No. 07-1512

In the Supreme Court of the United States

ROBERT J. LUCAS, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
RONALD J. TENPAS
Assistant Attorney General
KATHERINE W. HAZARD
KATHERINE J. BARTON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the wetlands at issue in this case are "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. 816, 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 a CWA permit is required for the discharge of pollutants from septic systems that are installed in and discharge directly into wetlands that are "waters of the United States."

3. Whether petitioners were properly held liable for violating the CWA by knowingly causing the discharge of pollutants from point sources into waters of the United States, even though petitioners did not own or operate the septic systems at the time the discharges from them occurred.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulations: Page

Regulation—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 07-1512

ROBERT J. LUCAS, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-63a) is reported at 516 F.3d 316.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 2008. A petition for rehearing was denied on March 4, 2008 (Pet. App. 64a-65a). The petition for a writ of certiorari was filed on June 2, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Mississippi, petitioners were convicted on 18 counts of mail fraud, in violation of 18 U.S.C. 1341; one count of conspiracy, in violation of 18 U.S.C. 371; and 22 counts of knowingly discharging pol-

lutants into waters of the United States without a permit, in violation of Section 301(a) of the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act or CWA), 33 U.S.C. 1311(a).[1] The individual petitioners were sentenced to prison terms ranging from 87 months to 108 months, three years of probation, and $15,000 in fines. The corporate petitioners were fined a total of $5.3 million. Each of the five petitioners was required to pay restitution of $1,407,400. The court of appeals affirmed. Pet. App. 1a-63a.

1. a. Congress enacted the 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). A person who "knowingly" violates that prohibition is subject to potential felony penalties. 33 U.S.C. 1319(c)(2)(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).

The CWA establishes two complementary permitting schemes. Section 404(a) authorizes the Secretary of the Army, acting through the United States Army Corps of

---

[1] Petitioner Robert J. Lucas, Jr., was convicted on all 41 counts; petitioner Robbie Lucas Wrigley was convicted on all counts of conspiracy and mail fraud and on 14 CWA counts (33 counts total); petitioner M.E. Thompson, Jr., was convicted on all counts of conspiracy and mail fraud and on seven CWA counts (26 counts total); petitioner Big Hill Acres, Inc., was convicted on all counts of conspiracy and mail fraud (19 counts total); and petitioner Consolidated Investments, Inc., was convicted on one count of conspiracy. Pet. App. 3a n.3, 4a.

Engineers (Corps), or a State with an approved program, to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). Section 402 authorizes the United States Environmental Protection Agency (EPA), or a State with an approved program, to issue a National Pollutant Discharge Elimination System (NPDES) permit for the discharge of pollutants other than dredged or fill material. See 33 U.S.C. 1342. The Corps and EPA share responsibility for implementing and enforcing Section 404 of the CWA. See, *e.g.*, 33 U.S.C. 1344(b) and (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).[2] The Corps regulations define the term "adjacent" to mean "bordering, contiguous, or neighboring." 33 C.F.R. 328.3(c).

b. 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 pow-

[2] To avoid confusion between the term "navigable waters" as defined in the CWA, see 33 U.S.C. 1362(7), 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, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

ers 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) (*SWANCC*), the Court held that use of "isolated" nonnavigable intrastate ponds 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 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 actual or proposed pollutant discharges into 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).

A four-Justice plurality in *Rapanos* interpreted the term "waters of the United States" as covering "rela-

tively 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.*[3] Justice Kennedy interpreted the term 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) (quoting *SWANCC*, 531 U.S. at 167); see *id.* at 779-780. 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).

2. Petitioners are three individuals and two corporations. Petitioners defrauded hundreds of individuals who purchased house lots with septic systems in reliance on petitioners' false representations that the sites were habitable and that the sewage systems were functional and installed in compliance with state law. See Pet. App. 2a-3a, 37a-38a, 41a-42a. Robert J. Lucas, Jr., was the owner of Big Hills Acres, Inc. (BHA, Inc.) and Consolidated Investments, Inc., the companies under which

---

[3] 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." 547 U.S. at 732 n.5.

the property was acquired and subdivided. *Id.* at 2a. M.E. Thompson, Jr., a private licensed engineer, designed the septic systems in question and certified that they were in compliance with Mississippi Department of Health (MDH) regulations, a certification that allowed the properties to be sold. *Id.* at 2a, 34a. Robbie Lucas Wrigley advertised, marketed, leased, and sold lots for residential use at the Big Hill Acres (BHA) development. *Id.* at 2a-3a, 41a.

