No. A_____
No. 07-1512

In the Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA, RESPONDENT.

APPLICATION FOR BAIL PENDING DISPOSITION OF PETITION FOR CERTIORARI

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To the Honorable Antonin Scalia, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

The petitioners, Robbie Lucas Wrigley, Robert J. Lucas, Jr., and M.E. Thompson, Jr., apply for an order granting them bail pursuant to the Bail Reform Act of 1984, 18 U.S.C. §3143(b), pending final action on their pending petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

INTRODUCTION AND SUMMARY

The petitioners—Robbie Lucas Wrigley, a young mother of a one-year-old, Robert Lucas (her father) and M.E. Thompson, another elderly grandfather—are currently imprisoned in various federal penitentiaries based upon ordinary land-development activities and a juridical reading of the Government's jurisdiction under the Clean Water Act that is more expansive than *both* the plurality and concurring opinions in *Rapanos* v. *United States*, 547 U.S. 715 (2006). Under the rule of lenity, the lower courts should have interpreted this complex and ambiguous statute conservatively, in a manner reflecting the need for adequate public notice as to the line dividing criminal from non-criminal conduct. See, e.g., *Bell* v. *United States,* 349 U.S. 81, 83 (1955); *accord United States* v. *Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion of Scalia, J.). However, as explained in the pending petition, at nearly every turn the courts below resolved perceived ambiguities in the statute and in this Court's interpretation of it in favor of the Government.

For example, in applying the *Rapanos* plurality, the Fifth Circuit held that jurisdiction under the Act extends to any wetland that "neighbors" a "tributary" of a

traditional navigable water, even absent a temporally "continuous" surface connection between the wetland and a "relatively permanent" body of water. 547 U.S. at 732, 739. The Fifth Circuit apparently thought that any surface connection, no matter how fleeting, was sufficient. But that Government-friendly approach is flatly contrary to this Court's decisions applying the rule of lenity. See, e.g., *United States* v. *Gradwell,* 243 U.S. 476, 485 (1917); *McBoyle* v. *United States,* 283 U.S. 25, 27 (1931); *United States* v. *Bass,* 404 U.S. 336 (1971); *Illinois Tools Works* v. *Independent Ink, Inc.*, 547 U.S. 28, 45 (2006); *accord Santos, supra,* 128 S. Ct. at 2025 (noting that rule of lenity is necessarily "defendant-friendly"). And for that reason (among others) the judgment below seems likely to be reversed or at least vacated for a new trial—*if* the Court grants the petition.

We also think the Court is likely to grant the petition. As the petition and the amici have explained, the questions presented are of enormous importance to developers and other businesses nationwide. Moreover, as the Government has recently acknowledged, there is a mature circuit conflict on the first question presented, *i.e.*, which of the *Rapanos* opinions controls in the lower courts. See Brief for the United States in Opposition to certiorari in No. 07-1195, *Moses* v. *United States*, filed May 2008 (attached as Exhibit A), at 13 n.4. And, as the petition and the *amici* explain, that conflict reflects an even more fundamental, acknowledged circuit conflict over the proper application of *Marks* v. *United States*, 430 U.S. 188, 193 (1977), in determining the precedential effect of a split decision from this Court: specifically, should the "narrowest ground" for decision be

interpreted to mean the ground which least restricts governmental power, or that which least restricts individual liberty?

In the criminal context, at a minimum, we believe the rule of lenity requires the interpretation that least restricts individual liberty. But whether or not the Court ultimately adopts that position, it seems likely that the Court will want to resolve both the broader conflict over the proper understanding of *Marks* and the more specific conflict over the precedential effect of *Rapanos*. Moreover, for reasons explained in the petition (Pet. 18-19), and discussed below, this case provides a good vehicle with which to resolve both issues, notwithstanding the Fifth Circuit's attempt to skate past the conflict by purporting to apply both the plurality and the concurrence in *Rapanos*. Indeed, as the petition shows, and as we summarize below, the only way the Fifth Circuit was able to affirm these convictions was by ignoring or misconstruing key limitations in both opinions.

Given the likelihood of plenary review, and the likelihood of reversal, this case amply satisfies the requirements imposed by the Bail Reform Act for an order granting bail and release pending certiorari. 18 U.S.C. § 3143. In granting bail before the appeal to the Fifth Circuit, the district court found that petitioners posed no risk of flight and no danger to the community. Sentencing Hearing Tr. (attached as Exhibit H) at 177-78; see also Declaration of Phillip A. Wittman (attached as Exhibit B). And, although the Government opposed a request to the district court for bail pending certiorari, its opposition did not contest either of these elements. Accordingly, petitioners' request for release pending certiorari should be granted.

BACKGROUND

Petitioners were convicted under the Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. § 1251 *et seq.*, for building a mobile home development and associated septic systems on a large property, known as Big Hill Acres. Although portions of the property satisfy the technical scientific definition of "wetlands," all of the land on which homes or septic tanks were erected would be considered "dry" in ordinary parlance, that is, they are ordinarily dry enough to walk on, or even drive a vehicle on, without difficulty. See Pet. 8; *compare* Pet. App. 2a (suggesting that petitioners falsely "represented the lots as dry").

As the district court recognized, *all* of the charges on which petitioners were convicted, including the mail fraud and conspiracy counts, depended upon a finding that the property at issue was subject to jurisdiction under the Clean Water Act. Pet. App. 118a. Although the Act covers discharges of pollutants into "navigable waters," 33 U.S.C. § 1311(a), which in turn are defined as "the waters of the United States, including the territorial seas," 33 U.S.C. § 1362(7), no traditionally navigable waters lie on or adjacent to the property. Instead, the development drains into non-navigable, intermittent tributaries, ditches, and drainage swales. Pet. App. 116a-117a. Indeed, as the district court found, there was "no * * * evidence that any of the water from Big Hill Acres ever really reache[d] a navigable body of water," the closest of which is more than two miles away. Pet. App. 117a. And none of the relevant land was located within what the plurality in *Rapanos*

defined as "waters of the United States," that is, a "relatively permanent, standing or flowing bod[y] of water." 547 U.S. at 732.

1. Besides the mail fraud and conspiracy counts that rested upon the alleged violations of the Clean Water Act (see Superseding Indictment, attached as Exhibit C, at 6-32), the government offered two basic theories of liability, both directly contrary to the plurality's definition. First, the Government contended that the petitioners' efforts to prepare and grade their land for development resulted in the discharge of "pollutants"—such as dirt and gravel—into "waters of the United States" without a permit as required by Section 404 of the Act. See id. at 32-34; Verdict Form (attached as Exhibit D) at 11-14 (counts 20-29).

The Government's second theory was even more aggressive and novel: It claimed that an ordinary residential septic system is, in itself, a "point source" requiring a permit for operation. Thus, merely by designing and installing septic systems on land that would be considered "dry" in ordinary parlance, the petitioners were knowingly causing the *later* discharge of pollutants—in the form of human waste—directly into "waters of the United States." See Ex. D at 15-20 (counts 30-41). As one Government attorney described the theory to the district judge, "these septic tanks are point sources because they are placed *directly* in waters of the U.S." Pet. App. 83a (emphasis added). And according to the Government, the mere placement of septic tanks in this ordinarily dry land violated Section 402 of the Act. Ex. C at 34-36.

2. At trial, the bulk of the Government's evidence focused on the septic systems that petitioners had designed and installed. Some of those systems—albeit a smaller percentage than the local average—had failed, either because of design issues, installation problems, or misuse by residents. See Pet. 6-7. Not surprisingly, those failures had resulted in raw sewage leaking onto and into places where it should not have gone. Not surprisingly, some residents blamed those problems on the petitioners. And not surprisingly, the resulting evidence was highly inflammatory to a local jury.

The jury convicted the petitioners on all 41 counts of the indictment. See Ex. D. Petitioners were then subjected to multi-million dollar fines and prison terms of seven to nine years, which the petitioners are currently serving. Pet. 10-11.

3. Throughout the proceedings below, the parties and the courts struggled to apply this Court's decision in *Rapanos*. As noted, the plurality opinion in that case defined "waters of the United States" as "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features,'" such as streams, oceans, rivers, or lakes. 547 U.S. at 739. The Government, the plurality said, has jurisdiction over wetlands only if they are "adjacent" to such waters, with a "*continuous* surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id*. at 742 (emphasis added).

Justice Kennedy concurred in the judgment, providing the fifth vote for a majority. He opined that the government has jurisdiction over wetlands with a

"significant nexus" to "traditional" navigable waters such that "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.'" *Id.* at 780 (emphasis added). Thus, no significant nexus exists when the "wetlands' effects on water quality are speculative or insubstantial." *Ibid.*

The district court repeatedly expressed skepticism about whether the Government's case met either standard. For example, it indicated that it "would be much more impressed with the government's case if there were some evidence * * * some clue as to what might be factors that could be considered in determining whether there is a significant nexus between the wetland and navigable body of water, in fact." Pet. App. 116a-117a.

> For example, *if there were some evidence* of * * * the flow of water from the wetlands to the navigable body of water. And *we do not have that here***.** Some evidence that there is contamination [of] the * * * navigable body of water which is adjacent to the wetland. Whether there is some evidence which tends to show that there will be future contamination or a danger of contamination. And *we don't have any of that here.*

Id. at 117a (emphasis added). Indeed, the district court noted that there was "no * * * evidence that any of the water from Big Hill Acres ever really reache[d] a navigable body of water." *Ibid.*

Apparently recognizing the existence of a circuit conflict over which of the *Rapanos* opinions controls, the Fifth Circuit purported to apply both standards. See Pet. App. 11a-13a. However, as explained in the petition, the Fifth Circuit

misinterpreted those standards and in so doing significantly expanded the scope of federal jurisdiction.

For one thing, the court below ignored the plurality's requirement that "waters of the United States" comprise "*only* those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features,'" such as streams, oceans, rivers, or lakes. 547 U.S. at 739 (emphasis added). Instead, the Fifth Circuit accepted at face value the Government's theory that any sometimes-saturated land can constitute a "water of the United States." Pet. App. 23a n. 43.

Moreover, the Fifth Circuit found that the land at issue here met the plurality's requirement of a "continuous surface connection" with a "relatively permanent" body of water despite uncontested evidence that the land connects to permanent bodies of water *only* through "intermittent drains." Pet. App. 10a-11a (citing *Rapanos*, 547 U.S. at 742 (emphasis added)). As explained at length in the petition, the *only* evidence of a "continuous" surface connection between the property and any "relatively permanent" body of water concerned brief periods after a major rain or flood. Pet. 22-25; Pet. App. 116a-117a; Trial Tr. (attached as Exhibit G) at 2238, 3110, 3133-34. The Fifth Circuit thus apparently misinterpreted the "continuous surface connection" requirement to mean that a *temporary* or intermittent "surface connection," if it is physically "continuous" for even a brief time, is enough to satisfy the plurality's standard. Pet. App. 10a-12a.

Similarly, despite the trial court's determination that there was no evidence of "a significant nexus between the wetland and navigable body of water," the Fifth

Circuit held that Justice Kennedy's "significant nexus" test was satisfied. Pet. App. 12a (citing *Rapanos*, 547 U.S. at 742). According to the court, that standard was satisfied by "evidence that the [Big Hill Acres] wetlands control flooding in the area and prevent pollution in downstream navigable waters." *Ibid.* The court, however, cited no evidence of the magnitude of any effect on downstream waters, much less evidence that such effects were "significant," as required by the *Rapanos* concurrence. *Ibid.*; *Rapanos*, 547 U.S. at 780.

4. Petitioners filed a petition for a writ of certiorari on June 2, 2008. Since then, the Applicants have moved in both the district court and the Fifth Circuit for bail pending this Court's disposition of the petition. On July 2, 2008, the district court issued an order taking the motion "under advisement" until this Court decides whether or not to grant the petition—which the district court mistakenly estimated would take only a month. See Order, Criminal No. 1:04cr60-LG-JMR, July 2, 2008 (attached as Exhibit E). Then, despite clear authority to grant bail under 18 U.S.C. § 3143, the Fifth Circuit declared that it did not have jurisdiction to decide the issue because it had already issued its mandate. See Letter from Charles R. Fulbruge III, Clerk of the Fifth Circuit, July 9, 2008 (attached as Exhibit F).

ARGUMENT

The Bail Reform Act grants a Circuit Justice authority to release a defendant at any stage of federal criminal proceedings. See 18 U.S.C. §§ 3141, 3041, 3156(a). Moreover, the Act provides that defendants who have petitioned the Supreme Court

for a writ of certiorari to review a criminal conviction "shall" be released if the judicial officer finds:

> "(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released * * * and
>
> (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in —
>
> (i) reversal, [or]
>
> (ii) an order for a new trial * * * *"

18 U.S.C. § 3143 (b)(1).

We readily acknowledge the Court's admonitions that release on bail pending certiorari is granted only in extraordinary circumstances. See, e.g., *Julian* v. *United States*, 463 U.S. 1308, 1309 (1983) (Rehnquist, J., in chambers). But if ever there was a case warranting release pending certiorari, this is it. As we explain below in Section I, there is an unusually strong likelihood that the Court will grant certiorari, given the importance of the issues generally and the acknowledged circuit conflicts on some of them. Moreover, as we explain in Section II, there is an unusually strong likelihood that this Court will either reverse the judgment below or at least vacate it for a new trial under whichever legal standard the Court adopts. Finally, as we explain in Section III, there is unrebutted evidence establishing, clearly and convincingly, the other requirements imposed by the Bail Reform Act—matters that the Government has not disputed in any event.

I. Given the Acknowledged, Mature Circuit Splits and the Importance of the Issues Presented, This Court is Likely to Grant Certiorari.

In an application for bail pending certiorari, the applicant must demonstrate that the petition for certiorari "raises a substantial question of law or fact likely to result in (i) reversal, [or] (ii) an order for a new trial." 18 U.S.C. § 3143 (b)(1). This Court has interpreted this to mean that the defendant must show, as a threshold matter, "a reasonable probability that four Justices are likely to vote to grant certiorari." *Julian*, 463 U.S. at 1309. As explained in greater detail in the petition for certiorari, this case poses a question of enormous practical importance that has divided the lower courts along two separate fault lines. See Pet. 14-19. Because these circuit splits require this Court's attention and resolution, it is likely that this Court will grant certiorari.

1. First, lower courts have split over the specific question of which standard applies from this Court's decision in *Rapanos*—the four-justice plurality, Justice Kennedy's solo concurrence, or some combination. See *id.* at 4-6, 14-19.

As noted, in *Rapanos* a four-Justice plurality defined "waters of the United States" as "only those relatively *permanent*, standing or continuously flowing bodies of water 'forming geographic features,'" such as streams, oceans, rivers, or lakes. 547 U.S. at 739 (emphasis added). The Government, the plurality said, would have jurisdiction over wetlands only if they are at least "adjacent" to such waters, with a "*continuous* surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* at 742 (emphasis added). By contrast, the *Rapanos* concurrence opined that the Government has jurisdiction

over wetlands with a "significant nexus" to "traditional" navigable waters such that "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.'" *Id.* at 780 (emphasis added).

