No. 14-493

In the Supreme Court of the United States

KENT RECYCLING SERVICES, LLC, PETITIONER

v.

UNITED STATES ARMY CORPS OF ENGINEERS

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Army Corps of Engineers' determination that the property at issue contains "waters of the United States" protected by the Clean Water Act, 33 U.S.C. 1251 *et seq.*, constitutes "final agency action" subject to judicial review under the Administrative Procedure Act.

2. Whether the court of appeals correctly affirmed the dismissal of petitioner's claim under the Due Process Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 761 F.3d 383. The opinion of the district court (Pet. App. C1-C10) is not published in the *Federal Supplement* but is available at 2013 WL 773730.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1-B2) was entered on July 30, 2014. The petition for a writ of certiorari was filed on October 28, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Section 301(a) of the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, prohibits the "discharge of any pollutant"—defined as the addition of any pollutant to

the "waters of the United States" from any point source—except "as in compliance with" specified provisions of the CWA. 33 U.S.C. 1311(a), 1362(7) and (12). The CWA allows discharges under two complementary permitting regimes. Section 404 authorizes the Army Corps of Engineers (Corps) to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a) and (d). Section 402 authorizes the Environmental Protection Agency (EPA) to issue permits for the discharge of any pollutant other than dredged or fill material. 33 U.S.C. 1342.

The Corps' regulations authorize (but do not require) the Corps to provide the agency's view on whether particular tracts contain "waters of the United States" that are subject to the agency's regulatory authority under Section 404 of the CWA. See 33 C.F.R. 320.1(a)(6), 331.2; 33 C.F.R. Pt. 331, App. C. After the Corps issues an "approved" jurisdictional determination, an affected party may pursue an administrative appeal of that determination within the Corps. See 33 C.F.R. Pt. 331. Such jurisdictional determinations indicate that federally regulated waters are present, but "do not include determinations that a particular activity requires a * * * permit." 33 C.F.R. 331.2. A jurisdictional determination therefore does not of its own force impose any obligations on a landowner.

Neither the CWA nor its implementing regulations require that a landowner obtain a jurisdictional determination. Whether or not it obtains such a determination, a landowner planning to discharge dredged or fill material has various options. The landowner may apply for a Section 404 permit from the Corps.

See 33 U.S.C. 1344; 33 C.F.R. Pts. 323, 325; 40 C.F.R. Pt. 230. After the landowner has exhausted its administrative remedies, the agency's final permitting decision, including the Corps' determination that the property at issue contains waters protected by the CWA, is subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See, *e.g., Carabell* v. *United States Army Corps of Eng'rs*, 391 F.3d 704, 706-707 (6th Cir. 2004), vacated on other grounds, 547 U.S. 715 (2006). The landowner may also proceed under an applicable general permit previously issued by the Corps. See 33 U.S.C. 1344(e); 33 C.F.R. Pt. 330 (nationwide permit program).

Alternatively, a landowner may proceed with its project without seeking a permit. If the activity is not subject to any exemptions (see, *e.g.*, 33 U.S.C. 1344(f)), and the government determines that a completed or ongoing discharge violates the CWA, then the government may take administrative action, including the issuance of a warning letter, a "cease and desist" order, an administrative compliance order, an administrative penalty, or a combination of those options. See 33 U.S.C. 1319(a) and (g); 33 C.F.R. 326.3(c). The recipient of an EPA compliance order may bring suit under 33 U.S.C. 1319(a) to challenge the order, and it may contend that the property is not within the coverage of the CWA. See *Sackett* v. *EPA*, 132 S. Ct. 1367, 1370 (2012). The government may also bring an enforcement action in district court to obtain injunctive and other relief. 33 U.S.C. 1319(b); 33 C.F.R. 326.5. At that time, the discharger may raise any applicable defenses, including the contention that its conduct did not violate the CWA because it did not involve a discharge into "waters of the United

States." See, *e.g.*, *United States* v. *Deaton*, 332 F.3d 698, 701-702 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004). In any of those proceedings, the fact that the landowner has received a jurisdictional determination does not expose it to increased penalties or otherwise alter its rights or obligations within the proceeding.

In *Sackett*, this Court held that an EPA compliance order, which reflects the EPA's determination that a landowner has violated the CWA by discharging without a permit and which requires remedial action, see 33 U.S.C. 1319(a)(3), is "final agency action" subject to judicial review under the APA. 5 U.S.C. 704; see 132 S. Ct. at 1371-1372. Applying the two-part test for final agency action set forth in *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997), the Court explained that the compliance order represented the "consummation" of the agency's decisionmaking process because the EPA's conclusion that the Sacketts had violated the CWA was not subject to further review within the agency. *Sackett*, 132 S. Ct. at 1372 (quoting *Bennett*, 520 U.S. at 178). The Court also concluded that the compliance order "determined rights or obligations." *Id.* at 1371 (quoting *Bennett*, 520 U.S. at 178). The Court explained that the order by its terms imposed "the legal obligation to 'restore'" the property in question, and that the order required the Sacketts to give the EPA access to their property. *Ibid.* In addition, the order imposed "legal consequences" by "expos[ing] the Sacketts to double penalties in a future enforcement proceeding" and "severely limit[ing] [their] ability to obtain a permit" under the CWA. *Id.* at 1371-1372.