The BHA development comprises 2620 acres located in Jackson County, Mississippi, approximately eight miles from the Gulf of Mexico. Pet. App. 2a; Tr. 1679. Approximately 1200 acres of the property are wetlands. Tr. 2029, 2068. The wetlands are part of a continuous system of wetlands, streams, bayous, and rivers that begins north of the site and extends through it south to the Gulf. Pet. App. 11a-12a.

The BHA lots were "not connected to a central municipal waste system, and County law required Lucas to certify and install individual septic systems on each lot." Pet. App. 2a. An MDH engineer initially performed the certification of the septic systems at the BHA site, but MDH rescinded many of its approvals when it discovered that the systems had been improperly placed in saturated soils. *Ibid.* Lucas then hired Thompson to perform the certifications. *Ibid.*

Beginning in 1997, the Corps, EPA, and MDH issued a series of warnings to petitioners that they were installing the septic systems in violation of state and federal law. Pet. App. 3a & n.2, 47a-48a. In 1999-2000, those agencies all issued cease and desist orders, but the violations continued. *Id.* at 3a & n.2, 14a n.25. Lucas's own employees warned him that the property was wet and likely regulated. *Id.* at 15a & n.28. Petitioners never-

theless ran newspaper advertisements describing the property as "high and dry," and Wrigley repeatedly represented to potential purchasers, even in response to specific inquiries, that the lots did not contain wetlands. *Id.* at 41a.

The evidence presented at petitioners' trial indicated, however, that "the lots were not in fact dry, as [petitioners] had advertised, and that residents encountered sewage problems on their wet lots." Pet. App. 41a. Septic systems failed and raw sewage backed up into toilets, bathtubs, showers, and sinks; spilled out over yards and flowed or washed to nearby streams; and created highly unpleasant odors. Tr. 396, 403, 555, 620, 1095, 1097, 1340, 1343, 1511-1512, 1518-1519, 1750, 1775-1777, 1919, 2622, 2464-2465, 2510, 2605, 2608, 3486, 3736, 3739, 3741, 3745. Unstable wetland soils resulted in subsiding driveways and home sites, causing homes to sink and buckle. Tr. 401, 404, 555, 1097, 1512, 1601, 2623.

3. On November 5, 2004, a federal grand jury returned a 41-count superseding indictment charging petitioners with various offenses relating to the development and marketing of the lots described above. See Pet. App. 3a-4a & n.3. Count 1 alleged that all petitioners had conspired to commit mail fraud, in violation of 18 U.S.C. 1341, and to discharge pollutants from point sources into waters of the United States, in violation of the CWA (33 U.S.C. 1319(c)(2)(A)), for the purpose of profiting from the sale of BHA properties that could not have been marketed if the public had known they contained wetlands and water-saturated soil. Counts 2-19 charged all petitioners except Consolidated Investments with undertaking a scheme to defraud by inducing individuals to purchase BHA lots under the false representation that those lots were suitable for habitation.

Counts 20-29 charged individual petitioners with knowingly causing the discharge of fill materials from excavation and earth-moving equipment into BHA lots containing wetlands covered by the CWA, in violation of 33 U.S.C 1319(c)(2)(A). Counts 30-41 charged individual petitioners with knowingly causing pollutants, including sewage and domestic wastewater, to be discharged from septic systems into BHA lots containing wetlands covered by the CWA, also in violation of 33 U.S.C. 1319(c)(2)(A). Counts 20-41 also charged petitioners under 18 U.S.C. 2 with aiding and abetting violations of the CWA.