The courts of appeal have expressly split over which of these opinions is binding on the lower courts. See Pet. 14-16. Specifically, the Seventh, Ninth, and Eleventh Circuits have concluded that Justice Kennedy's concurrence controls. See *United States* v. *Gerke Excavating, Inc.*, 464 F.3d 723, 724-725 (7th Cir. 2006), *cert. denied*, 128 S. Ct. 45 (2007); *Northern California River Watch* v. *City of Healdsburg*, 496 F.3d 993, 999 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 1225 (2008); *United States* v. *Robison*, 505 F.3d 1208, 1219 (11th Cir. 2007). But the First Circuit, expressly disagreeing with other circuits, has held that federal jurisdiction exists when *either* the plurality *or* the concurrence is satisfied. *United States* v. *Johnson*, 467 F.3d 56, 61 (1st Cir. 2006). The Government, moreover, has recently acknowledged the existence of a "square" conflict on this issue. See Ex. A at 13 n.4 ("The [Eleventh Circuit's] resolution of that issue squarely conflicts with the decision of the First Circuit.").

2. The lower courts have parted ways not only on which *Rapanos* opinion controls, but over the proper *methodology* for determining how to apply any fractured decision of this Court. Pet. 14-16. In *Marks* v. *United States*, this Court explained that "[w]hen a fragmented Court decides a case and no single rationale

explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. at 193 (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n. 15 (1976)). Lower courts, however, have struggled to determine what are the "narrowest grounds" in such split opinions. Pet. 14-16. Indeed, they have split not only over *how* to apply this Court's guidance in *Marks* v. *United States*, but over *whether Marks* still applies at all. *Ibid.*; Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners at 11-14 (hereinafter "PLF Brief") at 11-14.

In *Gerke*, the Seventh Circuit ignored *Marks* altogether in deciding that Justice Kennedy's "significant nexus" standard should be applied. According to that court, because Justice Kennedy's concurrence was less restrictive of the *Government's* jurisdiction under the CWA, it constituted the "narrowest ground." 464 F.3d at 724-25. The court also noted that whenever Justice Kennedy would find jurisdiction on the basis of a "significant nexus," the four dissenters would find jurisdiction as well. *Id.* at 724. In other words, the Seventh Circuit cobbled together a theoretical majority of this Court by combining Justice Kennedy's opinion with that of the *Rapanos* dissenters, thereby bypassing the plurality opinion entirely and ignoring this Court's guidance in *Marks* that lower courts should find the narrowest grounds among "those Members who concurred in the judgments." *Marks*, 430 U.S. at 193. The Ninth Circuit reached the same conclusion in *Northern California River Watch*, holding without analysis that

Justice Kennedy's concurrence "is the narrowest ground to which a majority of the Justices would assent if forced to choose." 496 F.3d at 999.

The First Circuit, by contrast, criticized the Seventh Circuit for "equat[ing] the 'narrowest opinion' with the one least restrictive of federal authority to regulate." *Johnson,* 467 F.3d at 61. Nevertheless, by adopting an either/or test under which courts could find jurisdiction under either the plurality or the concurrence in *Rapanos*, the First Circuit essentially aligned itself with the *Rapanos* dissent*,* which would also find jurisdiction under either test. *Rapanos,* 547 U.S. at 810. In so doing, the First Circuit admitted it was deviating from this Court's guidance in *Marks*. *Johnson,* 467 F.3d at 61. Nevertheless, it asserted that "the Supreme Court itself has moved away from the *Marks* formula." *Id*. at 65 (citing *Nichols* v. *United States,* 511 U.S. 738, 745-46 (2003)).

Finally, the Eleventh Circuit's opinion in *Robison*—which held that the *Rapanos* concurrence alone controls—specifically criticized the First Circuit for departing from *Marks*: "It would be inconsistent with *Marks* to allow the dissenting *Rapanos* Justices to carry the day and impose an 'either/or' test." 505 F.3d at 1221. The court further explained that under *Marks*, the opinion of the dissenting Justices "is of no moment." *Ibid*.

Accordingly, the conflict on this overriding issue, like the more specific conflict over which of the *Rapanos* opinions controls, could not be more stark. Both conflicts demand the Court's attention.

3. There is also no doubt about the practical importance of the issues presented. This Court's prior efforts to construe the scope of federal jurisdiction over wetlands—in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); and *Rapanos*—are themselves a testament to the immense practical importance of that issue. And the *Rapanos* plurality opinion described at some length the enormous costs imposed on the Nation's economy and its citizens by the federal Government's attempts to regulate development on inland wetlands. See 547 U.S. at 721-22.

As the petition explains (at 16-18), these costs have only mushroomed since *Rapanos*. Among other things, the Corps of Engineers estimates that the additional uncertainty engendered by *Rapanos* has added 60 to 90 days per permit application. Pet. 18.

Amicus briefs filed in support of the petition—by the U.S. Chamber of Commerce, the National Association of Homebuilders, and the Pacific Legal Foundation—further attest to the practical importance of the issues presented. Indeed, the Chamber and the NAHB noted that "many of [their] members have had development plans ruined by the Corps' assertion of CWA jurisdiction over their property" while "[o]ther members have been denied the potential economic benefits that result from development." Brief of Amici Curiae Chamber of Commerce and NAHB at 2.

4. Finally, as the petition explains, this case is a very good vehicle with which to resolve the issues over which the circuits are in conflict, as well as to establish a proper understanding of whichever standard the Court chooses. See Pet. 18-19.

First, unlike prior cases in which this Court has denied petitions addressing the scope of federal jurisdiction under the Clean Water Act, this case involves a final judgment.[1] Indeed, it is pursuant to that final judgment that the three applicants currently sit in federal penitentiaries in various locations in the South, serving prison terms ranging from seven to nine years—simply for undertaking normal property development activities.

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[1] *E.g., United States* v. *Gerke Excavating, Inc.,* 464 F.3d 723 (7th Cir. 2006), *cert. denied*, 128 S. Ct. 45 (2007); *United States* v. *Johnson*, 467 F.3d 56 (1st Cir. 2006), *cert. denied*, 128 S. Ct. 375 (2007); *United States* v. *Morrison,* 178 Fed. Appx. 481 (6th Cir. 2006), *cert. denied*, 127 S. Ct. 270 (2007). Of the cases that involved final judgments, one was decided before the circuit conflict developed. See *Baccarat Fremont Developers, LLC* v. *U.S. Army Corps of Eng'rs*, 425 F.3d 1150 (9th Cir. 2005), *cert. denied*, 127 S. Ct. 1258 (2007). In two of the remaining cases, the petition did not squarely present the issue on which the circuits are divided. See *United States* v. *Heinrich*, 184 Fed. Appx. 542 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 2974 (2007); *United States* v. *Moses*, 496 F.3d 984 (9th Cir. 2007), *cert. denied*, 544 U.S. ___, 2008 WL 743960 (June 23, 2008). And in *Northern Cal. River Watch* v. *City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 1225 (2008), the petitioners focused primarily on the issue of regulating discharges into groundwater. Only at the tail end of a lengthy list of six Questions Presented did the petitioners present the jurisdictional issue involving the interplay between *Rapanos* and *Marks*.

The first decision to expressly acknowledge a circuit conflict was *United States* v. *Robison*, 505 F.3d 1208 (11th Cir. 2007), *petition for rehearing denied* March 27, 2008, but to our knowledge the Government did not seek certiorari in that case. See Ex. A at 13 n.4. Thus, this case apparently offers the Court its first real opportunity to address and resolve the circuit conflict since it was acknowledged by the lower courts.

Second, because the petition (in Question 2) challenges the Fifth Circuit's application of *both* the plurality and the concurring opinions in *Rapanos*, the fact that the Fifth Circuit did not attempt to choose between them is of no moment: In resolving the case on the merits, this Court would surely begin by deciding the preliminary question of which legal standard controls and then apply that standard in determining whether the judgment below should be reversed, affirmed, or vacated for a new trial.

For all these reasons, this case is an excellent vehicle with which to resolve the acknowledged circuit conflict on this critical issue. Accordingly, we think the Court is highly likely to grant the petition.

II. Because the Fifth Circuit Misinterpreted This Court's Opinions in *Rapanos*, This Court's Decision Will Likely Result in Reversal or a New Trial.

Under the Bail Reform Act, the defendants must also show that the petition is "likely" to result in reversal or a new trial on all counts. See *Morison* v. *United States*, 486 U.S. 1306, 1306-07 (1988) (Rehnquist, C.J., in chambers). That is the likely result here, for several reasons.

1. First, as shown in the petition, the Fifth Circuit's decision in this case misapplied *both* the plurality and concurring opinions in *Rapanos*. Pet. 20-25.

Most obviously, as explained previously, the Fifth Circuit accepted the Government's theory that *any* sometimes-saturated land can constitute a "water of the United States" (Pet. App. 23a n. 43), thereby implicitly rejecting the position of the *Rapanos* plurality that "waters of the United States" include "only … relatively

permanent, standing or continuously flowing bodies of water ...." 547 U.S. at 739 (emphasis added). Here, *all* of the alleged Clean Water Act violations assumed that discharges onto the land at Big Hill Acres—none of which is located within a "relatively permanent" body of water—could constitute discharges into the "waters of the United States." See Ex. C at 32-36, Ex. D at 11-10. And because (as discussed previously), all of the conspiracy and mail fraud counts were premised on the Clean Water Act counts, adoption of the *Rapanos* plurality would require a reversal on all counts.

Moreover, the Fifth Circuit failed to adhere to the requirement of the plurality that, for federal jurisdiction to exist, a wetland must have a "continuous surface connection" with a "relatively permanent" body of water. *Rapanos*, 547 U.S. at 742. Here, the unrebutted evidence at trial showed that the saturated soils at Big Hill Acres were connected to permanent bodies of water *only* through "intermittent drains" rather than a temporally continuous surface connection. See Ex. G at 2238, 3110, 3133-34. As previously explained, the only evidence of a "continuous" surface connection between the property and any "relatively permanent" body of water concerned brief periods just after a major rain or flood. See Pet. 22-25. But the Fifth Circuit apparently interpreted the "continuous surface connection" requirement to refer only to a *physically* continuous connection, however fleeting, and therefore held that the evidence was sufficient to satisfy the plurality's standard. Pet. App. 10a-12a.

That, we believe, is a misinterpretation of the plurality opinion. In ordinary parlance, "continuous" is defined to mean, not just *physical* continuity, but the quality of being "uninterrupted in *time*." See, e.g., American Heritage Dictionary of the English Language (4th Ed. 2006); Random House Webster's Unabridged Dictionary (2d. Ed. 2001); Oxford English Dictionary (1971). Thus, a "continuous surface connection" necessarily requires a substantial degree of temporal as well as physical continuity. Accordingly, contrary to the Fifth Circuit's view, a "continuous surface connection" cannot be established solely on the basis of intermittent water flows, even if, during those fleeting periods, there is some physical surface connection between the land at issue and a genuinely navigable body of water. Such a fleeting physical continuity cannot be sufficient to establish federal jurisdiction (and criminal liability) because, otherwise, a property owner or developer would not have reasonable notice that a piece of land is indeed a jurisdictional wetland.

For these reasons, we believe the Court is likely to reverse the Fifth Circuit if it determines that the *Rapanos* plurality controls the analysis. See Pet. 20-26.

The Fifth Circuit's decision also misapplied the standard in the *Rapanos* concurrence, which requires that, for federal jurisdiction to attach, a wetland must "*significantly* affect" traditional navigable waters. *Rapanos*, 547 U.S. at 780 (emphasis added). As the district court observed at trial, the Government never attempted to show that the saturated soils at Big Hill Acres "significantly affect" any traditional navigable waters. Pet. App. 116a-117a. For example, the

Government introduced no evidence of flow rates of surface water to navigable water and no evidence even showing the proximity between Big Hill Acres wetlands and any traditionally navigable waters. *Ibid.*

Yet here again, the Fifth Circuit held that the evidence was sufficient under the *Rapanos* concurrence simply because of evidence that the wetlands at issue "control flooding in the area and prevent pollution in downstream navigable waters." Pet. App. 12a. The court, however, cited no evidence of the magnitude of any effect on downstream waters, much less evidence that such effects were "significant," as required by the *Rapanos* concurrence. *Ibid.*; *Rapanos*, 547 U.S. at 780. And any such conclusion would be implausible: As the district court pointed out, the Government had presented "no hard evidence of contamination of a navigable body of water," and "no hard evidence * * * that any of the water from Big Hill Acres ever really reaches a navigable body of water" at all. Pet. App. 117a.

If, as the Fifth Circuit has now held, conclusory statements that wetlands "control flooding" and "prevent pollution" are sufficient to establish a "significant nexus," then virtually all wetlands are subject to the CWA—for *all* wetlands arguably control flooding and prevent pollution to some extent. See Pet. App. 12a. Such a result, however, is contrary to Justice Kennedy's admonition that effects on water quality cannot be merely "speculative or insubstantial." 547 U.S. at 780. And for that reason, if the Court elects to adopt Justice Kennedy's standard, we believe a reversal or new trial is likely.

2. The rule of lenity substantially increases the likelihood that this Court will rule in petitioners' favor on the merits.

First, it increases the odds that a majority of the Court will adopt the *Rapanos* plurality—which is generally viewed as more favorable to property holders—as the controlling rule under a *Marks* analysis. Although this Court has not, to our knowledge, examined the interplay between *Marks* and the rule of lenity, it seems obvious that the latter rule would require that the "narrowest grounds" requirement of *Marks* be construed to mean the ground that least intrudes into individual liberty, rather than, as the Seventh Circuit indicated in *Gerke*, the ground that least constrains governmental authority. See *supra* 13-14; *accord* PLF Brief at 11-14. After all, as a recent plurality opinion has noted, the rule of lenity is necessarily "defendant-friendly," not government-friendly. *United States* v. *Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion of Scalia, J.). Thus, if the *Marks* "narrowest ground" requirement is to be applied consistently with the rule of lenity in criminal cases, the "narrowest ground" must be that which least restricts individual liberty.

Second, regardless of which legal standard the Court chooses, the rule of lenity makes it more likely that the Court will interpret that standard in a way that is more favorable to defendants than the Fifth Circuit did. As the Court is well aware, the rule of lenity "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them" and, in so doing, "vindicates the fundamental principle that no citizen should be held accountable for a violation of a

statute whose commands are uncertain." *Santos*, 128 S. Ct. at 2025. As explained above, however, at nearly every turn, the Fifth Circuit interpreted the Clean Water Act—and this Court's various opinions construing it—in a decidedly government-friendly way.

In fact, the Fifth Circuit has now adopted—and the defendants are incarcerated on the basis of—an interpretation of the Clean Water Act that has been *rejected* by a majority of the current Justices. As noted, the Fifth Circuit's position that jurisdiction can be established under the CWA without a temporally "continuous surface connection" to a "relatively permanent of water" is contrary to the four-Justice plurality. At the same time, the Fifth Circuit's position that jurisdiction can be established without the wetland's having a "significant effect" on a traditional navigable water is contrary to the position of Justice Kennedy—and likely the plurality Justices as well.

Third, the rule of lenity makes it more likely that the Court will rule in petitioners' favor on the third question presented—whether an ordinary residential septic tank constitutes a "point source" within the meaning of Section 402 of the Act. As the petition explains, the Fifth Circuit's holding on this critical issue finds little support in the statutory language, and is contrary to the EPA's own consistent position. Pet. 26-33. Surely, if Section 402 is sufficiently ambiguous to allow the EPA to interpret it as *not* encompassing ordinary residential septic systems, then the rule of lenity requires that same interpretation in the context of a criminal trial.

For all these reasons, the Court is likely, not only to grant review, but also to rule in petitioners' favor if it does so.