2. Petitioner allegedly has an option to purchase property in Louisiana owned by Belle Company,

L.L.C. (Belle), "in the event that [the property] can be used as a solid-waste landfill." Pet. App. A1-A2; see *id.* at D4. Belle asked the Corps for the agency's determination of whether that property contains waters protected by the CWA. *Id.* at D14. In 2009, the Corps issued a preliminary jurisdictional determination stating that the property may contain "waters of the United States" subject to the Corps' regulatory authority under the CWA. *Ibid.* Belle then submitted additional information to the Corps, and in January 2011 the Corps issued an "approved" jurisdictional determination. *Ibid.* Belle, joined by petitioner, pursued an administrative appeal of the approved jurisdictional determination, and the Corps' reviewing official remanded the matter to the district engineer for further action. *Id.* at D14-D15. In February 2012, the district engineer issued the Corps' jurisdictional determination that is at issue here. *Id.* at D15.

In 2009, Belle also applied for a permit from the Corps to develop the property, but Belle stopped pursuing the permit before the Corps made a decision on that application. Pet. App. A4, A14 n.2, C2-C3. Instead of completing the permit process, Belle, joined by petitioner, brought suit in federal district court seeking vacatur of the Corps' jurisdictional determination. *Id.* at D1-D26 (complaint). Belle and petitioner alleged, *inter alia*, that the jurisdictional determination was arbitrary and capricious, and that the Corps had violated their right to due process during the administrative appeal of the jurisdictional determination. *Id.* at D19-D22.

3. The district court granted the Corps' motion for judgment on the pleadings and dismissed the complaint for lack of jurisdiction. Pet. App. C1-C10. The

court held that the Corps' jurisdictional determination was not subject to judicial review pursuant to the APA because it was not "final agency action" under *Bennett*. *Id.* at C5-C9. Relying on the Ninth Circuit's decision in *Fairbanks North Star Borough* v. *United States Army Corps of Engineers*, 543 F.3d 586, 593-594 (2008), cert. denied, 557 U.S. 919 (2009), the court held that, although the Corps' determination marked the consummation of the agency's decisionmaking process, it did not affect the legal rights or obligations of the parties. The court explained that the determination "'imposes no new or additional legal obligations,' but simply 'reminds' Belle of existing duties under the CWA." Pet. App. C7 (quoting *Fairbanks*, 543 F.3d at 595 n.10).

4. The court of appeals affirmed. Pet. App. A1-A25. The court held that the Corps' jurisdictional determination was not "final agency action" subject to judicial review under the APA. *Id.* at A6-A25. In reaching that conclusion, the court applied the two requirements for "final agency action" identified by this Court in *Bennett*. *Ibid.*

The court of appeals agreed with petitioner that the Corps' determination satisfied the first *Bennett* requirement because "the Corps has asserted its final position on the facts underlying jurisdiction—that is, the presence or absence on Belle's property of waters of the United States as defined in the CWA." Pet. App. A10. The court concluded, however, that the Corps' jurisdictional determination did not satisfy *Bennett*'s second requirement because it did not impose obligations or legal consequences on petitioner and Belle. *Id.* at A11-A19. The court explained that, when "'the action sought to be reviewed may have the

effect of forbidding or compelling conduct on the part of the person seeking to review it, but only if some further action is taken by the [agency],' that action is nonfinal and nonreviewable because it 'does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action.'" *Id.* at A11 (quoting *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 129-130 (1939), and citing *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 240-241 (1980)). The court also observed that it had previously held that a jurisdictional determination was not final. *Id.* at A12 (citing *Greater Gulfport Props., LLC* v. *United States Army Corps of Eng'rs*, 194 Fed. Appx. 250, 250 (2006) (per curiam)).

The court of appeals concluded that this Court's decision in *Sackett* did not require a different conclusion because the compliance order at issue there imposed coercive consequences, while the jurisdictional determination challenged here does not. Pet. App. A12-A19. The court explained that, whereas the compliance order reflected an agency determination that the recipient had violated the CWA, the jurisdictional determination "does not state that Belle is in violation of the CWA." *Id.* at A17. Rather, the jurisdictional determination is simply "a notification of the property's classification as wetlands [that] does not oblige Belle to do or refrain from doing anything to its property." *Id.* at A13. The court also observed that the compliance order in *Sackett* "itself imposed, independently, coercive consequences for its violation," but that the jurisdictional determination "imposes no penalties on Belle" and does not affect its ability to obtain a permit. *Id.* at A15-A16. Finally, the court of appeals explained that its holding did not impair

Belle's or petitioner's ability to contest the substance of the Corps' jurisdictional determination once its rights have been concretely affected, either by seeking judicial review of a subsequent permitting decision or by asserting the absence of CWA coverage as a defense to any enforcement action. *Id.* at A13, A18.

