 7-8) that the court of appeals' decision is inconsistent with *Rapanos* is premised in part on a misreading of Justice Kennedy's concurrence in that case. Petitioner argues (see Pet. 7-8) that the court of appeals should have ascertained whether *his own pollutant discharges* had a significant nexus to, *i.e.*, effect on, the downstream traditional navigable waters into which Teton Creek flows. Under that approach, the determination whether a particular waterbody is part of "the waters of the United States" would depend in part on the nature and likely effects of the discharges themselves.

Justice Kennedy's concurring opinion in *Rapanos* does not support that atextual approach. Rather, Justice Kennedy stated that "to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment). Although evidence of the downstream effects of a particular discharge may demonstrate a significant nexus between a tributary and the traditional navigable waters into which it flows, a discharge-specific showing is unnecessary under Justice Kennedy's standard. That point is confirmed by the nature of the issues that Justice Kennedy would have had the lower courts address

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cedure. See *Johnson* v. *United States*, 520 U.S. 461, 467 (1997); *United States* v. *Olano*, 507 U.S. 725, 732-735 (1993). By contrast, the sufficiency-of-the-evidence standard applies to the adequacy of the evidence *under the instructions as given by the district court*. *Cf. Lockhart* v. *Nelson*, 488 U.S. 33, 42 (1988); *Neder* v. *United States*, 527 U.S. 1, 10 (1999). The court of appeals treated petitioner's challenge as contesting the sufficiency of the evidence, Pet. App. 7a, and petitioner makes no separate challenge to the jury instructions in this Court.

on remand. The remands would have considered the general connections between the wetlands and waters at issue, not the particular effects that the defendants' conduct would have had. See *id.* at 783-787.

But even if a showing as to the effects of particular discharges *were* required, the government would have carried its burden in this case. Although the court of appeals did not adopt petitioner's understanding of Justice Kennedy's concurrence, the court found that "[t]he evidence supported a determination that when the water flowed, materials dislodged by [petitioner's] operations would be carried downstream into the lower portion of Teton Creek and on into the Teton River." Pet. App. 16a; see *id.* at 4a-5a; 15a-16a. Petitioner is therefore wrong in contending (Pet. 10) that "it is undisputed that there is no nexus between [petitioner's] activities and the physical, chemical and biological integrity of any navigable waters of the United States."

For essentially the same reasons, petitioner is also wrong in arguing (Pet. 9-10) that the Ninth Circuit's decision in this case conflicts with the Eleventh Circuit's ruling in *United States* v. *Robison*, 505 F.3d 1208 (2007). Contrary to petitioner's contention, the Eleventh Circuit did not interpret Justice Kennedy's *Rapanos* concurrence to require "a significant nexus between *the defendants' activities* and the * * * integrity of a navigable water of the United States." Pet. 10 (emphasis added). Rather, the Eleventh Circuit correctly understood Justice Kennedy's standard to require a nexus between traditional navigable waters and the "water or wetland"

into which pollutants are discharged. 505 F.3d at 1218; see *id*. at 1222-1223.[4]

c. Petitioner also suggests (Pet. 6-7) that the plurality opinion in *Rapanos* established the controlling legal standard for determining whether the CWA encompasses a particular tributary. While there is disagreement among the circuits concerning the proper application of *Rapanos* (see note 4, *supra*), no court of appeals has held that the *Rapanos* plurality opinion provides the sole governing standard. Petitioner's contention lacks merit and provides no basis for this Court's review in this particular case.