3. There is also no doubt that a favorable resolution of the jurisdictional question will reach all of the counts on which petitioners were convicted, and will result, at a minimum, in a new trial. As the district court recognized during the trial, *all* the counts against the defendants stem from the alleged violations of the Clean Water Act at their property, Big Hill Acres, and all of them depend on a finding that their land is subject to federal jurisdiction. See Pet. App. 118a. As the indictment and other portions of the record make clear, the conspiracy and mail fraud counts all depended upon underlying substantive violations (or attempted violations) of Section 402 or 404 of the Act. See Ex. C at 6-32. Specifically, the alleged mail fraud violations consisted in convincing buyers to purchase lots located on lands defined as wetlands under the Act, and the conspiracy count alleged a conspiracy to solicit purchases of lands defined as wetlands under the Act. *Ibid.*

Accordingly, if this Court rules that the Government lacked jurisdiction under the CWA, all of these charges must of necessity be dismissed. Moreover, if the Court merely clarifies the standard for federal jurisdiction under the CWA, without applying that standard to the facts in this case, petitioners will be entitled, at a minimum, to a new trial on the remaining CWA counts under the new standard. See, e.g., *United States* v. *Edwards*, 303 F.3d 606, 640 (5th Cir. 2002); *United States* v. *Tellier*, 83 F.3d 578, 581-82 (2d Cir. 1996).

The district court, moreover, already decided that a decision in petitioners' favor would likely result in a reversal or new trial when it permitted petitioners to remain free pending appeal to the Fifth Circuit. At that time, the district court not only held that the Government's jurisdiction under the CWA raised a substantial question of law, it also held that, if jurisdiction were overturned on appeal, the convictions under the CWA would necessarily also be overturned. Ex. H at 177-78. Similarly, the court went on to hold that a reversal of the CWA counts would likely also reverse the mail-fraud counts: "[I]t goes without saying that if there's a substantial question of law insofar as the Clean Water Act cases are concerned, that it could tend to affect the convictions under the [mail] fraud [counts]." *Id*. at 178. Similarly, the Fifth Circuit agreed that in this case, the "overarching question is jurisdiction." Pet. App. 4a. For all these reasons, a decision in petitioners' favor would easily satisfy the Bail Reform Act's "likelihood of reversal or new trial" requirement.

The Government has not seriously disputed this conclusion. To be sure, in the district court the Government argued that the jurisdictional question would not affect the mail fraud and conspiracy charges. See Government's Opposition to Motion for Release (attached as Exhibit I) at 2-3. That argument, however, ignores the district court's finding that all the charges hinged on the jurisdictional question, and the Fifth Circuit's holding that the "overarching question is jurisdiction." Pet. App. 4a.

Finally, even if the Court ultimately ruled against petitioners on the jurisdictional issue, a favorable decision on the third question presented—whether an ordinary residential septic system is a "point source" subject to the permitting requirements under Section 402 of the Act—would also result in at least a new trial. As noted, the bulk of the Government's case at trial focused on the septic tank failures on some of the residential lots on the alleged wetlands. That evidence was so emotion-laden, and accordingly so prejudicial to the petitioners, that reversal of their convictions of those counts would almost certainly require a retrial on the remaining counts.

In short, the issue of the Government's jurisdiction under the Clean Water Act is a substantial question that is likely to be resolved in petitioners' favor, resulting in a reversal or at least a new trial.

III. As the Government Has Conceded and the District Court Has Found, The Other Requirements of the Bail Reform Act Have Been Satisfied.

The Bail Reform Act's remaining requirement—that defendants are not likely to flee or pose a danger to the community—is also satisfied as to each of these defendants. 18 U.S.C. § 3143(b)(1). Indeed, the Government failed to dispute this issue in any way in the proceedings below, so any additional arguments on this point are waived. See Ex. I.

Mrs. Robbie Wrigley. As the district court previously held in granting release to Robbie Wrigley pending her appeal, she poses no risk of flight or danger to the community upon release. Ex. H at 177-78. She remained free on bond, and without incident, from the date of her arraignment on June 24, 2004, until she

began serving her sentence in early 2008. Ex. B at ¶ 3. While released she was an exemplary citizen. *Id*. During the pendency of her appeal, Robbie and her husband Randy had a child, Lucas Wrigley, who is now just over 1 year old. Both Mrs. Wrigley and her child suffer greatly as a result of Mrs. Wrigley's mother's incarceration. *Id*.

During the pendency of this case, moreover, Mrs. Wrigley has appeared at every court proceeding requiring her attendance, reported to her probation officer timely and in accordance with the conditions of her release, and reported to begin serving her sentence when directed to do so. *Id*. at ¶ 4. Her conduct over the nearly four-year period from the date of her arraignment, through trial, sentencing, and appeal to the Fifth Circuit, demonstrates that she does not pose a flight risk or any risk to the community.

Mr. Robert Lucas, Mrs. Wrigley's father, is similarly unlikely to flee or to pose a danger to the community if he is released. *Id*. at ¶ 6. He is 68 years old, has no previous criminal record or prior arrests, and has never been accused of violence, much less been convicted of a violent crime. *Id*. He suffers from multiple ailments—including high blood pressure, cardiovascular disease, and stress syndrome—most of which have been exacerbated by his incarceration. *Id*. He also has strong ties to his family and his community: He has been married to his wife Murphy for 42 years. *Id*. His daughter Kelly lives in Mississippi and is helping to raise Robert and Murphy's young grandson, Lucas, whose mother Robbie Wrigley was swept up in the prosecution of this case. *Id*.

The lack of any flight risk is further demonstrated by his behavior in this case. Mr. Lucas was free on bond from the date of his arraignment on June 24, 2004, until he began serving his sentence in early 2008. *Id.* at ¶ 7. He also appeared at every court proceeding requiring his attendance, reported to his probation officer in a timely manner and in accordance with the conditions of release, and reported to begin serving his sentence when directed to do so.[2] *Id.*

Mr. M.E. Thompson. As the district court previously held in granting bail and release pending appeal, Defendant M. E. Thompson, Jr., likewise poses no such risk. Ex. H at 177. He is presently 77 years of age and in ill health. Ex. B at ¶ 1. He suffers from diabetes and, immediately following his trial in this cause, underwent quadruple by-pass heart surgery for which he received medical care and treatment by local physicians, including the Veteran's Administration. *Id.* Mr. Thompson's health prevents him from any strenuous activity and confines him to the area of his treatment. *Id.*

Mr. Thompson also has extensive familial and social ties to the Mississippi Gulf Coast, where he has resided for approximately 45 years. *Id.* at ¶ 2. He is a graduate of Mississippi State University with a degree in civil engineering. *Id.* Prior to his conviction in this case, Mr. Thompson held a professional engineer's

[2] We recognize that on January 22, 2008, the district court determined that Mr. Lucas at that time posed a danger to the community based upon water-related activities at another property, and for that reason revoked his bail. But in briefing this issue to the district court, the Government did not deny that Mr. Lucas *presently* poses no such risk.. Nor could that conclusion reasonably be denied: First, despite the Government's expressions of concern at the time, those allegations never resulted in any criminal, civil or administrative charges. Second, as a result of the district court's action, Mr. Lucas now clearly understands the importance of checking with the Government and the relevant regulatory authorities before taking any action affecting water flow on his property.

license, a real estate broker's license, a real estate appraiser's license, and was a registered land surveyor. *Id.* He has no past criminal record, misdemeanor or felony, other than minor traffic offenses. *Id.* Further, he is an honorably discharged veteran of the United States Air Force and a retired United States civil servant. *Id.* He also appeared at all required court settings and faithfully complied with all requirements pending his trial and appeal. *Id.*

Accordingly, as the district court previously recognized, none of the petitioners is likely to flee, and none poses any danger to the community. Ex. H at 177.

CONCLUSION

As we have shown, petitioners easily satisfy all the requirements for release pending certiorari imposed by the Bail Reform Act: Their petition raises issues that are both "substantial" and "likely to result in a reversal or new trial." And the undisputed evidence—and prior findings by the district court—clearly establish that they pose no flight risk or danger to the community. The application for bail should be granted.

Respectfully submitted.

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JULY 2008

EXHIBIT A

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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In the Supreme Court of the United States

No. 07-1195

C. LYNN MOSES, PETITIONER

v.

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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

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

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[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

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[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.

PAUL D. CLEMENT
Solicitor General
RONALD J. TENPAS
Assistant Attorney General
ELLEN DURKEE
KATHERINE W. HAZARD
Attorneys

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.

EXHIBIT B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA	)
	)
v.	)
	)
ROBERT J. LUCAS, JR.	)
ROBBIE LUCAS WRIGLEY	)
M.E. THOMPSON, JR.	)
BIG HILL ACRES, INC.	)
CONSOLIDATED INVESTMENTS, INC.	)
	)
Defendants.	)

DECLARATION OR PHILLIP A. WITTMANN
IN SUPPORT OF APPLICATION FOR BAIL PENDING SUPREME COURT REVIEW

All three of the individual defendants in this case are personally known to me, and I declare the following facts to be true of my own personal knowledge:

1. Defendant M.E. Thompson presents no risk of flight and no danger to the community if he were released from prison pending resolution of his petition for certiorari to the Supreme Court of the United States. Mr. Thompson is presently 77 years of age and in ill health. He suffers from diabetes and, immediately following his trial in this cause, underwent quadruple by-pass heart surgery for which he received medical care and treatment by local physicians, including the Veteran's Administration. Mr. Thompson's health prevents him from any strenuous activity and confines him to the area of his treatment.

2. Mr. Thompson also has extensive familial and social ties to the Mississippi Gulf Coast, where he has resided for approximately 45 years. He is a graduate of Mississippi State University with a degree in civil engineering. Prior to his conviction in this case, Mr. Thompson

held a professional engineer's license, a real estate broker's license, a real estate appraiser's license, and was a registered land surveyor. He has no past criminal record, misdemeanor or felony, other than minor traffic offenses. Further, he is an honorably discharged veteran of the United States Air Force and a retired United States civil servant. He also appeared at all required court settings and faithfully complied with all requirements pending his trial and appeal.

3. Defendant Robbie Wrigley likewise poses no risk of flight or danger to the community if she were released from prison pending disposition of her petition for certiorari to the Supreme Court of the United States. She remained free on bond, and without incident, from the date of her arraignment on June 24, 2004, until she began serving her sentence in early 2008. While released she was an exemplary citizen. She married Randy Wrigley and during the pendency of her appeal gave birth to a child, Lucas Wrigley, who is now just over 1 year old.

4. During the pendency of this case, Mrs. Wrigley has appeared at every court proceeding requiring her attendance, reported to her probation officer timely and in accordance with the conditions of her release, and reported to begin serving her sentence when directed to do so. Her conduct over the nearly four-year period from the date of her arraignment, through trial, sentencing, and appeal to the Fifth Circuit, demonstrates that she does not pose a flight risk or any risk to the community.

5. In addition, Ms. Wrigley demonstrated her commitment to her family and community by staying behind rather than evacuating as Hurricane Katrina headed for the Mississippi Gulf Coast. Despite losing her own home, she helped many less fortunate than she whose homes and lives were also destroyed by the Katrina, while she and her husband rebuilt their home.

6. Robert Lucas is similarly unlikely to flee or to pose a danger to the community if he is released pending review in the Supreme Court. He is 68 years old, has no previous criminal record or prior arrests, and has never been accused of violence, much less been convicted of a violent crime. He suffers from multiple ailments—including high blood pressure, cardiovascular disease, and stress syndrome—most of which have been exacerbated by his incarceration. He also has strong ties to his family and his community: He has been married to his wife Murphy for 42 years. His daughter Kelly lives in Mississippi and is helping to raise Robert and Murphy's young grandson, Lucas, whose mother Robbie Wrigley was swept up in the prosecution of this case.

7. The lack of any flight risk is further demonstrated by his behavior in this case. Mr. Lucas was free on bond from the date of his arraignment on June 24, 2004, until he began serving his sentence in early 2008. He also appeared at every court proceeding requiring his attendance, reported to his probation officer in a timely manner and in accordance with the conditions of release, and reported to begin serving his sentence when directed to do so.

8. Mr. Lucas also stayed at his residence during Hurricane Katrina so that he would be available immediately after the storm to respond to the needs of his family, his community, and the residents of Big Hill Acres. Both of his daughters, Robbie Lucas Wrigley and Kelly Lucas, lost their homes during the storm. In Katrina's aftermath, Robert Lucas devoted his time and efforts to helping his family and his community to recover and rebuild.

9. Although the district court determined on January 22, 2008, that Mr. Lucas at that time posed a danger to the community based upon activities at another property, and for that reason revoked his bail, those activities never resulted in any criminal, civil or administrative charges. Moreover, as a result of the district court's action, Mr. Lucas now clearly understands

the importance of checking with the Government and the relevant regulatory authorities before taking any action affecting water flow on his property.

I declare under the penalty of perjury under the laws of the United States of America that the forgoing is true and correct.

Phillip A. Wittmann

PHILLIP A. WITTMANN

Executed on: July 8, 2008

EXHIBIT C

61545 pc

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF AMERICA

v. CRIMINAL NO. 1:04cr60GuRo

ROBERT J. LUCAS, JR.	18 U.S.C. § 2
ROBBIE LUCAS WRIGLEY	18 U.S.C. § 371
M. E. THOMPSON, JR.	18 U.S.C. § 1341
BIG HILL ACRES, INC.	33 U.S.C. § 1319(c)(2)(A)
CONSOLIDATED INVESTMENTS, INC.	

SUPERCEDING INDICTMENT

The Grand Jury charges:

At all times relevant to this Indictment in the Southern District of Mississippi:

INTRODUCTION

A. Parties

1. Defendant ROBERT J. LUCAS, JR., of Lucedale, Mississippi, is a real estate developer operating in southern Mississippi and elsewhere. He is the chief executive of BIG HILL ACRES, INC., and of CONSOLIDATED INVESTMENTS, INC., the companies under which the land in Vancleave, Mississippi, known as Big Hill Acres was acquired and subdivided.

2. Defendant ROBBIE LUCAS WRIGLEY of Ocean Springs, Mississippi, is a realtor operating in southern Mississippi. Defendant ROBBIE LUCAS WRIGLEY is the daughter of Defendant ROBERT J. LUCAS, JR. She advertised, marketed, leased, and sold to the

public lots for residential use at the Big Hill Acres development.

3. Defendant M. E. THOMPSON, JR., of D'Iberville, Mississippi, is a licensed professional engineer who certified to the Jackson County Planning Department that his designs for hundreds of Big Hill Acres septic systems and their installations were in compliance with relevant Mississippi Health Department regulations.

4. Defendant BIG HILL ACRES, INC., is a corporation established under the laws of Mississippi and first registered with the Mississippi Secretary of State in 1980. "R. J. Lucas, Jr." of Lucedale, Mississippi, is listed as its President and Secretary. BIG HILL ACRES, INC., is the owner of property in Vancleave, Mississippi, that is known as the Big Hill Acres subdivision. It is the corporation to which some payments were made by renters, lessees, and purchasers of lots in Big Hill Acres.

5. Defendant CONSOLIDATED INVESTMENTS, INC., is a corporation established under the laws of Mississippi and first registered with the Mississippi Secretary of State in 1989. "R. J. Lucas, Jr." of Lucedale, Mississippi, is listed as its President. At various times it owned property in Vancleave, Mississippi, that was part of the Big Hill Acres subdivision.