After a 29-day trial, the jury found petitioners guilty on all counts. Pet. App. 2a. The district court sentenced Lucas to 108 months of imprisonment and sentenced Wrigley and Thompson to 87 months of imprisonment. The three individual petitioners were also sentenced to three years of probation and assessed $15,000 in fines. The court fined BHA, Inc., $4.8 million and Consolidated Investments $500,000; assessed $1,407,400 in restitution against each of the petitioners; and made special assessments of $7600 and $400 against BHA, Inc., and Consolidated Investments respectively. *Id.* at 61a & n.133.

4. The court of appeals affirmed. Pet. App. 1a-63a.

a. The court of appeals held that the evidence was sufficient to support the jury's determination that the wetlands into which petitioners discharged pollutants are "waters of the United States." Pet. App. 9a-13a. Without attempting to identify the controlling rule of law that emerges from the fractured decision in *Rapanos*, the court of appeals concluded that "the evidence presented at trial supports all three of the *Rapanos* standards"—*i.e.*, the standards endorsed by the *Rapa-*

nos plurality, Justice Kennedy's concurrence, and the four dissenters. *Id.* at 13a.

The court of appeals explained that, under the *Rapanos* plurality's standard, a wetland is covered by the CWA if it (1) is adjacent to "a relatively permanent body of water connected to traditional interstate navigable waters," and (2) "has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." Pet. App. 10a (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion)). The court concluded that "[t]he evidence presented at trial is sufficient by the plurality's measure of federal waters." *Id.* at 11a. The court explained:

> One of the Government's expert witnesses at trial, Mike Wylie, described how he began at the westernmost drainage of the property and moved across, finding "flowing open water" north of the site and boat points on the western portion of the property "at the confluence of two tributaries." These tributaries had "strong flow" and "high velocity." Wylie showed photographs of his staff kayaking in tributaries connected to BHA wetlands as well as in several wetlands on the property. A jury could have reasonably concluded that these pictures show areas on the edge of the BHA property where "it is difficult to determine where the 'water' ends and the 'wetland' begins."

Id. at 11a-12a. The court of appeals additionally noted that the government had presented evidence showing multiple tributaries "all connected to the development property, and all eventually flowing into the traditionally navigable Tchoutachabouffa River, the Pascagoula River, and the Mississippi Sound." *Id.* at 12a. The court

also cited testimony that "there is a continuous band of wetlands and streams and creeks that lead from the site to the waters." *Ibid.*

The court of appeals likewise concluded that the evidence was sufficient, under the standard set forth in Justice Kennedy's concurring opinion in *Rapanos*, to establish a "significant nexus" between the sites of the discharges and traditional navigable waters. Pet. App. 12a. Under that standard, the court explained, the relevant question is "whether '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.'" *Ibid.* (quoting *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring)). The court held that the government had satisfied that standard at petitioners' trial by "present[ing] evidence that the BHA wetlands control flooding in the area and prevent pollution in downstream navigable waters, evidence supporting the significant nexus standard of the *Rapanos* concurrence." *Ibid.*

b. Petitioners challenged the sufficiency of the indictment on Counts 30-41, which charged petitioners with violating the CWA by causing unpermitted discharges of sewage from the septic tanks into wetlands covered by the Act. Petitioners contended that the NPDES permitting requirements under Section 402 of the CWA "do not apply to individual septic systems." Pet. App. 17a. The court of appeals rejected that contention. *Id.* at 16a-27a.

The court of appeals explained that 40 C.F.R. 122.1(b) identifies two distinct sets of discharges for which an NPDES permit is required. Under subsection (1) of that regulatory provision, a permit is required "for

the discharge of 'pollutants' from any 'point source' into 'waters of the United States.'" Pet. App. 18a (quoting 40 C.F.R. 122.1(b)(1)).[4] Under subsection (2), the permit requirement "*also* applies," with exceptions not relevant here, to "owners or operators of any treatment works treating domestic sewage, whether or not the treatment works is otherwise required to obtain an NPDES permit." *Id.* at 19a (quoting 40 C.F.R. 122.1(b)(2)). The court of appeals explained that subsection (2) identifies *other* sources, *in addition to* the point sources described in Section 122.1(b)(1), for which an NPDES permit is required. *Id.* at 20a-21a. Thus, although septic systems are not among the "treatment works" covered by subsection (2) of the regulation, they are still covered by subsection (1) if their operation involves the discharge of pollutants from "point sources" into waters covered by the CWA. See *id.* at 21a-23a.