Under a proper understanding of *Rapanos*, the Corps and EPA may exercise regulatory jurisdiction over any tributary that satisfies *either* the standard for

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[4] The Solicitor General has not yet decided whether to seek this Court's review of the Eleventh Circuit's holding in *Robison*, see 505 F.3d at 1219-1222, that CWA coverage may be established *only* under the standard set forth in Justice Kennedy's *Rapanos* concurrence, and not under the standard adopted by the *Rapanos* plurality. The *Robison* court's resolution of that issue squarely conflicts with the decision of the First Circuit in *United States* v. *Johnson*, 467 F.3d 56, 66 (2006), cert. denied, 128 S. Ct. 375 (2007), which held that the "federal government can establish jurisdiction over [wetlands] if it can meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*." The Eleventh Circuit denied rehearing in *Robison* on March 27, 2008, and a petition for a writ of certiorari would currently be due on June 25, 2008. Even if the government ultimately files a certiorari petition in *Robison* and this Court grants review, the Court's decision is unlikely to affect the proper disposition of the instant case, since the court of appeals found that the stretch of Teton Creek into which petitioner discharged pollutants was covered by the CWA under both the *Rapanos* plurality's standard and that of Justice Kennedy. See Pet. App. 14a-15a. The petition in this case therefore should not be held pending the possible filing and disposition of any certiorari petition in *Robison*.

CWA coverage adopted by the *Rapanos* plurality *or* the standard set forth in Justice Kennedy's concurrence. That is so because the four dissenting Justices in *Rapanos* stated explicitly that they would sustain the exercise of federal regulatory jurisdiction under the CWA whenever either of those standards is satisfied. See 547 U.S. at 810 & n.14 (Stevens, J., dissenting). Thus, in all such cases, the agencies' exercise of regulatory jurisdiction would be consistent with the views of a majority of this Court's Members. See *United States* v. *Jacobsen*, 466 U.S. 109, 115-118 (1984) (holding that the controlling legal standard in a prior case was established by a principle adopted by two Justices who wrote separately in the majority and four Justices who joined the dissent); *Waters* v. *Churchill*, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement among the plurality, concurring, and dissenting opinions to identify the legal "test * * * that lower courts should apply," under *Marks* v. *United States*, 430 U.S. 188 (1977), as the holding of the Court); cf. *Abdul-Kabir* v. *Quarterman*, 127 S. Ct. 1654, 1667, 1668 n.15, 1671 (2007) (analyzing concurring and dissenting opinions in a prior case to identify a legal conclusion of a majority of the Court); *League of United Latin Am. Citizens* v. *Perry*, 126 S. Ct. 2594, 2607 (2006) (same); *Alexander* v. *Sandoval*, 532 U.S. 275, 281-282 (2001) (same); *Wilton* v. *Seven Falls Co.*, 515 U.S. 277, 285 (1995) (same).

In any event, the evidence supports the jury's verdict in this case under the standard adopted by the *Rapanos* plurality. See Pet. App. 12a-13a, 14a. The plurality construed the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams,

oceans, rivers, and lakes," 547 U.S. at 739, that are connected to traditional navigable waters, see *id.* at 742. The *Rapanos* plurality made clear that its reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id.* at 732 n.5. Teton Creek is a conventionally identifiable hydrographic feature with an established bed and bank. It flows year-round throughout much of its length, both upstream and downstream of the portion affected by the irrigation diversion, and has substantial seasonal flow in the segment into which petitioner discharged pollutants. It is thus quite different from a naturally episodic and rare flow of water or a "transitory puddle[]." *Id.* at 733.[5]

d. Finally, even if some question concerning the CWA's application to seasonal streams (or seasonal segments of larger streams) otherwise warranted this Court's review, this case would be an unsuitable vehicle for resolving it. As one independent ground for its decision, the Ninth Circuit explained that the whole of Teton Creek had flowed year-round until the installation of an irrigation diversion structure in Alta, Wyoming, and the court concluded that the man-made diversion did not affect the CWA's application to the stream segment at

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[5] Petitioner also asserts (Pet. 11-12) that this Court should grant review to decide whether the tributary at issue in this case is part of "the waters of the United States" under a non-binding guidance document issued by the Corps and EPA to assist agency personnel in implementing *Rapanos*. The significance of that guidance was not addressed by the court of appeals in this case or in any other case cited by petitioner. In any event, Teton Creek satisfies the *Rapanos* standards as interpreted in the guidance.

issue here. See Pet. App. 2a, 9a-10a. Petitioner makes no effort to challenge that holding, let alone to explain why it would warrant this Court's review.