The court of appeals further held that the district court had properly dismissed Belle's and petitioner's claim that the Corps' administrative-appeal process deprived them of their liberty and property interests without due process of law. Pet. App. A20-A23. The court stated that "[t]he only waiver of sovereign immunity that Belle cites is the APA." *Id.* at A22. The court reiterated that Belle had not shown that the administrative-appeal process that culminated in the jurisdictional determination was final agency action. *Id.* at A22-A23.

ARGUMENT

Petitioner contends (Pet. 12-29) that the Corps' jurisdictional determination is reviewable final agency action, and that petitioner's due-process claim was improperly dismissed. Further review is not warranted. The actual property owner (Belle) has discontinued its effort to obtain judicial relief, and it is unclear whether petitioner has standing to seek review of the court of appeals' decision and whether this case continues to present a live controversy. In any event, the court of appeals' decision is correct, and it does not conflict with any decision of this Court or any other court of appeals.

1. This case is a poor vehicle to consider the questions presented because there are substantial questions concerning whether petitioner has standing to seek review and whether the case remains live.

a. It is not clear that petitioner, who allegedly holds an option to purchase the property in question, has standing to invoke this Court's jurisdiction. Article III requires that "an actual controversy * * * be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975)). In particular, if only one of two (or more) aligned parties seeks this Court's review of an adverse court of appeals decision, that party must have Article III standing in order for this Court to exercise jurisdiction. See *Diamond* v. *Charles*, 476 U.S. 54, 62-64 (1986).

Belle, the owner of the property at issue, was a plaintiff in the district court and an appellant in the court of appeals. See Pet. App. A1. Belle did not join the certiorari petition (see Pet. ii), however, nor did it otherwise seek review of the court of appeals' judgment.[1] Because petitioner alone seeks this Court's review, the Court would need to ascertain petitioner's standing to challenge the judgment below before addressing the questions presented. See *Diamond*, 476 U.S. at 64-65; cf. *Hollingsworth* v. *Perry*, 133 S. Ct.

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[1] This Court's analysis in *Diamond* suggests that, even if Belle had filed a brief as respondent in support of granting the petition, the Court would lack jurisdiction unless petitioner could establish its own Article III standing. See 476 U.S. at 63-64. In any event, Belle has not filed such a brief, and the time for doing so has expired. See Sup. Ct. R. 12.6 ("A response of a party aligned with petitioner below who supports granting the petition shall be filed within 30 days after the case is placed on the docket, and that time will not be extended."). Because the petition was docketed on October 30, 2014, Belle's time to file in support of granting the petition expired on December 1, 2014 (a Monday).

2652, 2660-2661 (2013); *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 493 (2009).[2]

The complaint alleges that, at the time Belle and petitioner filed the complaint, petitioner held an "option" to purchase the relevant property from Belle "in the event that it can be used as a solid-waste landfill." Pet. App. A2; see *id.* at D4. A plaintiff holding an option to purchase property may have standing to challenge restrictions on its use if the terms of the option give rise to a concrete interest in the property and the plaintiff has acted in reliance on the option. Compare *Warth* v. *Seldin*, 422 U.S. 490, 514-516 (1975) (association of developers lacked standing to challenge exclusionary zoning ordinance in absence of evidence of impact on specific projects), with *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 256-262 (1977) (developer holding lease on property and a contingent contract to purchase the property had standing to challenge a zoning decision, in part because the developer had already invested substantial resources in anticipation of developing the property); *Toll Bros., Inc.* v. *Township of Readington*,

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[2] The government did not argue below that petitioner lacked standing, and the lower courts did not address the question. In the courts below, the question whether petitioner had standing was of no apparent practical importance in light of Belle's evident standing to sue and appeal as owner of the property. Cf. *Diamond*, 476 U.S. at 64 (noting that, if the State of Illinois had appealed the Seventh Circuit's adverse judgment in that case, the private appellant could have participated as a party in this Court by "rid[ing] 'piggyback' on the State's undoubted standing"). In any event, the question whether petitioner has standing to challenge the court of appeals' judgment concerns the Court's jurisdiction. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (Court is "oblige[d]" to consider standing questions) (citation omitted).

555 F.3d 131, 138-141 (3d Cir. 2009) (evaluating terms of option and investment in property to determine whether developer with exclusive option to purchase land had a concrete present interest in the property).

The record in this case contains no information about the nature or terms of petitioner's option, whether the option continues to exist, or whether petitioner has invested resources in anticipation of buying the property. It is therefore not apparent from the record whether petitioner has standing to seek review of the judgment below.

b. In addition, recent developments with respect to the property at issue cast doubt on the existence of a continuing controversy.