The court of appeals concluded that the BHA septic systems are covered by 40 C.F.R. 122.1(b)(1) because (1) they are "containers," and thus are "point sources" within the meaning of 40 C.F.R. 122.2 (see note 4, *supra*); (2) they hold "solid waste" and "sewage," which are pollutants under applicable EPA regulations; and (3) they discharge directly into wetlands that are "waters of the United States." Pet. App. 23a-24a & n.43. The court of appeals explained that finding septic tanks to be "point sources" was consistent with case law, including the plurality opinion in *Rapanos*, which stated that any

---

[4] Under 40 C.F.R. 122.2, the term "point source" is defined to mean "any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged."

conduit that conveys a pollutant to covered waters is a point source. *Id.* at 24a-27a (citing, *inter alia*, *Rapanos*, 547 U.S. at 743 (plurality opinion)). The court of appeals therefore held that Counts 30-41 of the indictment sufficiently charged violations of the CWA. *Id.* at 27a.

c. Petitioners also challenged the jury instruction on Counts 30-41, which required a finding "that the defendants knew that they were discharging *or causing the discharge of* pollutants" from a point source into covered waters without a Section 402 permit. Pet. App. 29a-30a (quoting jury instruction) (emphasis added). Petitioners contended that they were not required to obtain a Section 402 permit because they neither owned nor operated the septic tanks. *Id.* at 30a. The court of appeals rejected that contention, concluding that petitioners could "be held indirectly liable for the discharges as aiders and abettors under 18 U.S.C. § 2." *Id.* at 31a (emphasis omitted). The court explained that "[a] principal is criminally culpable for causing an intermediary to commit a criminal act even where the intermediary has no criminal intent and is innocent of the substantive crime." *Ibid.* The court concluded:

> Although [petitioners'] personal septic waste was not the waste that entered federal wetlands, the attempted technical distinction between the "discharge of any pollutant" and "causing" this discharge is unavailing here. The lot owners eventually used the systems, but Defendants were the cause of their operation and their unlawful discharge from the systems. At minimum, they aided and abetted the operation of the septic systems and the resulting discharges.

Id. at 34a. The court of appeals held on that basis that the "jury instruction allowing conviction for 'causing' the discharge of pollutants was not an abuse of discretion." *Ibid.*

ARGUMENT

1. Petitioners contend (Pet. 14-19) that this Court should grant review in order to clarify the controlling rule of law that emerges from *Rapanos*. Petitioners are correct that a circuit conflict exists on that question. The First Circuit has held that the CWA covers all waters that satisfy *either* the standard announced by the *Rapanos* plurality *or* the "significant nexus" standard described in Justice Kennedy's concurrence. See *United States* v. *Johnson*, 467 F.3d 56, 60-66 (2006), cert. denied, 128 S. Ct. 375 (2007). The Eleventh Circuit, by contrast, has held that CWA coverage may be established *only* under the standard set forth in Justice Kennedy's *Rapanos* concurrence. See *United States* v. *Robison*, 505 F.3d 1208, 1219-1222 (2007), petition for cert. pending *sub nom. United States* v. *McWane, Inc.*, No. 08-223 (filed Aug. 21, 2008).[5]

---

[5] Petitioners contend (Pet. 14-15) that the Seventh and Ninth Circuits have also categorically held that Justice Kennedy's "significant nexus" standard is the controlling rule that emerges from *Rapanos*. That is incorrect. In *United States* v. *Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006), cert. denied, 128 S. Ct. 45 (2007), the court remanded the case for further proceedings in light of *Rapanos* and stated that "Justice Kennedy's proposed standard * * * must govern the further stages of this litigation." The court recognized, however, that cases may occasionally arise in which Justice Kennedy "would vote against federal authority only to be outvoted 8-to-1 (the four dissenting Justices plus the members of the *Rapanos* plurality)," *ibid.*, and it did not specify what it regarded as the proper disposition of such a case. In *Northern California River Watch* v. *City of Healdsburg*, 496 F.3d 993

Petitioners are also correct that the question of which *Rapanos* standard controls is of great practical importance and warrants this Court's review. For that reason, the United States has filed a petition for a writ of certiorari seeking review of the Eleventh Circuit's ruling in *Robison*. See *United States* v. *McWane, Inc.*, No. 08-223 (filed Aug. 21, 2008). That petition explains (at 28-32) that the current circuit conflict significantly impedes the government's enforcement of the CWA and places substantial burdens on regulated entities.