B. Property Description

6. The Big Hill Acres development owned by Defendants BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., and operated by Defendants ROBERT J. LUCAS, JR., and ROBBIE LUCAS WRIGLEY, is a residential subdivision of approximately 2,620 acres, about half of which is wetland constituting a water of the United States subject to regulation by the federal government under the authority of the Clean Water Act. The

site is located in Vancleave, in Jackson County, Mississippi, approximately 8.7 miles north of the Gulf of Mexico. The property is part of a continuous system of wetlands, tributaries, bayous, and rivers that begins north of the Big Hill Acres site and extends through it south to the Gulf of Mexico. Surface water from the Big Hill Acres site drains in three directions. Western portions of the site drain into Bayou Costapia. Bayou Costapia empties into the Tchoutacabouffa River which empties into the Gulf of Mexico. Central portions of the Big Hill Acres development drain through tributaries into Old Fort Bayou Creek. Old Fort Bayou Creek connects to Old Fort Bayou which is a protected coastal preserve emptying into the Gulf of Mexico. Eastern portions of the Big Hill Acres site drain into the headwaters of Little Bluff Creek. Little Bluff Creek connects to Bluff Creek which flows into the Pascagoula River and into the Gulf of Mexico.

C. Law Prohibiting Fraud

7. Title 18, United States Code, Section 1341 forbids the use of the United States Mail in furtherance of any scheme to defraud individuals of money or property by means of materially false or fraudulent pretenses, representations, or promises.

D. Law Regulating Wetlands

8. The Clean Water Act, Title 33, United States Code, Section 1251 et seq., regulates the discharge of pollutants into waters of the United States. A wetland as defined in Title 33, United States Code, Section 1362 (7) and Title 33, Code of Federal Regulations, Sections 328.3(a)(1), (5) and (7), is a water of the United States. A wetland is an area that is inundated or saturated by surface or groundwater at a frequency and duration

sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

9. Dredged spoil, solid waste, sewage, garbage, rock, sand, and other materials are pollutants under Title 33, United States Code, Section 1362(6) when discharged to waters of the United States.

10. It is a violation of Title 33, United States Code, Section 1319(c)(2)(A) knowingly to discharge dredged or fill material from a point source into wetlands, without a permit from the United States Army Corps of Engineers under the authority of Section 404 of the Clean Water Act. A point source is any discernible, confined, or discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, or container from which pollutants are or may be discharged. 33 U.S.C. § 1362 (14).

11. No owner, lessor, lessee, or tenant of land at Big Hill Acres ever applied for or received any permit from the United States Army Corps of Engineers allowing fill or any pollutant to be placed into any wetland in the Big Hill Acres development.

E. Law Regulating the Disposal of Waste into Waters of the United States

12. It is a violation of Title 33, United States Code, Section 1319(c)(2)(A) knowingly to cause the discharge of any pollutant from a pipe, hose, channel, or other point source into waters of the United States without a permit issued under Section 402 of the Clean Water Act.

13. No owner, lessor, lessee, or tenant of land at Big Hill Acres ever applied for or

received any permit from the State of Mississippi or from the federal government allowing any sewage, wastewater, or any other pollutant from any septic system to be discharged into any wetland in the Big Hill Acres development.

F. Law Regulating the Installation of Below-Ground Septic Systems

14. Mississippi Code Annotated Section 41-67-6(4) states that a person may not design, construct, or install, or cause to be installed a below-ground wastewater disposal system that does not comply with the rules and regulations of the Mississippi Department of Health, Regulation 300 - Section 02A-01, et seq. Those regulations establish standards to which every subsurface disposal system installed in the state of Mississippi must conform in order to assure that sewage and residential waste are properly filtered and treated so that they will not contaminate drinking water and pose a threat to human health or the environment. Those regulations prohibit placement without a permit of an effluent disposal field wholly within an area which is frequently flooded, swamp, marsh, or wetland. MSDH 300 - Section 02A-24. They further require that there be a minimum of twelve inches of unsaturated soil between the bottom of the below-ground system and a seasonal water table in soils that contain a restrictive layer; and a minimum of twenty-four inches of unsaturated soil between the bottom of the below-ground system and a seasonal water table in soils that do not contain a restrictive layer. MSDH 300 -Section 02A-24.

15. In Jackson County, electrical power will not be connected to a residential lot unless a septic system has been designed and approved by the Mississippi Department of Health or by a professional engineer licensed by the State of Mississippi.

COUNT 1
(Conspiracy, 18 U.S.C. § 371)

A. Notice that Big Hill Acres Land Was Not Habitable

16. Beginning in or around 1994, Defendant ROBERT J. LUCAS, JR., on his own as well as in partnership with another, began to acquire land in Jackson County, Mississippi, under the corporate names BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC. After 1994, these properties were subdivided into lots varying in size between approximately two and five acres and marketed to the public as home sites in a development known as Big Hill Acres.

17. The Big Hill Acres property was marketed as mobile home lots to fixed and low income families under high interest installment contracts through which the purchaser did not receive title to the property until the last of the monthly payments was made, often fifteen to twenty years after the contract was signed.

18. In February 1995, Defendant ROBERT J. LUCAS, JR., received a report from a professional engineer hired to complete an analysis required under state law to determine the feasability of various methods of wastewater disposal for subdivisions of residential lots. The analysis included 72 parcels in the Big Hill Acres development. The engineer's report and the maps accompanying it noted the presence of wetlands and flood zones on substantial portions of the property that became the Big Hill Acres subdivision.

19. On or about August 7, 1996 inspectors from the United States Army Corps of Engineers warned Defendant ROBERT J. LUCAS, JR., that substantial portions of the Big Hill Acres property contained wetlands and, therefore, could not be subdivided and

developed without the approval of and a permit from the Army Corps of Engineers. In spite of this warning, development of lots containing wetlands continued.

20. In a December 19, 1996 letter, the Mississippi Department of Health notified Defendant ROBERT J. LUCAS, JR., that it was rescinding approvals for the placement of more than one hundred septic systems on Big Hill Acres lots made by one of its former employees. The letter stated that it was rescinding the approvals because of its concern that the sites had been incorrectly evaluated and, therefore, that the septic systems on them would not function properly. The letter indicated that the Department of Health, at its own expense, would reevaluate lots for which recommendations were rescinded. Defendant ROBERT J. LUCAS, JR., was asked to submit a plat, a development plan, for Big Hill Acres, to the Department of Health so that it could evaluate the scope of the subdivision and the feasibility of installing a central sewage collection system rather than individual on-site septic systems.

21. During the end of 1996 and the beginning of 1997, Defendants ROBERT J. LUCAS, JR., and ROBBIE LUCAS WRIGLEY received from the Mississippi Department of Health reevaluations of the lots for which recommendations had been rescinded. These reevaluations indicated that more than half of the lots contained saturated soils, thus rendering any below-ground septic system ineffective and making the installation of such a system a violation of state law.

22. In a February 11, 1997 letter the Mississippi Department of Health again asked Defendant ROBERT J. LUCAS, JR., to comply with state law requiring that a plan be filed

for developments containing more that thirty-five lots so that an evaluation could be made as to whether individual on-site septic systems or a central sewage collection system should be installed. That letter also reiterated that on-site wastewater disposal systems had to be designed, constructed, and installed in compliance with Mississippi Health Department regulations.

23. Having found violations of state law in some of the Big Hill Acres septic systems that Defendant M. E. THOMPSON, JR., designed, the Mississippi Department of Health notified Defendant M. E. THOMPSON, JR., in a February 21, 1997 letter, of the requirements that a professional engineer must meet in order to comply with Mississippi law regarding the installation of an on-site wastewater disposal system. These requirements include the performance of an accurate soil and site evaluation to determine whether the groundwater is deep enough and the soil sufficiently absorptive to provide the necessary filtration for a septic system. The letter stated that Mississippi law also requires an engineer to design and certify a septic system that will operate effectively for the specific lot approved and that the engineer supervise the construction and installation of the septic system he has designed. Less than a month later, Defendants ROBERT J. LUCAS, JR., and ROBBIE LUCAS WRIGLEY also received notice of the content of this letter.

24. In a February 24, 1997 letter from the Mississippi Department of Health, Defendant ROBERT J. LUCAS, JR., was again asked to submit a subdivision plan for the Big Hill Acres site describing the anticipated scope of the development.

25. In a March 14, 1997 letter from the Mississippi Department of Health,

Defendant

M. E. THOMPSON, JR., was warned: "It appears the systems you are designing and having installed do not meet current design standards. It appears that underground absorption systems are being installed in saturated soils. Mixing waste with groundwater is a potential health hazard due to the possibility of polluting the drinking water aquifers. . . . The concentration of water wells and septic tanks in the subdivisions (Lucas in Van Cleave [sic], Gulf Park Estates, and Ocean Beach) where you are designing these systems is alarming. The state of Florida is already fighting infiltration of septic tank effluent into their drinking water aquifers, studies indicate as high as 30 percent of their drinking water is now polluted. The areas where it appears that you are designing and installing septic field drains at unsuitable depths due to the saturated/water levels are the same sandy loam soil types as the polluted areas in Florida. We must not repeat their mistake, the costs are too great." Less than a month later, Defendants ROBERT J. LUCAS, JR., and ROBBIE LUCAS WRIGLEY also received notice of the content of this letter.

26. In a March 21, 1997 letter from the Mississippi Department of Health, Defendant

M. E. THOMPSON, JR., was warned: "As my previous letters have indicated you must notify the Health Department prior to installation of any more systems and submit the required documentation to the Jackson County Health Department environmental staff."

27. In a March 25, 1997 letter from the Mississippi Department of Health, Defendant

M. E. THOMPSON, JR., was warned of his continuing failure to submit to the Department of Health proper designs, descriptions, and supporting affidavits for the septic systems he was having installed in Jackson County.

28. In an April 2, 1997 letter from the Mississippi Department of Health, Defendant M. E. THOMPSON, JR., was notified of his failure to indicate the depth of the groundwater in five septic system designs he submitted for Big Hill Acre lots and was again warned of his continuing failure to submit to the Department of Health proper designs, descriptions, and supporting affidavits for the septic systems he was having installed.

29. On or about April 9, 1997 Defendant M. E. THOMPSON, JR., met with Mississippi Department of Health officials who explained to him the regulatory requirements for the installation of septic systems. He was offered the assistance of the department's staff to assure his compliance with the regulations.

30. On or about May 14, 1997 Defendant M. E. THOMPSON, JR., met with Mississippi Department of Health officials who discussed with him the proper method for evaluating soils to determine whether they are suitable for the placement of septic systems. They warned him that many of the systems he was designing and approving in the Big Hill Acres development were in violation of state regulations in that they were illegally being placed in wetlands and in saturated soil and, hence, were likely to fail.

31. In a May 27, 1997 letter from Mississippi Department of Health, Defendant M. E. THOMPSON, JR., was again informed that the manner in which he was testing soil to determine its suitability for septic systems was incorrect and likely to produce inaccurate

results.

32. In a June 9, 1997 letter from the Mississippi Department of Health, Defendant M. E. THOMPSON, JR., was warned, "none of the systems designed by you are installed in compliance with the Mississippi Department of Health's Regulations Governing Individual On-site Sewage Disposal Systems. All of the systems are installed at depths which allow sewage and seasonal ground water tables to mix (water saturated soils)."

33. In a July 25, 1997 letter from the Mississippi Department of Health, Defendant M. E. THOMPSON, JR., was warned, "it appears that you are continuing to advise the installation of individual on-site sewage disposal systems that are not in compliance with Mississippi Department of Health (MSDH) Regulations. . . . Tragically you continue to design and cause to be installed systems that are in saturated soils. . . . [Y]ou are continuing to knowingly breach the wastewater laws and the MSDH wastewater regulations. You must either fully comply with the statutes when designing systems, or cease and desist immediately."

34. On or about August 19, 1997 Defendant M. E. THOMPSON, JR., was served with a complaint in a lawsuit filed by the Mississippi Department of Health alleging that he was designing and constructing on-site wastewater disposal systems that fail to comply with state law. The complaint stated, "Examples of non-compliance include insufficient amount of separation between the bottom of the absorption field and the season[al] water table and the placement of the absorption field less than 100 feet from a well." In seeking an injunction to prevent Defendant M. E. THOMPSON, JR., from designing and improperly

approving the placement of septic systems, the complaint alleged, "The improper disposal of human waste constitutes a direct and immediate threat to the public health and the environment. . ." and "many of the individual on-site wastewater systems designed or constructed by the Defendant expose the public to improperly treated human waste, and/or pollute shallow ground water."

35. At a time shortly after the Mississippi Department of Health filed its lawsuit against Defendant M. E. THOMPSON, JR., Defendant ROBBIE LUCAS WRIGLEY went to the Department of Health's office in Gulfport and admonished a Department of Health employee that he and his office should stop interfering with Defendant M. E. THOMPSON, JR.'s efforts to design and approve septic systems.

36. In a September 18, 1997 letter from the Mississippi Department of Health, Defendant M. E. THOMPSON, JR., was notified that if he needed further assistance, in addition to the training in soil evaluation he had already received from the Department, he should notify the County Environmentalist who, for a small fee, would perform a soil evaluation for him to determine a lot's suitability for an on-site wastewater disposal system.

37. In an October 21, 1997 letter from the Mississippi Department of Health, Defendant M. E. THOMPSON, JR., was warned that all soil evaluations for on-site wastewater disposal systems must be performed in conformity with requirements of which he already had been provided notice. Again he was informed that a soil and site evaluation could be performed for him by an environmental health department official.

38. In a November 4, 1997 letter from the Mississippi Department of Health

Defendant M. E. THOMPSON, JR., was again notified of the requirements an engineer must meet under Mississippi law in designing and certifying on-site wastewater disposal systems. Specifically, Defendant M. E. THOMPSON, JR., was again told how soil evaluations should be done and under what criteria the seasonal water table is to be measured.

39. On or about January 7, 1998 an advertisement appeared in a gulf coast newspaper offering for sale by Lucas Real Estate property described as "2 Acres - High & Dry land, [with] well, septic & power pole."

40. On or about June 12, 1998 Defendant ROBERT J. LUCAS, JR., bought in his own name 129.51 acres of property. The deed for that land stated that the property was "Subject to all. . . governmental land-use regulations, including, but not limited, to wetlands."

41. In a June 15, 1998 deed through which he conveyed the 129.51 acres that he bought on June 12, 1998 to BIG HILL ACRES, INC., Defendant ROBERT J. LUCAS, JR., noted: "Any property which may constitute 'Coastal Wetlands' as defined in the Coastal Wetlands Protection Law is conveyed by quitclaim only."

42. On a number of occasions during 1998, individuals working at the direction of Defendant ROBERT J. LUCAS, JR., at the Big Hill Acres site to build roads, trench and drain lots, and install culverts and driveways, warned Defendant ROBERT J. LUCAS, JR., that the property contained wetlands and that he needed a permit legally to excavate and fill it.

43. During a May 7, 1999 meeting with representatives of the United States Army Corps of Engineers, Defendant ROBERT J. LUCAS, JR., was again notified that much of the land he was developing for residential use was wetland.

44. During a May 24, 1999 meeting with representatives of the United States Army Corps of Engineers, Defendant ROBERT J. LUCAS, JR., was given further notice that much of the land he was developing for residential use was wetland.

45. In a letter from the United States Army Corps of Engineers dated June 3, 1999, Defendant ROBERT J. LUCAS, JR., was warned that his placement of dredged or fill material into wetlands without a permit from the Department of the Army was a violation of the Clean Water Act. He was ordered to cease and desist from the construction of a residential subdivision adjacent to Jim Ramsey Road near Vancleave, Mississippi, because it contained wetlands. In that letter Defendant ROBERT J. LUCAS, JR., was warned, "If further work is performed in wetlands after receipt of this letter, this office must initiate immediate legal action to halt the unauthorized activity."