The Corps has informed this Office that Belle has submitted a prospectus and a permit application to the Corps to use the subject property as part of a mitigation bank—that is, as wetlands that are managed and protected for purposes of providing compensatory mitigation to offset authorized impacts to other waters subject to the CWA. See 33 C.F.R. 332.1(a), 332.2, 332.8. Because the use of the property as a mitigation bank would appear to be incompatible with petitioner's plan to use the property as a "solid waste landfill," Pet. App. D4, Belle's action raises questions about the continued existence of petitioner's option to purchase the property and the extent of its continuing interest in the property. In addition, if Belle succeeds in transforming the property into a mitigation bank, it is unlikely that this case would remain live. At that point, it is unclear that petitioner would have any continuing practical ability to develop the site according to its plans, and it would therefore lack any re-

maining interest in challenging the jurisdictional determination.[3]

2. Petitioner contends (Pet. 12-26) that the Corps' jurisdictional determination is final agency action. In rejecting that argument, the court of appeals correctly applied the settled standard for identifying final agency action, see *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997), and the court's ruling does not conflict with this Court's decision in *Sackett* v. *EPA*, 132 S. Ct. 1367, 1370 (2012). Further review is not warranted.

a. The APA authorizes judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. Two conditions must be met for agency action to be "final." *Bennett*, 520 U.S. at 177-178. "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or

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[3] In addition, the jurisdictional determination that petitioner challenges has now expired. Pet. App. E2 (determination was "valid until May 15, 2014"). As a practical matter, because the jurisdictional determination expired only recently, it likely continues to reflect the Corps' current position on CWA coverage. But it is no longer in effect, and if petitioner or Belle requests a new jurisdictional determination, the Corps will evaluate whether the condition of the property has changed and will assess the CWA's coverage based on current conditions. If those conditions have not changed, the Corps would likely issue substantially the same jurisdictional determination, but if they have changed, the agency might reach a different conclusion about CWA coverage. Either way, petitioner would have the opportunity to pursue an administrative appeal of any new determination. 33 C.F.R. 331.2, 331.5. Before taking any enforcement action, moreover, the Corps would consider current circumstances in evaluating whether the CWA applies. See 65 Fed. Reg. 16,488 (Mar. 28, 2000).

from which legal consequences will flow." *Ibid.* (internal citations and quotation marks omitted). The court of appeals held that *Bennett*'s first prong was satisfied, but that the second prong was not. Petitioner therefore challenges the court's holding with respect to the second *Bennett* prong.

The court of appeals correctly held that a jurisdictional determination does not determine rights or obligations, or impose legal consequences. Pet. App. A11-A19; see *Bennett*, 520 U.S. at 178. A jurisdictional determination informs the landowner of the Corps' conclusion that the land contains "waters of the United States" and is therefore subject to the CWA's prohibition on unauthorized discharges of pollutants. 33 U.S.C. 1311(a). But the jurisdictional determination does not impose any obligations not already imposed by the CWA, nor does it direct the landowner to take (or refrain from taking) any action. If a particular tract contains waters of the United States, the CWA obligates the landowner to obtain a permit before discharging pollutants into those waters, whether or not the landowner has requested or received a jurisdictional determination from the Corps. 33 U.S.C. 1311(a); see 33 C.F.R. 331.2 (jurisdictional determinations "do not include determinations that a particular activity requires a * * * permit").

The jurisdictional determination also does not alter the manner in which the Corps may enforce the CWA, or the penalties to which a violator is potentially subject. Whether or not the Corps has issued a jurisdictional determination, if the Corps or the EPA believes that a landowner has violated the CWA by discharging pollutants without a permit, the EPA may issue an administrative compliance order (of the sort at issue

in *Sackett*), or it may institute an administrative penalty proceeding and impose a penalty. 33 U.S.C. 1319(a) and (g). Both those types of administrative action constitute final agency action and afford the landowner the opportunity to obtain judicial review, under the APA, of the agency's underlying conclusion that the land contains waters of the United States. See 33 U.S.C. 1319(g); *Sackett*, 132 S. Ct. at 1371-1372. Such enforcement actions are necessarily predicated on the agency's belief that the CWA applies to the waters in question; but the fact that the Corps has already publicly expressed that conclusion in a jurisdictional determination does not affect the substance of the compliance order or the landowner's rights in an administrative penalty proceeding. See 33 U.S.C. 1319(a) and (g). Alternatively, the United States may file a judicial enforcement action, and in that suit, the fact that the Corps had previously issued a jurisdictional determination would not alter the United States' burden of establishing that the land contains waters of the United States. 33 U.S.C. 1319(b).