This case, however, does not provide a suitable vehicle for resolution of the circuit conflict. In affirming petitioners' CWA convictions, the court of appeals did not purport to decide what rule of law emerges from the fractured decision in *Rapanos*. The court found it unnecessary to resolve the question that has divided the circuits because it determined that the evidence in this case was sufficient to establish CWA coverage under *each* of the competing standards set forth in the various *Rapanos* opinions. See Pet. App. 13a.[6] If the Court

---

(9th Cir. 2007), cert. denied, 128 S. Ct. 1225 (2008), the court stated that Justice Kennedy's concurring opinion in *Rapanos* constitutes "the narrowest ground to which a majority of the Justices would assent if forced to choose *in almost all cases*," and that the *Rapanos* concurrence "provides the controlling rule of law *for our case*." *Id.* at 999-1000 (emphases added). As in *Gerke*, the court did not specifically discuss the proper resolution of a coverage dispute involving wetlands that have been shown to satisfy the *Rapanos* plurality's standard but not that of Justice Kennedy. Analysis of that question was unnecessary because the Ninth Circuit held that Justice Kennedy's standard *was* satisfied and that the wetlands at issue therefore were covered by the CWA. See *id.* at 1000-1001.

[6] While petitioners argued in the court of appeals that the jury instructions given at their trial were erroneous, see Pet. App. 4a-5a, they did *not* contend that the instructions were inconsistent with the stan-

were to grant certiorari in this case, petitioners' CWA convictions therefore would stand regardless of which of the *Rapanos* standards the Court found to be controlling. In *Robison*, by contrast, the court of appeals squarely held that coverage may be established *only* under Justice Kennedy's "significant nexus" standard, 505 F.3d at 1219-1222, and it stated that "the decision as to which *Rapanos* test applies may be outcome-determinative in this case," *id.* at 1224. The government's pending certiorari petition in *McWane* therefore squarely presents the issue that has generated the circuit conflict, while this case does not.[7]

2. Seeking to create at least the possibility that this Court's resolution of the circuit split might result in the reversal of their CWA convictions, petitioners contend (Pet. 20-25) that the Court should grant review not only to determine *which Rapanos* standard applies, but also to correct the Fifth Circuit's purported misinterpretation of the plurality and concurring opinions. Petitioners do not contend, however, that any conflict in authority exists on the proper understanding of either the *Rapanos* plurality's standard or that of Justice Kennedy. Nor do they provide any other basis for concluding that

---

dards for CWA coverage articulated in *Rapanos*, see *id.* at 8a n.8. The court of appeals rejected the instructional challenge that petitioners did raise, *id.* at 8a, and petitioners do not renew that claim in this Court.

[7] Because the waters into which petitioners caused pollutants to be discharged are covered by the CWA both under the *Rapanos* plurality's standard and under that of Justice Kennedy, petitioners' own convictions would not be affected by any reasonably foreseeable decision on the merits that this Court might issue if the government's petition for a writ of certiorari in *McWane* is granted. The petition in this case therefore should not be held pending the Court's disposition of the petition in *McWane*.

clarification of the details of those standards warrants this Court's review.