46. In a June 15, 1999 letter to the United States Army Corps of Engineers, Defendant ROBERT J. LUCAS, JR., responded to the June 3, 1999 cease and desist order stating that "no additional activities involving discharges of fill material into wetlands will be undertaken on the property in question prior to resolving all issues related to the cease and desist order. Moreover, as directed by [Army Corps inspectors] no additional lots containing impacted wetlands will be sold without authorization from your office."

47. During a June 29, 1999 meeting with representatives of the United States Army

Corps of Engineers and the Environmental Protection Agency, Defendant ROBERT J. LUCAS, JR., was again notified that much of the land he was developing for residential use was wetland.

48. In an administrative order from the United States Environmental Protection Agency dated August 4, 1999, Defendant ROBERT J. LUCAS, JR., was warned that his placement of fill material into wetlands without a permit was a violation of the Clean Water Act and that the Corps of Engineers and the EPA had determined that he had committed Clean Water Act violations "in his ongoing construction of a residential subdivision." He was ordered to cease and desist from any further unpermitted filling of wetlands and warned that, "Any person who violates such an order is subject to a civil or criminal penalty. . . ."

49. After the United States Army Corps of Engineers issued its June 3, 1999 cease and desist order and after the United States Environmental Protection Agency issued its August 4, 1999 cease and desist order, Defendant M. E. THOMPSON, JR., continued to design and certify the installation of below-ground septic systems in lots containing wetlands and Defendants ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., continued to develop, advertise, sell, and rent lots containing wetlands and to collect payments for them up to or about the time of this indictment.

B. The Conspiracy

50. Beginning in or about 1994 and continuing to the date of this Indictment, in Jackson County, in the Southern Division of the Southern District of Mississippi and

elsewhere, Defendants ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, M. E. THOMPSON, JR., BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., did knowingly and willfully conspire with each other and with others known and unknown to the Grand Jury to commit offenses against the United States, including the following:

a. Use of the United States Mail in furtherance of a scheme to defraud by inducing individuals to lease, rent, and purchase residential lots in the Big Hill Acres development in Vancleave, Mississippi, by making material representations they knew to be false that the lots were suitable for habitation when they were not, in violation of Title 18, United States Code, Section 1341.

b. While trenching, draining, and filling wetlands, knowingly causing pollutants, including dredged spoil, septic tanks, pipe, gravel, and other fill material, to be discharged from point sources, including excavation and earth-moving equipment, into waters of the United States, specifically, wetlands located in Vancleave, Mississippi, without a permit issued by the United States Army Corps of Engineers under the authority of Section 404 of the Clean Water Act, in violation of Title 33, United States Code, Section 1319(c)(2)(A).

c. By installing septic systems in water-saturated soils and wetlands, knowingly causing pollutants, including human waste, to be discharged from point sources, into waters of the United States, specifically, wetlands located in Vancleave, Mississippi, without a permit issued by the United States Environmental Protection Agency or the State of Mississippi under the authority of Section 402 of the Clean Water Act in violation of Title

33, United States Code, Section 1319(c)(2)(A).

C. Objective of the Conspiracy

51. It was the purpose of the conspirators and the objective of their conspiracy to benefit financially by leasing, renting, and selling Big Hill Acres property and by facilitating the lease, rental, and sale of Big Hill Acres property that could not have been marketed had the public known that it contained wetland and water-saturated soil.

D. Manner and Means of the Conspiracy

It was part of the conspiracy that:

52. Defendants ROBERT J. LUCAS, JR., BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., subdivided into home sites property that they knew to be wet, contain water-saturated soil, or seasonally flood.

53. Defendants ROBERT J. LUCAS, JR., BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., subdivided into lots, home site property that they knew to be wetlands.

54. Defendants ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., offered for sale as home sites property that they knew to be wet, contain water-saturated soil, or seasonally flood, or that they knew to be wetlands.

55. Defendants ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., instructed employees to dig, trench, drain, and fill wetlands at the Big Hill Acres development without a permit to do so.

56. Defendants ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., offered for sale property as home lots that they knew to contain saturated soils unsuitable for the installation of below-ground septic systems.

57. Knowing that the Mississippi Department of Health had rescinded approvals for on-site wastewater disposal systems at Big Hill Acres and was subjecting the development to close scrutiny, Defendants ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., did not seek any further soil evaluations from the Department of Health but instead, at greater expense, employed a professional engineer, Defendant M. E. THOMPSON, JR., to design and approve septic systems for Big Hill Acres lots they had reason to believe the state would not approve.

58. In spite of numerous warnings from the Mississippi Department of Health that he was improperly authorizing the placement of below-ground septic systems in saturated soils and in violation of state health regulations, Defendant M. E. THOMPSON, JR., continued to authorize the placement of below-ground septic systems in saturated soil at Big Hill Acres and Defendants ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., continued to market to the public as home sites the lots on which they had been installed.

59. In selling, leasing, and renting to the public lots containing wetland on which septic systems had been placed in violation of Mississippi Department of Health regulations,

Defendants ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, M. E. THOMPSON, JR., BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., caused the discharge of sewage into wetlands that are waters of the United States.

60. In building roads, trenching and filling land, and arranging for the installation of septic systems in wetlands, Defendants ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, M. E. THOMPSON, JR., BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., caused the discharge of pollutants into wetlands that are waters of the United States.

E. Overt Acts in Furtherance of the Conspiracy

61. In furtherance of the conspiracy and in order to effect the objects thereof, Defendants ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, M. E. THOMPSON, JR., BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., and others known and unknown to the Grand Jury committed the following overt acts in the Southern District of Mississippi and elsewhere.

(1) Construction of Roads and Home Sites in Wetlands

62. On or about the dates indicated below, Defendants ROBERT J. LUCAS, JR., BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., authorized and supervised the discharge of dredged and fill material, including dirt, timber, concrete, gravel, garbage, and other debris into wetlands in the construction of the roads at the Big Hill Acres site identified below and the home sites abutting them.

Overt Act No.	Date	Location

1	Winter 1997	Eastern Portion of Foxridge Road
2	Winter 1997	Overlook Road
3	Winter 1998	Roanoke Road
4	Summer 1999	Sugargate Road
5	Summer 1999	Barksdale Road

(2) Installation of Illegal Septic Systems in Lots That Were Sold or Leased

a. Below-Ground Septic Systems Placed in Wetlands

63. For each lot listed in the chart below, on or about the date listed below:

- Defendant M. E. THOMPSON, JR., submitted to the Jackson County Planning Department a design for a below-ground septic system in wetland where the presence of saturated soil made such a system incapable of treating sewage. (See Design Date.)
- Defendants ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., arranged for a contractor to install the septic system designed by M.E. THOMPSON, JR., thus causing the unpermitted filling of wetlands in violation of the Clean Water Act and the unpermitted discharge of sewage and other pollutants into wetlands that are waters of the United States. (See Installation Date.)
- Defendant M. E. THOMPSON, JR., submitted to the Jackson County Planning Department a letter certifying that the below-ground septic system he designed had been installed in compliance with Mississippi state law when in fact it was not. (See Certification Date.)

- A contract for the lease, sale, or rental of the lot was signed, as indicated, by Defendant ROBERT J. LUCAS, JR. (RL), ROBBIE LUCAS WRIGLEY (RW), or BIG HILL ACRES, INC. (BH), with a lessee or buyer of the lot. (See Contract Date and Sold By.)
- On the lots marked with an asterisk (*), a below-ground septic system was installed in spite of a specific Health Department warning that the placement of such a system on that lot would violate state law.

Lot No.	Act No.	Design Date	Act No.	Installation Date	Act No.	Certification Date	Act No.	Contract Date	Sold By
AA-17*	6	2/6/1997	7	3/28/1998	8	3/4/1998	9	3/26/1998	RW
M-1*	10	3/27/1997	11	4/3/1997	12	4/11/1997	13	3/25/1997	BH
M-1*							14	10/15/1999	RW
O-1*	15	4/22/1997	16	4/23/1997	17	4/23/1997	18	7/20/1996	RW
II-1	19	8/1/1997	20	8/1/1997	21	9/12/1997	22	8/30/1997	RW
II-3	23	8/2/1997	24	10/16/1997	25	10/20/1997	26	10/14/1997	RW
II-6	27	8/2/1997	28	10/17/1997	29	10/24/1997	30	1/3/1998	RW
JJ-6	31	8/2/1997	32	11/21/1997	33	12/1/1997	34	3/2/1998	RW
JJ-6							35	4/2/2000	RW
Lot No.	Act No.	Design Date	Act No.	Installation Date	Act No.	Certification Date	Act No.	Contract Date	Sold By

E-3*	36	8/5/1997	37	2/9/1998	38	2/11/1998	39	2/1/1998	RW
E-3*							40	11/14/2001	BH
II-4	41	8/7/1997	42	5/26/1998	43	5/26/1998	44	5/21/1998	RW
II-4							45	1/20/1999	RW
II-4							46	12/11/1999	RW
II-5	47	8/7/1997	48	11/15/1997	49	11/17/1997	50	11/14/1997	RW
E-6*	51	9/3/1997	52	9/4/1997	53	9/5/1997	54	9/2/1997	RW
V-6*	55	2/11/1998	56	2/11/1998	57	2/12/1998	58	12/16/1997	RW
II-8	59	4/15/1998	60	4/25/1998	61	4/24/1998	62	4/14/1998	RW
II-8							63	9/22/2001	RL
H-7*	64	5/8/1998	65	6/23/1998	66	6/22/1998	67	3/18/1997	RW
E-2*	68	5/22/1998	69	5/19/1998	70	5/22/1998	71	5/3/1997	RW
NN-5	72	5/22/1998	73	12/21/1998	74	12/17/1998	75	12/17/1998	RW
KK-5	76	5/28/1998	77	5/16/1998	78	6/9/1998	79	5/24/1998	RW
U-15	80	6/18/1998	81	8/5/1998	82	10/14/1998	83	6/13/1998	RW
AA-5*	84	6/22/1998	85	6/24/1998	86	7/3/1998	87	6/22/1998	RW
NN-9	88	7/3/1998	89	7/9/1998	90	7/30/1998	91	7/10/1998	RW
T-9	92	7/7/1998	93	7/31/1998	94	8/3/1998	95	7/30/1998	RW
T-9							96	12/13/2001	BH

T-18	97	7/14/1998	98	7/13/1998	99	7/30/1998	100	7/13/1998	RW
U-14	101	7/14/1998	102	7/10/1998	103	8/6/1998	104	7/9/1998	RW
T-8	105	7/21/1998	106	7/20/1998	107	2/25/1999	108	2/12/1999	RW
U-12	109	7/21/1998	110	10/13/1998	111	10/19/1998	112	10/12/1998	RW
U-13	113	7/21/1998	114	10/1/1998	115	10/28/1998	116	8/22/1998	RW
U-18	117	7/21/1998	118	12/10/1998	119	12/17/1998	120	12/8/1998	RW
U-18							121	11/3/2001	RL
U-18							122	5/18/2002	RL
U-18							123	9/1/2002	BH
Lot No.	Act No.	Design Date	Act No.	Installation Date	Act No.	Certification Date	Act No.	Contract Date	Sold By
LL-13	124	7/22/1998	125	7/27/1998	126	7/30/1998	127	5/23/1998	RW
NN-14	128	7/28/1998	129	7/24/1998	130	7/30/1998	131	7/23/1998	RW
K-9*	132	9/16/1998	133	9/15/1998	134	9/17/1998	135	8/29/1998	RW
T-17	136	12/10/1998	137	12/22/1998	138	3/11/1999	139	2/26/1999	RW
T-17							140	11/5/2001	BH
G-2B*	141	1/7/1999	142	1/1/1999	143	1/8/1999	144	12/24/1998	RW
MM-5	145	2/12/1999	146	2/13/1999	147	2/18/1999	148	2/12/1999	RW
U-9	149	2/12/1999	150	2/14/1999	151	3/11/1999	152	2/12/1999	RW

T-10	153	2/18/1999	154	3/17/1999	155	6/30/1999	156	6/22/1999	RW
T-10							157	1/27/2000	RW
U-17	158	2/18/1999	159	4/2/1999	160	4/26/1999	161	4/14/1999	RW
LL-11	162	3/2/1999	163	1/16/1999	164	12/15/1999	165	12/1999	RW
GG-4*	166	3/4/1999	167	2/19/1999	168	3/5/1999	169	2/17/1999	RW
NN-12	170	3/10/1999	171	4/5/1999	172	4/5/1999	173	3/22/1999	RW
AG-5	174	3/25/1999	175	4/16/1999	176	4/20/1999	177	3/13/2000	RW
AF-18	178	4/19/1999	179	4/19/1999	180	4/20/1999	181	4/16/1999	RW
KK-2	182	4/23/1999	183	4/24/1999	184	4/23/1999	185	4/21/1999	RW
Z-9	186	9/17/1999	187	9/20/1999	188	9/20/1999	189	9/16/1999	RW
Z-9							190	6/28/2001	RL

b. Below-Ground Septic Systems Installed Contrary to Health Department Warnings

64. For each lot listed in the chart below, on or about the date listed below:

- Defendant M. E. THOMPSON, JR., submitted to the Jackson County Planning Department a design for a below-ground septic system for a lot on which the Health Department had determined that such a system was in violation of state law and had warned that the presence of saturated soil on the lot would make such a system incapable of adequately treating sewage. (See Design Date.)
- Defendants ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., arranged for a

contractor to install the septic system designed by M. E. THOMPSON, JR., thus causing the placement of a system that was in violation of state law and likely to fail and to cause the discharge of untreated sewage onto the ground and the backup of sewage into homes. (See Installation Date.)

- Defendant M. E. THOMPSON, JR., submitted to the Jackson County Planning Department a letter certifying that the below-ground septic system he designed had been installed in compliance with Mississippi state law when in fact it was not. (See Certification Date.)
- A contract for the lease, sale, or rental of the identified lot was signed, as indicated, by Defendant ROBERT J. LUCAS, JR. (RL), or ROBBIE LUCAS WRIGLEY (RW), with a lessee or buyer of the lot. (See Contract Date and Sold By.)

Lot No.	Act No.	Design Date	Act No.	Installation Date	Act No.	Certification Date	Act No.	Contract Date	Sold By
AA-16	191	2/6/1997	192	2/20/1997	193	2/25/1997	194	3/8/1997	RW
F-3	195	3/3/1997	196	4/4/1997	197	4/9/1997	198	3/19/1997	RW
G-1B	199	4/16/1997	200	4/17/1997	201	4/18/1997	202	4/8/1997	RW
G-1B							203	11/5/1998	RW
V-8	204	4/16/1997	205	4/19/1997	206	4/22/1997	207	3/8/1996	RL
F-12A	208	8/2/1997	209	1/21/1998	210	1/20/1998	211	1/14/1998	RW
W-3	212	8/2/1997	213	8/8/1997	214	9/2/1997	215	8/7/1997	RW
A-5	216	4/3/1998	217	4/6/1998	218	4/6/1998	219	3/31/1998	RW
Lot No.	Act No.	Design Date	Act No.	Installation Date	Act No.	Certification Date	Act No.	Contract Date	Sold By
A-5							220	7/25/1998	RW

N-8	221	5/8/1998	222	5/9/1998	223	5/11/1998	224	7/16/1996	RW
Y-1	225	5/14/1998	226	5/11/1998	227	5/15/1998	228	5/11/1998	RW
R-5	229	6/18/1998	230	6/19/1998	231	7/3/1998	232	6/16/1998	RW
R-5							233	10/9/1998	RW
O-11	234	12/16/1998	235	12/16/1998	236	12/17/1998	237	12/14/1998	RW
U-7	238	2/25/1999	239	3/2/1999	240	2/26/1999	241	9/17/1998	RW

(3) Notice of Wetlands Fraudulently Inserted in Lease/Sale Contracts

65. On or about the dates identified below, Defendants ROBBIE LUCAS WRIGLEY, BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., added handwritten language to contracts for the sale of lots, after the buyer had signed the contract, that falsely stated the buyer had been given notice of the presence of wetland on the property sold when, in fact, the buyer had not been given such notice.