In any of those proceedings, moreover, the only potential liability the landowner would face would be liability for violating the CWA. Because the jurisdictional determination does not contain any directive that could be violated, the CWA does not provide for additional penalties for violating a jurisdictional determination, as opposed to the statute itself. See 33 U.S.C. 1319(d). Before and after a jurisdictional determination is issued, the landowner therefore faces the same legal regime, the same potential obligations, and the same legal exposure.

As a practical matter, a landowner who receives a jurisdictional determination may feel more con-

strained to seek a permit than someone who has not received a similar determination. But that incentive arises solely from the additional information that a jurisdictional determination conveys about the agency's view of the CWA's coverage—not from any independent obligation to seek a permit imposed by the jurisdictional determination. That sort of practical effect, absent any actual legal obligation or consequence, is not sufficient to render the action final. See *National Ass'n of Home Builders* v. *Norton*, 415 F.3d 8, 13-16 (D.C. Cir. 2005) (incentive to comply voluntarily with agency's guidance concerning underlying statutory obligation is insufficient to establish legal consequences under *Bennett*).

The court below therefore correctly held that the jurisdictional determination is not final agency action. That holding is consistent with the decision of the other court of appeals that has considered the issue. See *Fairbanks N. Star Borough* v. *United States Army Corps of Eng'rs*, 543 F.3d 586 (9th Cir. 2008), cert. denied, 557 U.S. 919 (2009).[4]

b. Petitioner contends (Pet. 12-18) that the decision below conflicts with *Sackett*, which held that an EPA administrative compliance order is "final agency action." 132 S. Ct. at 1371-1372. *Sackett* is distinguishable, however, because the Court relied on several independently coercive aspects of the compliance order—features that a jurisdictional determination does not share—that materially increased the landowner's obligations and the potential legal consequences it faced for violating the CWA.

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[4] The issue is currently pending in the Eighth Circuit as well. *Hawkes Co.* v. *United States Army Corps of Eng'rs*, No. 13-3067 (argued Dec. 11, 2014).

i. In *Sackett*, the EPA had issued an administrative compliance order against the Sacketts, asserting that their property contained waters of the United States and that the Sacketts had violated the CWA by discharging fill material onto the property. 132 S. Ct. at 1370-1371; see 33 U.S.C. 1319(a)(3) (when the EPA finds "that any person is in violation of" the CWA, it may issue a compliance order "requiring such person to comply with" the statute). The Court held that the compliance order satisfied *Bennett*'s first prong because the order "mark[ed] the 'consummation' of the agency's decisionmaking process" with respect to the CWA's coverage and the existence of a violation. *Sackett*, 132 S. Ct. at 1372 (quoting 520 U.S. at 178); *id.* at 1374-1375 (Ginsburg, J., concurring). The Court reasoned that the Sacketts had no entitlement to further agency review of those determinations. *Id.* at 1372.

In holding that the compliance order also satisfied *Bennett*'s second prong, the Court relied on the compliance order's imposition of obligations and legal consequences beyond those already established by the CWA. The Court explained that the compliance order determined "rights or obligations" under *Bennett*'s second prong because it imposed a "legal obligation" on the Sacketts to "'restore' their property according to an agency-approved Restoration Work Plan," and to give the EPA access to the property and relevant documentation. *Sackett*, 132 S. Ct. at 1371 (quoting 520 U.S. at 178). The Court also concluded that "'legal consequences . . . flow' from issuance of the order" because, under the CWA, a landowner can be liable for penalties for violating the compliance order itself, in addition to penalties for violating the statute.

Ibid. (quoting *Bennett*, 520 U.S. at 178, and assuming without deciding that the Sacketts faced penalties for violating the order in addition to violating the CWA). The compliance order also "severely limit[ed] the Sacketts' ability to obtain a permit for their fill" under Corps regulations limiting permits for activities that are the subject of a compliance order. *Id.* at 1372.

ii. Unlike the compliance order at issue in *Sackett*, the jurisdictional determination that petitioner seeks to challenge does not alter petitioner's obligations or impose legal consequences within the meaning of *Bennett*'s second prong.

A jurisdictional determination does not contain any finding that the landowner has violated the CWA, and it therefore does not direct the landowner to take any action, such as restoring the property or providing the EPA with access to the property. Cf. *Sackett*, 132 S. Ct. at 1371. The jurisdictional determination enables the property owner to take into account the agency's view of CWA coverage in determining whether to refrain from discharging pollutants, to seek a permit, or to decline to seek a permit and proceed at its own risk. But it does not *require* the landowner to take any action that is not already required by the CWA (such as obtaining a permit to discharge pollutants into covered waters).