2. There is likewise no merit to petitioner's contentions that, even if the relevant segment of Teton Creek is part of "the waters of the United States" within the meaning of 33 U.S.C. 1362(7), his conduct did not violate the CWA. Petitioner argues (Pet. i, 7) that his activities were not subject to the CWA's permitting requirements because those activities occurred while no water was in the stream bed. The *Rapanos* plurality squarely rejected the proposition that a "channel is a 'water' covered by the Act only during those times when water flow actually occurs," explaining that "no one contends that federal jurisdiction appears and evaporates along with the water." 547 U.S. at 733 n.6 (plurality opinion). Justice Kennedy's concurring opinion also affords no support to petitioner's argument. Justice Kennedy explained that "the Corps can reasonably interpret the Act to cover the paths of such impermanent streams," *id.* at 770 (Kennedy, J., concurring in the judgment), and he observed that the exclusion of waterways with irregular flows would "make[] little practical sense in a statute concerned with downstream water quality," *id.* at 769.

Petitioner's approach would except from the CWA's coverage discharges that are made into the stream beds of covered waters and that have a demonstrable likelihood of impairing the quality of traditional navigable waters downstream, simply because the flow of water had temporarily abated at the time the discharge occurred. As the court of appeals explained, "the mere fact that pollutants are deposited while this part of Teton Creek is dry cannot make a significant difference. * * * To hold otherwise would countenance significant

pollution of the waters of the United States as long as the polluter dumped the materials at a place where no water was actually touching them at the time." Pet. App. 15a. Petitioner identifies no decision of this Court or of any court of appeals that has adopted the limitation on CWA coverage that he advocates.

Petitioner further contends (Pet. 8-9) that this Court should address the question whether the incidental fallback of dredged material off of heavy equipment is a "discharge of a pollutant" within the meaning of the CWA, 33 U.S.C. 1362(12)(A). This case does not present that issue. The court of appeals did not hold that incidental fallback constitutes a pollutant discharge under the CWA, but rather held that petitioner's own discharges did not involve incidental fallback. Pet. App. 17a.

The Corps regulations define "incidental fallback" as "the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal." 33 C.F.R. 323.2(d)(2)(ii); see Pet. App. 16a.[6] The court of appeals

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[6] Petitioner's reliance (Pet. 9) on *National Association of Home Builders* v. *United States Army Corps of Engineers*, 440 F.3d 459 (D.C. Cir. 2006), is misplaced. The court of appeals in that case did not address the merits of the plaintiff's facial challenge to 33 C.F.R. 323.2(d)(2)(i), which addresses "the use of mechanized earth-moving equipment" in waters of the United States, but simply held that the challenge was ripe for judicial review. See 440 F.3d at 463-465. Although the district court on remand held that Section 323.2(d)(2)(i) is invalid, see *National Ass'n of Home Builders* v. *United States Army Corps of Eng'rs*, Civil Action No. 01-0274(JR), 2007 WL 259944, at *3-*4 (D.D.C. Jan. 30, 2007) (*NAHB*), any inconsistency between a district court ruling and the court of appeals' decision in this case would not warrant this Court's review. In any event, the district court in *NAHB*

explained that "the evidence here shows massive movement and redistribution of materials within Teton Creek." *Id.* at 17a. The court rejected petitioner's contention that his own activities involved conduct "similar to a small volume of dirt that happened to fall off a bucket and back to the approximate place of removal." *Ibid.* That factbound assessment of the record in this case is correct and does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2008

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simply held that the challenged regulatory provision did not adequately define the line between incidental fallback and regulable discharges. See *id.* at *3. The court did not suggest that activities of the sort in which petitioner engaged, which involved "massive movement and redistribution of materials within Teton Creek," Pet. App. 17a, including the erection of "log and gravel structures in the creek," *id.* at 3a, would fall outside the CWA's coverage.