Overt Act No.	Date	Lot No.
242	January 29, 2000	AM-6
243	February 21, 2000	M-6

All in violation of Title 18, United States Code, Section 371.

COUNTS 2 - 19
(Mail Fraud, 18 U.S.C. § 1341)

66. Paragraphs 1 through 49 and paragraphs 51 through 65 enumerated above are realleged and incorporated herein.

67. Between 1994 and the date of this Indictment, the exact date being unknown to the Grand Jury, in Jackson County, in the Southern Division of the Southern District of Mississippi and elsewhere, Defendants ROBERT J. LUCAS, JR., ROBBIE LUCAS

WRIGLEY, M. E. THOMPSON, JR., BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., aided and abetted by one another, did devise and intend to devise a scheme and artifice to defraud individuals and others and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, as set forth below.

A. The Scheme and Artifice to Defraud

68. It was the principal object of the scheme and artifice to defraud to obtain money by inducing individuals to lease, rent, and purchase lots of subdivided real property at the Big Hill Acres development under the representation that these lots were suitable for habitation when in fact they were not. The defendants perpetrated this scheme to defraud in the following ways:

B. Manner and Means of the Scheme and Artifice to Defraud

69. Having been warned that property in the Big Hill Acres development was wetlands and could not be filled and developed without a permit, Defendants ROBERT J. LUCAS, JR., BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., caused wetlands in the Big Hill Acres development to be trenched, filled, and subdivided into residential lots.

70. Knowing that the property was low-lying, prone to flooding, and contained saturated soil, Defendants ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., and others at their direction, in advertisements to the public and in statements to individuals, represented to

potential purchasers of Big Hill Acres lots that the lots were habitable and suitable for home sites when in fact they were not.

71. Knowing that the Mississippi Health Department would not authorized the placement of below ground septic systems in saturated soil, Defendants ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., sought and obtained approvals for such systems in saturated soil from Defendant M. E. THOMPSON, JR., a licensed professional engineer.

72. Having been trained and instructed as to how properly to test soil to determine its suitability for the placement of septic systems in conformity with Mississippi Health Department regulations, Defendant M. E. THOMPSON, JR., repeatedly designed, authorized, and certified the placement of septic systems on lots at the Big Hill Acres development that were in violation of Mississippi Department of Health regulations.

73. Knowing that the property was low-lying and prone to flooding and that it contained saturated soils, Defendant M. E. THOMPSON, JR., and others at his direction submitted to the Jackson County Planning Department approvals for septic systems that under Mississippi Department of Health regulations should not have been approved or placed on the lots for which he authorized them.

74. Having been warned that he was designing and authorizing the placement of septic systems in saturated soils in violation of the Mississippi Department of Health regulations and thereby creating a threat to public health and the environment, Defendant M. E. THOMPSON, JR., continued to design, authorize, and certify the placement of

additional septic systems for lots in the Big Hill Acres development knowing that these lots could not be sold without being approved for septic systems.

75. Knowing that the property was low-lying and prone to flooding and that it contained saturated soils, Defendants ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., and others at their direction illegitimately obtained authorization, in collaboration with Defendant M. E. THOMPSON, JR., to install in lots septic systems that were in violation of state law.

76. Knowing that septic systems for which they had obtained authorization were improperly designed and installed and thus were likely to fail, Defendants ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., caused documents to be submitted to the Jackson County Planning Department certifying that the septic systems had been designed and installed in conformity with Mississippi Health Department regulations when they were not, in order to obtain electrical power for the lots and thereby make them marketable as home sites.

77. Knowing that septic systems for which they had obtained authorization were improperly designed and installed and thus were likely to fail, Defendants ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., and others at their direction represented to customers that the lots they were marketing at the Big Hill Acres development had or would

have properly designed and correctly installed septic systems that made the lots suitable for purchase as home sites.

78. Defendants ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC., entered into contracts with purchasers of Big Hill Acres to buy home sites that were not suitable for habitation requiring the purchasers to make monthly payments to the Big Hill Acres office in Lucedale, Mississippi.

79. For the purpose of executing the scheme and artifice to defraud, and attempting to do so, in Jackson County, in the Southern Division of the Southern District of Mississippi, Defendants ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, and M. E. THOMPSON, JR., knowingly caused a payment for the sale of the lot identified below to be delivered by the United States Postal Service to BIG HILL ACRES, INC., at P. O. Box 857 Lucedale, MS 39452 on or about the date indicated below, each such mailing being a separate count of this indictment:

Count	Date of Mailing	Lot No.
2	May 3, 2003	O-1
3	April 15, 2004	II-3
4	August 20, 2001	V-6
5	August 31, 2001	AA-17
6	December 26, 2001	KK-5
7	April 17, 2004	NN-9

8	April 5, 2004	G-2B
9	January 6, 2000	YY-15
10	September 22, 1999	GG-4
11	August 15, 2000	U-15
12	April 19, 2004	AG-11
13	June 4, 2003	YY-12
14	February 19, 2003	AF-18
15	April 16, 2004	LL-3
16	May 24, 2003	YY-1

Count	Date of Mailing	Lot No.
17	August 29, 2003	JJ-6
18	February 7, 2004	AG-5

In violation of Title 18, United States Code, Section 1341.

80. For the purpose of executing the scheme and artifice to defraud, and attempting to do so, in Jackson County, in the Southern Division of the Southern District of Mississippi, Defendants ROBERT J. LUCAS, JR., and ROBBIE LUCAS WRIGLEY, knowingly caused a payment for the sale of the lot named to be delivered by the United States Postal Service to BIG HILL ACRES, INC., at P. O. Box 857 Lucedale, MS 39452 on or about the date indicated below:

Count	Date of Mailing	Lot No.

19 March 18, 2004 E-13

In violation of Title 18, United States Code, Section 1341.

COUNTS 20 - 29
(Unpermitted Filling of Wetlands, Violation of the Clean Water Act
33 U.S.C. § 1319(c)(2)(A))

81. Paragraphs 1 through 6 and paragraphs 8 through 49 enumerated above are realleged and incorporated herein.

82. On or about the dates listed below in Jackson County, in the Southern Division of the Southern District of Mississippi, Defendant ROBERT J. LUCAS, JR., in having authorized and supervised the construction of the following roads and the development of the residential lots abutting them, without having obtained a permit from the United States Army Corps of Engineers under the authority of Section 404 of the Clean Water Act, did knowingly cause the discharge of the pollutants, including dirt, pipes, culverts, gravel, garbage, debris, cement, asphalt, and other fill materials, from excavation and earth moving equipment, point sources, into wetlands that are waters of the United States:

Count	Date	Location
20	Summer 1999	Sugargate Road
21	Summer 1999	Barksdale Road
22	Summer 1999	Regale Road

In violation of Title 33, United States Code, Section 1319(c)(2)(A) and Title 18, United States Code, Section 2.

83. On or about the dates listed below, in Jackson County, in the Southern Division of the

Southern District of Mississippi, Defendant ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, and M. E. THOMPSON, JR., aiding and abetting one another, in authorizing the installation of a below-ground wastewater disposal system in the following Big Hill Acres lots, without having obtained a permit from the United States Army Corps of Engineers under the authority of Section 404 of the Clean Water Act, did knowingly cause the discharge of the pollutants, including dirt, cement, pipes, gravel, garbage, debris, and other fill materials from excavation and earth moving equipment, point sources, into wetlands that are waters of the United States:

Count	Date	Location
23	April 16, 1999	AG-5
24	April 24, 1999	Lot KK-2
25	April 18, 1999	Lot AF-18

Count	Date	Location
26	September 20, 1999	Lot Z-9

In violation of Title 33, United States Code, Section 1319(c)(2)(A) and Title 18, United States Code, Section 2.

84. On or about the dates listed below, in Jackson County, in the Southern Division of the Southern District of Mississippi, Defendant ROBERT J. LUCAS, JR., in having caused excavation and the installation of pipes and drain lines in below-ground wastewater disposal systems in the following Big Hill Acres lots without having obtained a permit from the United States Army Corps of Engineers under the authority of Section 404 of the Clean

Water Act, did knowingly cause the discharge of the pollutants, including dirt, pipes, gravel, garbage, debris, cement, and other fill materials, from excavation and earth moving equipment, point sources, into wetlands that are waters of the United States:

Count	Date	Location
27	April 2004	Lot U-15
28	April 2004	Lot U-17
29	April 2004	Lot AA-3

In violation of Title 33, United States Code, Section 1319(c)(2)(A) and Title 18, United States Code, Section 2.

COUNTS 30 - 41
(Unpermitted Discharge of Sewage to Wetlands, Violation of the Clean Water Act
33 U.S.C. § 1319(c)(A)(2))

85. Paragraphs 1 through 6 and paragraphs 8 through 49 enumerated above are realleged and incorporated herein.

86. On or about the dates and locations described below, in Jackson County, in the Southern Division of the Southern District of Mississippi, Defendants ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, and M. E. THOMPSON, JR., aiding and abetting one another, knowingly caused pollutants, including sewage and domestic wastewater, to be discharged from a septic system, a point source, into wetlands that are waters of the United States without a permit issued under the authority of Section 402 of the Clean Water Act, each such discharge being a separate count of this indictment:

Count	Date	Location

30	January 2003	Lot AF-18
31	April 2004	Lot Z-9
32	May 2004	AG-5

In violation of Title 33, United States Code, Section 1319(c)(2)(A) and Title 18, United States Code, Section 2.

87. On or about the dates and locations described below, in Jackson County, in the Southern Division of the Southern District of Mississippi, Defendants ROBERT J. LUCAS, JR., and ROBBIE LUCAS WRIGLEY, aiding and abetting one another, knowingly caused pollutants, including sewage and domestic wastewater, to be discharged from a septic system, a point source into wetlands that are waters of the United States without a permit issued under the authority of Section 402 of the Clean Water Act, each such discharge being a separate count of this indictment:

Count	Date	Location
33	March 2003	Lot LL-3

Count	Date	Location
34	October 2003	Lot E-13
35	October 2003	Lot G-2B
36	October 2003	Lot GG-4
37	October 2003	Lot YY-14
38	April 2004	Lot JJ-6
39	April 2004	Lot AB-15

In violation of Title 33, United States Code, Section 1319(c)(2)(A) and Title 18, United States Code, Section 2.

88. On or about the dates and locations described below, in Jackson County, in the Southern Division of the Southern District of Mississippi, Defendant ROBERT J. LUCAS, JR., knowingly caused pollutants, including sewage and domestic wastewater, to be discharged from a septic system, a point source, into wetlands that are waters of the United States without a permit issued under the authority of Section 402 of the Clean Water Act, each such discharge being a separate count of this indictment:

Count	Date	Location
40	March 2003	Lot I-6
41	October 2004	Lot U-15

In violation of Title 33, United States Code, Section 1319(c)(2)(A) and Title 18, United States Code, Section 2.

ADDITIONAL FINDINGS OF FACT

89. In having committed an offense charged in this indictment, individually and collectively, Defendants **BIG HILL ACRES, INC., CONSOLIDATED INVESTMENTS, INC., ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, and M. E. THOMPSON, JR.** caused the repetitive discharge of fill material into wetlands and the repetitive discharge of sewage into wetlands.

90. The discharge of sewage into the wetland lots of Big Hill Acres residents resulting from offenses charged in this indictment against Defendants **BIG HILL ACRES, INC.,**

CONSOLIDATED INVESTMENTS, INC., ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, and M. E. THOMPSON, JR. constitutes a condition that will require a substantial expenditure of money to cleanup.

91. In having been trained and certified as an engineer, Defendant **M. E. THOMPSON, JR.**, had specialized skill that enabled him to design and certify the installation of septic systems in lots at Big Hill Acres and thus significantly facilitated his commission of the offenses charged in this indictment. In having committed the offenses charged in this indictment, Defendant **M. E. THOMPSON, JR.** abused his specialized skill as a trained and certified engineer.

92. In having been trained and certified as a realtor, **ROBBIE LUCAS WRIGLEY**, had a specialized skill and a position of trust that facilitated the commission of the offenses charged in this indictment and that she abused in the commission of these offenses.

93. In having devised, organized, and managed the conduct constituting the offenses charged in this indictment **ROBERT J. LUCAS, JR.** was an organizer or leader of a criminal activity that involved five or more participants or a criminal activity having directed five or more participants and that was otherwise extensive.

94. Two hundred and fifty or more individuals were victims of the fraud charged in this indictment against Defendants **BIG HILL ACRES, INC., CONSOLIDATED INVESTMENTS, INC., ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, and M. E. THOMPSON, JR.**

95. The loss to all of the victims of the fraud charged in this indictment against Defendants **BIG HILL ACRES, INC., CONSOLIDATED INVESTMENTS, INC., ROBERT J. LUCAS, JR.,**

ROBBIE LUCAS WRIGLEY, and M. E. THOMPSON, JR. exceeded two and one half million dollars.

A True Bill

_____
Foreperson

_____
Dunn O. Lampton
United States Attorney

_____
Peter H. Barrett
Assistant United States Attorney

Thomas L. Sansonetti
Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice

_____
Jeremy F. Korzenik
Senior Trial Attorney
Environmental Crimes Section

Deborah L. Harris
Trial Attorney
Environmental Crimes Section

EXHIBIT D

FINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	**1:04CR60GuRo**
	§	
ROBERT J. LUCAS, JR., ROBBIE LUCAS WRIGLEY, M.E. THOMPSON, JR., BIG HILL ACRES, INC., and CONSOLIDATED INVESTMENTS, INC.	§	

SPECIAL VERDICT FORM

Part I

1. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
X GUILTY beyond a reasonable doubt ____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
X GUILTY beyond a reasonable doubt ____ NOT GUILTY

M.E. THOMPSON, JR.
X GUILTY beyond a reasonable doubt ____ NOT GUILTY

BIG HILL ACRES, INC.
X GUILTY beyond a reasonable doubt ____ NOT GUILTY

CONSOLIDATED INVESTMENTS, INC.
X GUILTY beyond a reasonable doubt ____ NOT GUILTY

of conspiracy to commit an offense against the laws of the United States in violation of Title 18, United States Code, Section 371, beginning on or about 1994 and continuing to on or about November 4, 2004, as alleged in Count 1 of the indictment.

2. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
X GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
X GUILTY beyond a reasonable doubt _____ NOT GUILTY

M.E. THOMPSON, JR.
X GUILTY beyond a reasonable doubt _____ NOT GUILTY

BIG HILL ACRES, INC.
X GUILTY beyond a reasonable doubt _____ NOT GUILTY

of mail fraud regarding lot O-1 of Big Hill Acres, purchased by the Spiers, in violation of Title 18, United States Code, Section 1341, on or about May 3, 2003, as alleged in Count 2 of the indictment.

3. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
X GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
X GUILTY beyond a reasonable doubt _____ NOT GUILTY

M.E. THOMPSON, JR.
X GUILTY beyond a reasonable doubt _____ NOT GUILTY

BIG HILL ACRES, INC.
X GUILTY beyond a reasonable doubt _____ NOT GUILTY

of mail fraud regarding lot II -3 of Big Hill Acres, purchased by the Graysons, in violation of Title 18, United States Code, Section 1341, on or about April 15, 2004, as alleged in Count 3 of the indictment.

4. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

M.E. THOMPSON, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

BIG HILL ACRES, INC.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of mail fraud regarding lot V-6 of Big Hill Acres, purchased by the Spences, in violation of Title 18, United States Code, Section 1341, on or about August 20, 2001, as alleged in Count 4 of the indictment.

5. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

M.E. THOMPSON, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

BIG HILL ACRES, INC.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of mail fraud regarding lot AA-17 of Big Hill Acres, purchased by the Wenningers, in violation of Title 18, United States Code, Section 1341, on or about August 31, 2001, as alleged in Count 5 of the indictment.

6. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

M.E. THOMPSON, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

BIG HILL ACRES, INC.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of mail fraud regarding lot KK-5 of Big Hill Acres, purchased by Nancy Watford, in violation of Title 18, United States Code, Section 1341, on or about December 26, 2001, as alleged in Count 6 of the indictment.

7. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

M.E. THOMPSON, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

BIG HILL ACRES, INC.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of mail fraud regarding lot NN-9 of Big Hill Acres, purchased by the Miceles, in violation of Title 18, United States Code, Section 1341, on or about April 17, 2004, as alleged in Count 7 of the indictment.

8. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
_X_ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
_X_ GUILTY beyond a reasonable doubt _____ NOT GUILTY

M.E. THOMPSON, JR.
_X_ GUILTY beyond a reasonable doubt _____ NOT GUILTY

BIG HILL ACRES, INC.
_X_ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of mail fraud regarding lot G-2B of Big Hill Acres, purchased by Norris Jones, in violation of Title 18, United States Code, Section 1341, on or about April 5, 2004, as alleged in Count 8 of the indictment.

9. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
_X_ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
_X_ GUILTY beyond a reasonable doubt _____ NOT GUILTY

M.E. THOMPSON, JR.
_X_ GUILTY beyond a reasonable doubt _____ NOT GUILTY

BIG HILL ACRES, INC.
_X_ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of mail fraud regarding lot YY-15 of Big Hill Acres, purchased by the Pattersons, in violation of Title 18, United States Code, Section 1341, on or about January 6, 2000, 2003, as alleged in Count 9 of the indictment.

10. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

M.E. THOMPSON, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

BIG HILL ACRES, INC.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of mail fraud regarding lot GG-4 of Big Hill Acres, purchased by the Griswolds, in violation of Title 18, United States Code, Section 1341, on or about September 22, 1999, as alleged in Count 10 of the indictment.

11. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

M.E. THOMPSON, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

BIG HILL ACRES, INC.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of mail fraud regarding lot U-15 of Big Hill Acres, purchased by Philip Johnson, in violation of Title 18, United States Code, Section 1341, on or about August 15, 2000, as alleged in Count 11 of the indictment.

12. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

M.E. THOMPSON, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

BIG HILL ACRES, INC.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of mail fraud regarding lot AG-11 of Big Hill Acres, purchased by ~~Joe~~ JACKSON Peterson, in violation of Title 18, United States Code, Section 1341, on or about April 19, 2004, as alleged in Count 12 of the indictment.

13. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

M.E. THOMPSON, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

BIG HILL ACRES, INC.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of mail fraud regarding lot YY-12 of Big Hill Acres, purchased by the Reynolds, in violation of Title 18, United States Code, Section 1341, on or about June 4, 2003, as alleged in Count 13 of the indictment.

14. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
_X_ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
_X_ GUILTY beyond a reasonable doubt _____ NOT GUILTY

M.E. THOMPSON, JR.
_X_ GUILTY beyond a reasonable doubt _____ NOT GUILTY

BIG HILL ACRES, INC.
_X_ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of mail fraud regarding lot AF-18 of Big Hill Acres, purchased by the Johnsons, in violation of Title 18, United States Code, Section 1341, on or about February 19, 2003, as alleged in Count 14 of the indictment.

15. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
_X_ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
_X_ GUILTY beyond a reasonable doubt _____ NOT GUILTY

M.E. THOMPSON, JR.
_X_ GUILTY beyond a reasonable doubt _____ NOT GUILTY

BIG HILL ACRES, INC.
_X_ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of mail fraud regarding lot LL-3 of Big Hill Acres, purchased by the Martins, in violation of Title 18, United States Code, Section 1341, on or about April 16, 2004, as alleged in Count 15 of the indictment.

16. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

M.E. THOMPSON, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

BIG HILL ACRES, INC.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of mail fraud regarding lot YY-1 of Big Hill Acres, purchased by the Johnstons, in violation of Title 18, United States Code, Section 1341, on or about May 24, 2003, as alleged in Count 16 of the indictment.

17. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

M.E. THOMPSON, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

BIG HILL ACRES, INC.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of mail fraud regarding lot JJ-6 of Big Hill Acres, purchased by the Taylors, in violation of Title 18, United States Code, Section 1341, on or about August 29, 2003, as alleged in Count 17 of the indictment.

18. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

M.E. THOMPSON, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

BIG HILL ACRES, INC.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of mail fraud regarding lot AG-5 of Big Hill Acres, purchased by the Sullivans, in violation of Title 18, United States Code, Section 1341, on or about February 7, 2004, as alleged in Count 18 of the indictment.

19. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

BIG HILL ACRES, INC.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of mail fraud regarding E-13 of Big Hill Acres, purchased by the Bossetts, in violation of Title 18, United States Code, Section 1341, on or about March 18, 2004, as alleged in Count 19 of the indictment.

20. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.

__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of knowingly causing the discharge of pollutants from a point source into waters of the United States without a permit as required by Section 404 of the Clean Water Act on or about the Summer of 1999 during the excavation and construction of Sugargate Road in violation of Title 33, United States Code, Section 1319(c)(2)(A), as alleged in Count 20 of the indictment.

21. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.

__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of knowingly causing the discharge of pollutants from a point source into waters of the United States without a permit as required by Section 404 of the Clean Water Act on or about the Summer of 1999 during the excavation and construction of Barksdale Road in violation of Title 33, United States Code, Section 1319(c)(2)(A), as alleged in Count 21 of the indictment.

22. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.

__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of knowingly causing the discharge of pollutants from a point source into waters of the United States without a permit as required by Section 404 of the Clean Water Act on or about the Summer of 1999 during the excavation and construction of Regale Road in violation of Title 33, United States Code, Section 1319(c)(2)(A), as alleged in Count 22 of the indictment.

23. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

M.E. THOMPSON, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of knowingly causing the discharge of pollutants from a point source into waters of the United States without a permit as required by Section 404 of the Clean Water Act on or about April 16, 1999, during the excavation and installation of a below ground septic system at lot AG-5 in violation of Title 33, United States Code, Section 1319(c)(2)(A), as alleged in Count 23 of the indictment.

24. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

M.E. THOMPSON, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of knowingly causing the discharge of pollutants from a point source into waters of the United States without a permit as required by Section 404 of the Clean Water Act on or about April 24, 1999, during the excavation and installation of a below ground septic system at lot KK-2 in violation of Title 33, United States Code, Section 1319(c)(2)(A), as alleged in Count 24 of the indictment.

25. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
_X_ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
_X_ GUILTY beyond a reasonable doubt _____ NOT GUILTY

M.E. THOMPSON, JR.
_X_ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of knowingly causing the discharge of pollutants from a point source into waters of the United States without a permit as required by Section 404 of the Clean Water Act on or about April 18, 1999, during the excavation and installation of a below ground septic system at lot AF-18 in violation of Title 33, United States Code, Section 1319(c)(2)(A), as alleged in Count 25 of the indictment.

26. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
_X_ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
_X_ GUILTY beyond a reasonable doubt _____ NOT GUILTY

M.E. THOMPSON, JR.
_X_ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of knowingly causing the discharge of pollutants from a point source into waters of the United States without a permit as required by Section 404 of the Clean Water Act on or about September 20, 1999, during the excavation and installation of a below ground septic system at lot Z-9 in violation of Title 33, United States Code, Section 1319(c)(2)(A), as alleged in Count 26 of the indictment.

27. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.

__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of knowingly causing the discharge of pollutants from a point source into waters of the United States without a permit as required by Section 404 of the Clean Water Act on or about April of 2004, during the excavation and installation of a below ground septic system at lot U-15 in violation of Title 33, United States Code, Section 1319(c)(2)(A), as alleged in Count 27 of the indictment.

28. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.

__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of knowingly causing the discharge of pollutants from a point source into waters of the United States without a permit as required by Section 404 of the Clean Water Act on or about April of 2004, during the excavation and installation of a below ground septic system at lot U-17 in violation of Title 33, United States Code, Section 1319(c)(2)(A), as alleged in Count 28 of the indictment.

29. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.

__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of knowingly causing the discharge of pollutants from a point source into waters of the United States without a permit as required by Section 404 of the Clean Water Act on or about April of 2004, during the excavation and installation of a below ground septic system at lot AA-3 in violation of Title 33, United States Code, Section 1319(c)(2)(A), as alleged in Count 29 of the indictment.

30. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

M.E. THOMPSON, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of knowingly causing the discharge of pollutants from a point source; to wit, a septic system on Lot AF-18, into waters of the United States without a permit as required by the National Pollutant Discharge Elimination System Program, Section 402 of the Clean Water Act on or about January of 2003 in violation of Title 33, United States Code, Section 1319(c)(2)(A), as alleged in Count 30 of the indictment.

31. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

M.E. THOMPSON, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of knowingly causing the discharge of pollutants from a point source; to wit, a septic system on Lot Z-9, into waters of the United States without a permit as required by the National Pollutant Discharge Elimination System Program, Section 402 of the Clean Water Act on or about April of 2004 in violation of Title 33, United States Code, Section 1319(c)(2)(A), as alleged in Count 31 of the indictment.

32. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

M.E. THOMPSON, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of knowingly causing the discharge of pollutants from a point source; to wit, a septic system on Lot AG-5, into waters of the United States without a permit as required by the National Pollutant Discharge Elimination System Program, Section 402 of the Clean Water Act on or about May of 2004 in violation of Title 33, United States Code, Section 1319(c)(2)(A), as alleged in Count 32 of the indictment.

33. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of knowingly causing the discharge of pollutants from a point source; to wit, a septic system on Lot LL-3, into waters of the United States without a permit as required by the National Pollutant Discharge Elimination System Program, Section 402 of the Clean Water Act on or about March of 2003 in violation of Title 33, United States Code, Section 1319(c)(2)(A), as alleged in Count 33 of the indictment.

34. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.

__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY

__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of knowingly causing the discharge of pollutants from a point source; to wit, a septic system on Lot E-13, into waters of the United States without a permit as required by the National Pollutant Discharge Elimination System Program, Section 402 of the Clean Water Act on or about October of 2003 in violation of Title 33, United States Code, Section 1319(c)(2)(A), as alleged in Count 34 of the indictment.

35. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.

__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY

__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of knowingly causing the discharge of pollutants from a point source; to wit, a septic system on Lot G-2B, into waters of the United States without a permit as required by the National Pollutant Discharge Elimination System Program, Section 402 of the Clean Water Act on or about October of 2003 in violation of Title 33, United States Code, Section 1319(c)(2)(A), as alleged in Count 35 of the indictment.

36. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of knowingly causing the discharge of pollutants from a point source; to wit, a septic system on Lot GG-4, into waters of the United States without a permit as required by the National Pollutant Discharge Elimination System Program, Section 402 of the Clean Water Act on or about October of 2003 in violation of Title 33, United States Code, Section 1319(c)(2)(A), as alleged in Count 36 of the indictment.

37. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY
__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of knowingly causing the discharge of pollutants from a point source; to wit, a septic system on Lot YY-14 into waters of the United States without a permit as required by the National Pollutant Discharge Elimination System Program, Section 402 of the Clean Water Act on or about October of 2003 in violation of Title 33, United States Code, Section 1319(c)(2)(A), as alleged in Count 37 of the indictment.

38. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.

__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY

__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of knowingly causing the discharge of pollutants from a point source; to wit, a septic system on Lot JJ-6, into waters of the United States without a permit as required by the National Pollutant Discharge Elimination System Program, Section 402 of the Clean Water Act on or about April of 2004 in violation of Title 33, United States Code, Section 1319(c)(2)(A), as alleged in Count 38 of the indictment.

39. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.

__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

ROBBIE LUCAS WRIGLEY

__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of knowingly causing the discharge of pollutants from a point source; to wit, a septic system on Lot AB-15, into waters of the United States without a permit as required by the National Pollutant Discharge Elimination System Program, Section 402 of the Clean Water Act on or about April of 2004 in violation of Title 33, United States Code, Section 1319(c)(2)(A), as alleged in Count 39 of the indictment.

40. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.

__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of knowingly causing the discharge of pollutants from a point source; to wit, a septic system on Lot I-6, into waters of the United States without a permit as required by the National Pollutant Discharge Elimination System Program, Section 402 of the Clean Water Act on or about March of 2003 in violation of Title 33, United States Code, Section 1319(c)(2)(A), as alleged in Count 40 of the indictment.

41. We the jury unanimously find the defendant:

ROBERT J. LUCAS, JR.

__X__ GUILTY beyond a reasonable doubt _____ NOT GUILTY

of knowingly causing the discharge of pollutants from a point source; to wit, a septic system on Lot U-15, into waters of the United States without a permit as required by the National Pollutant Discharge Elimination System Program, Section 402 of the Clean Water Act on or about October of 2004 in violation of Title 33, United States Code, Section 1319(c)(2)(A), as alleged in Count 41 of the indictment.

Part II
Finalization of the verdict form

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

_____
Date

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	**CRIMINAL NO. 1:04cr60-LG-JMR**
	§	
ROBERT J. LUCAS, Jr.	§	
ROBBIE LUCAS WRIGLEY	§	
M.E. THOMPSON, JR.	§	
BIG HILL ACRES, INC.	§	
and CONSOLIDATED	§	
INVESTMENTS, INC.	§	**DEFENDANTS**

ORDER TAKING MOTION FOR RELEASE PENDING APPEAL UNDER ADVISEMENT

BEFORE THE COURT are the Motions of the Defendants, Robert J. Lucas, Jr., Robbie Lucas Wrigley and M.E. Thompson, Jr. [281] for release pending appeal to the United States Supreme Court. On March 12, 2008, the United States Court of Appeals for the Fifth Circuit affirmed the convictions of the Defendants. *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008). On June 2, 2008, the Defendants filed a petition for writ of certiorari to the United States Supreme Court. *See Robert Lucas, Jr., et al., Petitioners v. United States,* No. 07-1512. According to the docket entry, a response to the petition is due July 7, 2008.

A motion for release pending the disposition of a petition for certiorari may be considered by the district court. *United States v. Snyder*, 946 F.2d 1125 (5th Cir. 1991). A movant must establish the factors under 18 U.S.C. § 3143(b) as to each count of conviction. *United States v. Valera-Elizondo*, 761 F.2d 1020 (5th Cir. 1985). In the opinion of the Court, the Motions for release should be taken under advisement awaiting a decision by the United States Supreme

Court on the Defendants' pending petition for writ of certiorari.[1]

IT IS THEREFORE ORDERED AND ADJUDGED, that the Motions of the Defendants, Robert J. Lucas, Jr., Robbie Lucas Wrigley and M.E. Thompson, Jr. [281] for release pending appeal to the United States Supreme Court are **TAKEN UNDER ADVISEMENT.**

SO ORDERED AND ADJUDGED this the 2nd day of July, 2008.

s/ *Louis Guirola, Jr.*
LOUIS GUIROLA, JR.
UNITED STATES DISTRICT JUDGE

[1]The Court notes that the delay should be brief. The average length of time that petitions for writs of certiorari remain pending is eight weeks from filing or about three to four weeks after the brief in opposition of the petition is filed. *See* R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE ,314 (9th ed. 2007).