Unlike the compliance order in *Sackett*, moreover, the jurisdictional determination at issue here does not expose petitioner (or Belle) to penalties for noncompliance with the jurisdictional determination itself. See *Sackett*, 132 S. Ct. at 1371. The only penalties to which a landowner is potentially subject are the penalties that the CWA provides for violating the statute. 33 U.S.C. 1319(d). Finally, the jurisdictional determi-

nation has no impact on petitioner's (or Belle's) ability to obtain a permit, as the regulations limiting permits for activities that are the subject of a compliance order do not apply here. See 33 C.F.R. 326.3(e)(1)(iv); *Sackett*, 132 S. Ct. at 1372. In sum, a jurisdictional determination possesses none of the coercive features that were dispositive in *Sackett*.

c. Petitioner's other arguments (Pet. 17-23) with respect to *Bennett*'s second prong are likewise unpersuasive.

i. Petitioner asserts (Pet. 17) that the jurisdictional determination "establishes a prima facie violation for discharging fill on the property without a permit." This is incorrect. If petitioner discharged fill materials on the property without a permit and the discharges did not fall within any exemption (see, *e.g.*, 33 U.S.C. 1344(f)), the government might file an enforcement action against petitioner. 33 U.S.C. 1319; see 33 C.F.R. 326.3(c); see also 33 U.S.C. 1365 (providing for citizen suits). In such an action, the government would be required to establish that the land in question in fact contains waters covered by the CWA, and the court would resolve that question without deference to any jurisdictional determination previously issued by the agency. *Fairbanks*, 543 F.3d at 594-595. Alternatively, the EPA could issue an administrative compliance order or institute an administrative penalty proceeding. See 33 U.S.C. 1319(b) and (g). Petitioner could then contest CWA coverage in seeking APA review of the compliance order or administrative penalty. *Sackett*, 132 S. Ct. at 1371-1374. In that situation as well, the fact that the Corps had previously issued a jurisdictional determination

would not alter the applicable standard of judicial review.[5]

Petitioner further asserts (Pet. 17) that the jurisdictional determination "converts an unauthorized discharge from an unknowing or negligent act into a knowing violation," which could increase civil and criminal penalties. The CWA directs a court in assessing an appropriate civil penalty for a violation to consider, *inter alia*, any "good-faith efforts" to comply with the CWA's requirements. 33 U.S.C. 1319(d). In addition, the CWA imposes criminal penalties for violating certain enumerated provisions of the statute, and knowing violations are subject to greater potential penalties. 33 U.S.C. 1319(c)(1)-(2). But those provisions do not mention, much less assign any particular evidentiary weight to, the Corps' prior issuance of a jurisdictional determination.

To be sure, a property owner's receipt of a jurisdictional determination—and its consequent knowledge that the agency believes the CWA applies to the

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[5] Petitioner also notes (Pet. 4, 8) that a Corps regulation states that a jurisdictional determination "shall constitute a Corps final agency action." 33 C.F.R. 320.1(a)(6). As the court of appeals correctly concluded, however, that provision is intended to inform the public that it can rely on the jurisdictional determination as the agency's considered decision, not to suggest that a jurisdictional determination is "final agency action" for purposes of judicial review under the APA. See Pet. App. A16 n.3; 51 Fed. Reg. 41,207 (Nov. 13, 1986) (explaining purpose of promulgating Section 320.1(a)(6)); 65 Fed. Reg. at 16,488 (explaining that Section 320.1(a)(6) does not establish that jurisdictional determinations are final or ripe for purposes of APA review, and that the Corps views jurisdictional determinations as not subject to immediate judicial review). The Corps' interpretation of its own regulations is entitled to deference. See *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).

land—might be offered as evidence of the owner's knowledge of its obligations under the CWA. See *Fairbanks*, 543 F.3d at 595. But the same could be said of any number of non-final agency warnings or opinion letters—or, for that matter, a private consultant's report concluding that the property contains waters protected by the CWA. "[T]hus, any difficulty [petitioner] might face in establishing good faith flows not from the *legal* status of the Corps' determination as agency action, but instead from the *practical* effect of [petitioner] having been placed on notice that construction might require a Section 404 permit." *Ibid.*

Petitioner also contends (Pet. 17, 21-22) that the jurisdictional determination "severely limits [its] ability to use the property for a waste disposal site because [petitioner] must now obtain a federal Clean Water Act (section 404) permit before the project can proceed." Pet. 17. The jurisdictional determination, however, is not the source of the obligation to secure a permit; the CWA is. Petitioner and Belle retain the ability either to proceed with construction or to apply for a permit, just as they did before the jurisdictional determination was issued. And if petitioner discharges pollutants onto the property without first obtaining a permit, it will be no more or less in violation of the CWA than if it had never requested an approved jurisdictional determination. See pp. 13-14, *supra*.

Petitioner does not dispute that it (or Belle) has the option of applying for a permit, and that it could obtain judicial review of the underlying coverage determination if its application is denied or if it disagrees with the permit's terms. Although petitioner would prefer to avoid the permitting process, that preference does not transform the jurisdictional determina-

tion into final agency action. An agency action is not final when it does not itself adversely affect a regulated entity's rights, but instead merely requires the entity to participate in agency adjudicatory proceedings. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 239-243 (1980) (agency complaint requiring a company to respond in an administrative adjudication was not final agency action); *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 129-130 (1939) (explaining that agency order is not immediately reviewable if it "does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action"). The burden of participating in an administrative process, even where "substantial," is different in kind and legal effect from the burden attending "final agency action." *Standard Oil*, 449 U.S. at 242.