In any event, petitioners are wrong in contending (Pet. 20) that the court of appeals' analysis "flatly misinterprets *both* the *Rapanos* plurality and the concurrence." With respect to Justice Kennedy's standard, the Fifth Circuit accurately described the relevant question as "whether '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.'" Pet. App. 12a (quoting *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment)). The court concluded that the proof at petitioners' trial was sufficient to establish coverage under the "significant nexus" standard because "[t]he Government presented evidence that the BHA wetlands control flooding in the area and prevent pollution in downstream navigable waters." *Ibid.* That understanding of the "significant nexus" standard is fully consistent with Justice Kennedy's recognition that, "[w]ith respect to wetlands, the rationale for [CWA] regulation is * * * that wetlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage." 547 U.S. at 779 (Kennedy, J., concurring in the judgment).[8]

---

[8] The BHA wetlands are located in five drainages that drain to three traditional navigable waters (Bayou Costapia, Old Fort Bayou Creek, and Bluff Creek). The evidence at petitioners' trial showed that the tributaries to which those wetlands are adjacent have persistent and substantial flows and travel through swamps, emergent wetlands, and braided forested wetland systems, each of which by its nature plays a critical role in maintaining the physical, chemical, and biological integrity of the watersheds of which it is a part. See Tr. 2966-3083. The evi-

Petitioners' attack (Pet. 21-25) on the court of appeals' application of the *Rapanos* plurality's standard is similarly flawed. The court of appeals specifically recognized that, under the plurality's standard, wetlands are covered by the CWA only if they have a "continuous surface connection" with a "relatively permanent body of water" that is connected to traditional navigable waters. Pet. App. 10a (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion)).[9] And, contrary to petitioners' suggestion

---

dence showed that pollutants discharged in the wetlands reached downstream waters. See, *e.g.*, Tr. 3746 (BHA resident testifying that she saw fecal matter and toilet paper flowing in streams adjacent to her lot). The government also submitted evidence that the BHA wetlands help to control flooding in the watersheds of Bayou Costapia, Old Fort Bayou Creek, and Bluff Creek by temporarily soaking up and storing stormwater. Gov't Exh. 78-b. The evidence further showed that the wetlands improve downstream water quality by intercepting surface runoff and removing or retaining its nutrients, processing organic wastes, and reducing sediment before it reaches these water bodies. *Ibid.* Petitioners' wetlands consultant agreed that the BHA wetlands trap sediment and prevent it from flowing downstream. See Tr. 4140, 4233.

[9] The government's evidence demonstrated the existence of a continuous band of wetlands and streams and creeks, with persistent or perennial flows, extending from the BHA wetlands to traditional navigable waters. See Pet. App. 12a; Tr. 3107. Based primarily on dash lines on a 1982 United States Geological Survey (USGS) map, petitioners' expert testified that the tributaries departing the BHA property were "intermittent streams." Tr. 4193-4194. Although the USGS is the most comprehensive, national-scale database available, errors in "distinctions between perennial and intermittent channels * * * can be quite large." Scott P. Sowa et al., Missouri Res. Assessment P'ship, *A Gap Analysis for Riverine Ecosystems of Missouri: Final Report* 105 (2005) (submitted to the USGS National Gap Analysis Program). Based on his visits to the site in April, May, November, and January, the government's expert testified that the tributaries were "persistent or perennial." Tr. 3107. Residents also testified to the abundance of flow sur-

(Pet. 22-23), the court did not misapprehend the type of "adjacency" or "continuous surface connection" that the *Rapanos* plurality's standard requires. Rather, the court of appeals recognized that the connection must be of a sort that "mak[es] it difficult to determine where the 'water' ends and the 'wetland' begins," Pet. App. 10a (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion)), and it specifically found that the evidence in this case was sufficient to establish such a connection, see *id.* at 11a-12a.

At bottom, petitioners' real complaint is not with the court of appeals' explication of the governing standards set forth in the *Rapanos* plurality opinion and in Justice Kennedy's concurrence, but with the Fifth Circuit's assessment of the record evidence in this case. Petitioners' criticisms are misplaced. See notes 8-9, *supra*. But in any event, the wholly factbound challenges that petitioners seek to raise implicate no issue of continuing importance warranting this Court's review.