EXHIBIT F

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

July 8, 2008

Mr William Lee Guice III
Rushing & Guice
604 Porter Avenue
Ocean Springs, MS 39564

Mr Phillip A Wittmann
Stone, Pigman, Walther & Wittmann
546 Carondelet Street
New Orleans, LA 70130

Mr Timothy Charles Holleman
Boyce Holleman & Associates
Suite 400D
11240 Highway 49 N
Gulfport, MS 39503

Mr Wilbur F Holder II
400 E Railroad Street
Long Beach, MS 39560

No. 06-60289 USA v. Lucas
USDC No. 1:04-CR-60-5
1:04-CR-60-4
1:04-CR-60-1

We received your motion for Release Pending Resolution of Petition for Certiorari to the Supreme Court of the United States. This court has no jurisdiction to grant the requested relief as the mandate issued in this case on March 14, 2008. Therefore, we are taking no action on this motion.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: Kim Folse
Kim Folse, Deputy Clerk
504-310-7712

cc: Mr Malcolm Reed Hopper
Mr James Murphy
Ms Katherine J Barton

BR-9

EXHIBIT G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF AMERICA — Plaintiffs
V. — CIVIL ACTION NO. 1:04cr60GuRo
ROBERT J. LUCAS, JR., ET AL — Defendants

COURT REPORTER'S TRANSCRIPT OF TRIAL

BEFORE HONORABLE LOUIS GUIROLA, JR.
UNITED STATES DISTRICT COURT JUDGE
- and a jury -
January 10, 2005
Gulfport, Mississippi

DAILY COPY
NOT PROOFREAD

APPEARANCES:

JEREMY F. KORZENIK, ESQUIRE
DEBORAH HARRIS, ESQUIRE
U.S. Department of Justice
P.O. Box 23985
Washington, DC 20026-3985

JAY T. GOLDEN, ESQUIRE
U.S. Attorney's Office
1575 20th Avenue
Gulfport, MS 39501
Representing the Government

APPEARANCES (CONT'D):
WILLIAM LEE GUICE, III, ESQUIRE
Rushing & Guice
P.O. Box 1925
Biloxi, MS 39533-1925

PHILLIP A. WITTMAN, ESQUIRE
DARIA B. DIAZ, ESQUIRE
PAUL MASINTER, ESQUIRE
Stone, Pigman, Walther
& Wittman, LLC
546 Carondelet St.
New Orleans, LA 70130-3588
Representing the Defendants,
Robert J. Lucas, Jr.,
Big Hill Acres, Inc. and
Consolidated Investments, Inc.

LESLIE D. HOLLEMAN, ESQUIRE
TIMOTHY C. HOLLEMAN, ESQUIRE
Boyce Holleman, P.A.
P.O. Drawer 1030
Gulfport, MS 39502-1030

Representing the Defendant,
Robbie Lucas Wrigley
WILBUR F. HOLDER, II, ESQUIRE
20048-A Pineville Road
Long Beach, MS 39560
Representing M. E. Thompson, Jr.

ALSO PRESENT: David McLeod, EPA
Robert J. Lucas, Defendant
M.E. Thompson, Defendant
Robbie Lucas Wrigley, Defendant

COURT REPORTER:
Margaret W. Seal, RMR, CRR
701 N. Main Street, Room 253
Hattiesburg, MS 39401
(601) 583-4383

stream. Does it differentiate between a -- what I would call a natural stream and a drainage -- a manmade drainage ditch?

THE WITNESS: No. This doesn't -- these blue lines don't differentiate between what you just described or even perennial or intermittent. It's just -- this is where I as an interpreter am saying that water would flow. Some of it may be manmade ditches. Most of it's not. Most of it is natural streams. But I didn't differentiate between the two. These are surface water drainage pathways.

THE COURT: Would you be capable of doing that.

THE WITNESS: Well, yes, but I don't know between now and tomorrow. But I mean --

THE COURT: Well, I think -- I suppose what I'm -- what I'm getting to here is the jury is going to look at this and you're going to be referring to them as streams when they may be in reality something else.

THE WITNESS: Right. I mean --

THE COURT: Would you be able to tell the jury where a natural stream begins or ends and a manmade drainage ditch begins?

THE WITNESS: Well, some of that may become a little more in focus once I move away from this scale. This is a small scale photograph showing a large area. I have some slides that zoom in on the site. And that may help.

THE COURT: Maybe I'm premature. We'll come back to

MR. WITTMAN: Your Honor, that's the --

THE COURT: Is that the legend for the map?

MR. WITTMAN: That's the legend -- the topographic map symbols provided by the USGS, Your Honor.

THE COURT: Thank you, sir.

BY MR. WITTMAN:

Q. And the intermittent stream symbol is shown right here with a dotted line, is it not?

A. Yes, sir.

Q. Okay. And going back to the map itself, it's correct, isn't it, that all of the streams depicted by the USGS or the drain ways depicted by the United States Geological Survey all reflect a dashed line indicating an intermittent stream?

A. Yes, sir.

Q. Okay. And turning to try and see the rest of the area -- I'll try and focus it. Again, we have intermittent streams depicted here?

A. Yes, sir.

Q. And that's true all the way across the property from west to east, is it not? All of these streams are intermittent?

A. Yes, sir.

Q. Okay. In fact, there's not a single stream or drain way on Big Hill Acres that the USGA says is anything other than an intermittent stream?

A. I think that's correct, yes, sir.

A. These wetlands are adjacent to tributaries to Bayou Costapia, yes, sir.

MR. WITTMAN: Now, may I have the Elmo, please, Your Honor?

BY MR. WITTMAN:

Q. The exhibit I showed you this morning is Government Exhibit 18; correct? That was in your draft, was it not? That's the same area? Do you recognize that as the same area?

A. No, sir. You've got it kind of half on and off. This -- this is a -- a wetland complex that is very near 18G, and it's a tributary to Bayou Costapia.

Q. It's the same area as 18G on the government's slide I showed you a moment ago, isn't it?

A. No, sir, I don't think so.

Q. You see the pine tree in the background, sir? That pine tree appeared on the slide you showed the jury in your previous slide.

A. You'll have to refresh my memory because the pine tree is in the -- far off in the distance.

Q. All right. The point I wanted to make was that in this slide, you refer to this same area as an intermittent drain, do you not? And not as a tributary?

A. Yes, sir. It's a wetland complex, yes, sir.

Q. That's not my question, sir. You refer to it as an intermittent drain, don't you? Yes or no?

A. In this exhibit?
Q. Yes.
A. I'll have to --
Q. And you changed this before you made your final PowerPoint, didn't you?
THE REPORTER: I didn't get the answer.
THE COURT: All right. Wait just a minute. Were you through with your answer, Mr. Wylie?
THE WITNESS: No, sir, I wasn't.
THE REPORTER: I didn't get an answer, period.
THE COURT: All right. Let's back up then. Go ahead and finish your answer.
THE WITNESS: Yes, sir.
A. I referred to it as an intermittent drain in this particular slide. However, it is a wetland complex that runs down to Bayou Costapia. It's an intermittent drain formed of wetlands.
Q. Okay. So you don't deny that it's an intermittent drain?
A. No, sir. I labeled it that, yes.
Q. Okay. But you changed it in your final presentation to call it a tributary, didn't you?
A. I must have, yes, sir.
Q. Thank you. Now, if we could, let's go to Map No. 3. And on Map No. 3 -- correct me if I'm wrong -- but I didn't see any boat points; is that correct?

eventually eroding out a channel. And once a channel has been eroded out, the water tends to take its course and that forms a natural stream. And it has a bed and a bank.

Q. What is the difference between a drain and a stream?

A. Well, a drain may be more than a natural stream. There are -- in other words, by the definition of a drain, since it has a bed and a bank, a ditch may be -- have a bed and a bank. But it's not a natural stream. So the term drain includes more than just natural streams.

Q. Dr. Sanders, what is an intermittent stream?

A. An intermittent stream is a stream that flows only during portions of the year, either as a result of the wet portion of the year or periodically when -- following significant rainfall events.

Q. Did you find any intermittent streams on Big Hill Acres?

A. Yes. All of the drains departing Big Hill Acres are intermittent streams. And that's not just my confirmation. That's according to the U.S. Geological Survey topographic maps, which identify them as intermittent streams.

Q. Did you find any streams which flowed year round on Big Hill Acres?

A. No.

Q. Dr. Sanders, what is a tributary?

A. A tributary is a stream that empties into another body of water.

EXHIBIT H

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DIVISION

UNITED STATES OF AMERICA — Plaintiffs

V. — CRIMINAL ACTION NO. 1:04cr60GuRo

ROBERT J. LUCAS, JR., ET AL — Defendants

COURT REPORTER'S TRANSCRIPT OF

DEFENDANTS' SENTENCE HEARING

BEFORE HONORABLE LOUIS GUIROLA, JR.

UNITED STATES DISTRICT COURT JUDGE

December 5, 2005

Hattiesburg, Mississippi

APPEARANCES:

JAY T. GOLDEN, ESQUIRE

U.S. Attorney's Office

1575 20th Avenue

Gulfport, MS 39501

Representing the Government

individual defendant insofar as physical or psychological treatment and/or evaluation may be required.

I note for the record that this is a recommendation only. And that designation falls within the sole discretion of the Federal Bureau of Prisons.

Each of the defendants is advised and admonished that they have the right to appeal their conviction and sentence and the judgment of this Court within ten days of the entry of the judgment of conviction. They're also advised that they have the right to appeal in forma pauperis.

Each of the defendants will be permitted to remain on the same conditions of release previously set by the Court and will be permitted to self-surrender on or before February 7th of 2006 to the United States Marshals Service.

In the event the defendants execute a notice of appeal, the defendants will be permitted to remain on the same conditions of release previously set by the Court with the following change.

None of the defendants will be permitted to divest themselves of any interest that they may have in personal or real property without further order of the Court.

The Court specifically finds insofar as the release of the defendants pending any putative appeal that they are not a risk of flight. They are not a danger to the community. And that substantial issues on questions of law exist from which the

judgment of this Court could be affected.

Mr. Golden, is there anything else on behalf of the government that you can think of or anything that I have left out or need to clarify?

MR. GOLDEN: No, Your Honor. The only thing that the government would state is that I know that -- I'm not quarreling with the Court on it, but the Court's made a decision about the substantial question of law. And the only part of that that we would certainly contest is at least that the mail fraud counts are fairly run-of-the-mill mail fraud counts that wouldn't necessarily, like the Clean Water Act cases, amount to a substantial question of law. But with that limited objection, we have nothing further.

THE COURT: That's noted. Although, it goes without saying that if there's a substantial question of law insofar as the Clean Water Act cases are concerned, that it could tend to affect the convictions under the fraud. And I'll leave that to -- I'll leave that to the reviewing court to consider.

All right. Mr. Wittman, is there anything else that you wish to bring up for purposes of the record on behalf -- oh, I'm sorry. I have --

MR. GOLDEN: The two corporations.

THE COURT: I have demonstrated my humanity. I have left out two J and Cs altogether. Let me go into those next. The two corporate defendants obviously need to be taken up.

EXHIBIT I

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF AMERICA

v. CRIMINAL NO. 1:04cr60LG-JMR

ROBERT J. LUCAS, JR.
ROBBIE LUCAS WRIGLEY
M. E. THOMPSON, JR.
BIG HILL ACRES, INC.
CONSOLIDATED INVESTMENTS, INC.

GOVERNMENT'S OBJECTION TO DEFENDANTS' EMERGENCY MOTION FOR RELEASE PENDING RESOLUTION OF PETITION FOR CERTIORARI

After they were tried, convicted, and sentenced; after one of the defendants was incarcerated for violations of his appeal bond; and after their appeal to the Fifth Circuit was unambiguously denied, the defendants now seek to be released from prison on the strength of their appeal to the Supreme Court on issues that have been repeatedly raised, considered, and rejected. The government opposes the defendants' request for release pending appeal to the Supreme Court because their appeal does not meet the requisite standard for such relief; it does not "raise a substantial question of law or fact likely to result in reversal, an order for a new trial" or in a sentence of imprisonment below that which has been imposed or already served. 18 U.S.C. § 3143 (b)(1).

In their Motion for Release, the defendants parse the Supreme Court's decision in *Rapanos v. U.S.*, 547 U.S. 715 (2006) in an attempt to identify divergences among the three standards for federal wetland jurisdiction articulated by the plurality, concurring, and dissenting opinions. These inconsistencies are, the defendants claim, the jurisdictional gaps through which

the Big Hill Acres wetland falls, placing it outside of the Clean Water Act's definition of "waters of the United States" and, hence, placing the defendants beyond the reach of the jury's verdict. But the issues as to which *Rapanos* jurisdictional standard controls and how they intersect, however crucial in some cases, are simply not material to this one. In affirming the convictions in this case, the Fifth Circuit did not decide which of the jurisdictional tests was controlling and which was satisfied by the facts of this case; it concluded that they all were, that the Big Hill Acres wetland the defendants were convicted of having filled and polluted is a protected water of the United States under all of the jurisdictional standards articulated in *Rapanos*. "In sum, the evidence presented at trial supports all three of the *Rapanos* standards and the jury's finding that Lucas, Thompson, and Wrigley were guilty beyond a reasonable doubt of knowingly causing the discharge of pollutants from a point source into waters of the Untied States without a permit as required by Section 404 of the of the CWA [Clean Water Act, 33 U.S.C. 1251 *et seq.*]..." *U.S. v. Robert J. Lucas, Jr.*, 516 F.3d 316, 327 (5th Cir. 2008)(internal quotations omitted). Since the facts establish federal jurisdiction for the Big Hill Acres wetland under all of the *Rapanos* standards, it is difficult to comprehend how any of the purported inconsistencies in the standards or any of the circuit splits to which the defendants refer are likely to be resolved by the Supreme Court through their appeal. This case simply does not raise any of the issues most in contention in defining Clean Water Act jurisdiction. Under any and all *Rapanos* jurisdictional tests, the wetland that the defendants illegally filled and polluted is protected under the Clean Water Act.

Not only were the defendants convicted of violations of the Clean Water Act but they were also convicted of mail fraud and conspiracy. The issues of federal wetland jurisdiction raised in the Motion for Release are irrelevant to the elements of these crimes and thus to these

counts of conviction. The law supporting the convictions for mail fraud and conspiracy is well settled and unlikely to be affected by any reconsideration of federal wetland jurisdiction.

The defendants' appeal of their convictions in this case does not raise any substantial question of law or fact likely to result in reversal. The defendants' request for release from prison pending the resolution of their appeal to the Supreme Court is unwarranted and, therefore, should be denied.

Respectfully submitted,

RONALD J. TENPAS
Assistant Attorney General
Environment and Natural Resources Division

By: *s/ Jeremy Korzenik*
Jeremy F. Korzenik
Senior Trial Attorney
Environmental Crimes Section

DUNN LAMPTON
United States Attorney
Southern District of Mississippi

By: *s/ Jay T. Golden*
Jay T. Golden
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2008, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which sent notification of such filing to the following:

Phillip A. Wittmann, Esq.

Tim Holleman, Esq.

William F. Holder, Esq.

s/ Jay T. Golden
Jay T. Golden
Assistant United States Attorney