Petitioner argues (Pet. 18) that the jurisdictional determination reduces the value of the relevant property. Any impact on the property's value resulting from the risk of CWA enforcement arises from the *statute's* requirements. The jurisdictional determination might as a practical matter affect a private party's calculation of the likelihood of CWA enforcement, but it does not itself give rise to the legal jeopardy of which petitioner complains. See *Reliable Automatic Sprinkler Co.* v. *Consumer Prod. Safety Comm'n*, 324 F.3d 726, 732-733 (D.C. Cir. 2003) (agency action does not become final simply because practical "consequences attach to any parties who are the subjects of Government investigations and believe that the relevant law does not apply to them").[6]

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[6] Petitioner's challenge to the jurisdictional determination is also not ripe for judicial review. Determining whether an agency action

ii. The pre-*Bennett* decisions on which petitioner relies (Pet. 19-21) are inapposite. In *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970), the Court held that a Federal Maritime Commission order that determined certain cargo fees was a final agency action. By altering the fee structure, the order imposed immediate "legal consequences" not imposed by the statute itself. *Id.* at 70-71. Similarly in *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956), the Court addressed an Interstate Commerce Commission (ICC) order exercising the ICC's authority to determine the commodities that fell within a statutory "agricultural" exemption to a permitting requirement. *Id.* at 41-42. The Court found that the order was final and reviewable because it established a rule of general applicability that had the force of law and would immediately cause the industry to alter its conduct based on the specific prescriptions contained in the order. *Id.* at 44. The jurisdictional determination at issue here, by contrast, simply expresses the agency's view as to

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is ripe for judicial review generally requires a court to evaluate the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148-152 (1967). The jurisdictional determination has now expired, and the Corps would issue a new determination upon request and only after considering whether current circumstances warrant any change in its conclusions. See note 3, *supra*. In addition, even assuming that the agency continues to hold the views expressed in the determination, Belle and petitioner may apply for a permit if they wish to discharge fill material in developing the property. Pet. App. E2, E5. It is possible that petitioner or Belle could receive a permit entitling it to develop the property without objectionable restrictions. Those uncertainties demonstrate that petitioner's suit is not ripe.

whether a particular site contains waters within the CWA's coverage. It informs the landowner's calculus of its legal risk without altering its obligations under the statute.

2. Petitioner challenges (Pet. 23-26) the court of appeals' conclusion that seeking review of the Corps' denial of a permit provides an adequate means of obtaining judicial review of the Corps' jurisdictional determination. Pet. App. A19 n.4. The court reasoned that, because the permit-review avenue existed, the Corps' jurisdictional determination was not an agency action for which there is "no other adequate remedy in a court." 5 U.S.C. 704. Petitioner does not contend that the court's conclusion conflicts with any decision of this Court or another court of appeals. Further review is not warranted.

The permitting process affords landowners an adequate avenue of obtaining judicial review of the Corps' jurisdictional determinations.[7] When the Corps denies a permit application, or issues a permit subject to conditions that the applicant opposes, the applicant may seek judicial review of that decision, including any determination about whether the waters on its property are covered by the CWA. See 33 U.S.C. 1344(a); 33 C.F.R. 331.10, 331.12; see also *Precon Dev.*

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[7] In *Sackett*, the Court concluded that the Corps' permitting process did not provide an adequate means of seeking review of an EPA compliance order, based on a circumstance not present here. Because the *EPA* (rather than the Corps) had issued the compliance order, the Court stated that judicial review of the Corps' permitting decision would not "provide an 'adequate remedy' for action already taken by another agency." 132 S. Ct. at 1372. Here, the Corps "issued the [jurisdictional determination], so it is not the case that the only alternative remedy is one provided by a different agency." Pet. App. A19 n.4.

Corp. v. *United States Army Corps of Eng'rs*, 633 F.3d 278, 287-297 (4th Cir. 2011). Many parties have obtained judicial review of a jurisdictional determination through that route. See, *e.g.*, *Carabell*, 391 F.3d at 706-707. And if the Corps grants a permit that petitioner accepts, there will be no need for judicial review of the threshold jurisdictional determination.