2. Petitioners contend (Pet. 26-33) that the court of appeals erred in holding that NPDES permits were required for the septic systems at issue in this case. Petitioners do not assert that the circuits are in conflict on

---

rounding their properties (Tr. 3747, 5934), with one explaining that the nearby "whole valley is interlaced with many little rivulets" that come down to a stream "about five feet wide" that "runs most all the time" or is "always there" and "leads to Fort Bayou Creek," which becomes a traditional navigable water downstream (Tr. 3073, 3745, 5936). Both experts agreed that there are "intermittent drains" (Tr. 3227) within the wetlands on the BHA property, but those drains are merely part of the hydrology of the wetlands themselves and do not constitute the tributaries that the wetlands are adjacent *to*. See Tr. 3012 (area with intermittent drain is "one big wetland drain basin complex" without "well defined bed and bank"); 3134 (describing an "intermittent drain formed of wetlands").

this question. And because the court of appeals expressly limited its holding to the rare circumstance in which septic systems discharge pollutants directly into "waters of the United States" covered by the CWA, its decision lacks the broad practical importance that petitioners attribute to it.

Although septic systems typically do not require NPDES permits, that is because they do not generally discharge pollutants directly into "waters of the United States." The court of appeals explained:

> We recognize that we have not formerly encountered a case charging an operator of a septic system with failure to obtain an NPDES permit. This is likely because few cases have presented us with these unique circumstances, where a developer hired an engineer to approve and install septic systems directly in wetlands that are waters of the United States, thus making a system that is typically a diffuse, non-point source into a point source.

Pet. App. 23a-24a n.43. EPA guidance similarly notes that individual septic systems "may provide an alternative to conventional centralized wastewater systems," but that "any onsite or clustered wastewater treatment system that discharges pollutants from a point source to waters of the United States is * * * illegal and subject to enforcement action unless it is authorized by an NPDES permit issued by an authorized state or tribe or by EPA." See Office of Water, U.S. EPA, *EPA 832-B-03-001, Voluntary National Guidelines for Management of Onsite and Decentralized (Clustered) Wastewater Treatment Systems* (2003) <http://www.epa.gov/owm/septic/pubs/septic_guidelines.pdf>.

For similar reasons, petitioners are incorrect in contending (Pet. 28-29) that 40 C.F.R. 122.1(b)(2) exempted the septic systems at issue in this case from NPDES permitting requirements. Consistent with the plain language of Section 122.1(b), the court of appeals explained that an NPDES permit is required for sources that are covered *either* by Section 122.1(b)(1), which encompasses point sources that discharge pollutants into "waters of the United States," *or* by Section 122.1(b)(2), which extends the NPDES permitting requirements to certain "treatment works treating domestic sewage." 40 C.F.R. 122.1(b)(2); see Pet. App. 17a-24a. Because the term "treatment works treating domestic sewage" is defined to exclude "septic tanks or similar devices," see 40 C.F.R. 122.2, septic systems are not covered by Section 122.1(b)(2). As the sources on which petitioners rely (see Pet. 28-29) indicate, that exemption reflects EPA's decision not to require an NPDES permit for *every* residential septic system. But where, as here, particular septic systems discharge pollutants directly into "the waters of the United States," thus bringing them within the coverage of Section 122.1(b)(1), nothing in Section 122.1(b)(2) exempts them from NPDES permitting requirements.

3. Petitioners further contend (Pet. 26, 30-31) that, even if the septic systems at issue in this case were subject to NPDES permitting requirements, petitioners themselves cannot be held criminally liable for any unpermitted discharges because they did not own or operate the systems at the time the discharges occurred. In rejecting that argument, the court of appeals explained that petitioners had been charged as aiders and abettors under 18 U.S.C. 2, and it correctly recognized that "[a] principal is criminally liable for causing an in-

termediary to commit a criminal act even where the intermediary has no criminal intent and is innocent of the substantive crime." Pet. App. 31a. Petitioners do not dispute the court of appeals' understanding of general principles of criminal liability; they identify no reason to suppose that those background principles are inapplicable to criminal prosecutions under the CWA; and they cite no case that has arrived at a different result under circumstances like those presented here. Further review therefore is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General
RONALD J. TENPAS
Assistant Attorney General
KATHERINE W. HAZARD
KATHERINE J. BARTON
Attorneys

AUGUST 2008