Petitioner contends that the permit procedure cannot serve as an "adequate remedy in a court," 5 U.S.C. 704, because the jurisdictional determination is "not subject to additional review * * * in the permit process." Pet. 23. That argument is misconceived. Section 704 asks whether the party has another adequate means of obtaining *judicial* review of the agency determination in question. 5 U.S.C. 704. The fact that the *Corps* generally does not revisit its jurisdictional determination during the permitting process does not suggest that the permitting procedure is an inadequate means of obtaining judicial review of the jurisdictional determination.[8]

Finally, petitioner argues (Pet. 23-24) that the permitting process is a "useless" and "punitive" procedure. That contention is at bottom a disagreement with Congress's determination that a permitting system is the most appropriate means of protecting the waters of the United States. Cf. *West Va. Highlands Conservancy, Inc.* v. *Huffman*, 625 F.3d 159, 169-170 (4th Cir. 2010) (noting that Congress considered the costs of a permitting system before deciding that "a

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[8] In addition, the Corps could revisit the jurisdictional determination during the permitting process, since an entity seeking a permit may argue to the Corps that circumstances have changed and that the land should no longer be treated as containing waters of the United States. See Gov't C.A. Br. 42.

permitting scheme is the crucial instrument for protecting natural resources"). Petitioner's desire to avoid the permitting process does not render that process an inadequate avenue for seeking judicial review.

3. Petitioner challenges (Pet. 26-28) the dismissal for lack of subject-matter jurisdiction of its due-process claim. Petitioner contends (Pet. 26, 28) that this aspect of the decision below conflicts with *Trudeau* v. *FTC*, 456 F.3d 178 (D.C. Cir. 2006), and with decisions of the Eighth and Ninth Circuits. No square conflict exists, and further review is not warranted.

As an initial matter, petitioner appears to have altered the thrust of its due-process claim on appeal. In the district court, petitioner characterized the claim as a facial challenge to the Corps' administrative-appeal procedures. On appeal, petitioner recast the claim as an as-applied challenge to the Corps' conduct in making the jurisdictional determination, alleging for the first time that specific Corps officials had acted in a biased manner during the administrative-appeal process. See Pet. App. A20; compare *id.* at D19-D20, with Pet. C.A. Br. 33-35. Petitioner's continuing interest in challenging the Corps' conduct in deliberating over the now-expired jurisdictional determination is slight at best. If petitioner were to request a new jurisdictional determination, it would be entitled to a new administrative appeal. See note 3, *supra*.

In any event, there is no square conflict warranting the Court's review. In *Trudeau*, the D.C. Circuit held that Section 704's requirement of "final" agency action is not a condition of the APA's waiver of sovereign immunity. 456 F.3d at 187; accord *The Presbyterian Church (U.S.A.)* v. *United States*, 870 F.2d 518, 525

(9th Cir. 1989); *Red Lake Band of Chippewa Indians* v. *Barlow*, 846 F.2d 474, 476 (8th Cir. 1988). Rather, the court held, the "final" agency action requirement is a component of the APA's right of action, such that a party relying on the APA as the right of action for its claim against an agency must plead final agency action in order to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Trudeau*, 456 F.3d at 188-189. The D.C. Circuit thus concluded that, when a plaintiff asserts a claim based on a non-statutory or constitutional right of action rather than on the APA, Section 704 does not require it to demonstrate that the agency's action is final, even if the plaintiff is relying on the APA's waiver of sovereign immunity. *Ibid.*

Trudeau does not squarely conflict with Fifth Circuit precedent. In a precedential decision issued shortly before the decision below, the Fifth Circuit held that, when a plaintiff asserts a "statutory or non-statutory cause of action that arises completely apart from the general provisions of the APA," the APA's waiver of sovereign immunity is not conditioned on the existence of "final" agency action. *Alabama-Coushatta Tribe* v. *United States*, 757 F.3d 484, 489 (2014). That holding is consistent with *Trudeau* and with the other decisions on which petitioner relies. With respect to claims that rely on the APA as establishing the requisite cause of action, the court in *Alabama-Coushatta* held that the waiver of sovereign immunity *is* conditioned on the existence of final agency action. *Ibid.* That holding deviates from *Trudeau*, which held that for such claims, "final" agency action is an element of the cause of action but not a condition of Section 702's waiver of sovereign immuni-

ty. But that distinction will ordinarily have little practical consequence: under both decisions, when the plaintiff relies on the APA as establishing its right of action, it must establish final agency action in order to survive a motion to dismiss, either under Federal Rule of Civil Procedure 12(b)(1) or under Rule 12(b)(6).

The decision below can be read to suggest, contrary to *Alabama-Coushatta*, that Section 704's final agency action requirement is a condition of the APA's sovereign-immunity waiver with respect to *all* claims, including constitutional claims. Pet. App. A21-A23; see also *Taylor-Callahan-Coleman Cntys. Dist. Adult Prob. Dep't* v. *Dole*, 948 F.2d 953, 956 (5th Cir. 1991) (stating without explanation that "final agency action" is a condition of APA's sovereign-immunity waiver with respect to a claim under the Due Process Clause). But in light of the Fifth Circuit's extended discussion of the issue in *Alabama-Coushatta*, the Fifth Circuit's position appears to be unsettled. The court of appeals may in the future resolve the issue through an en banc proceeding. There is accordingly no square disagreement between the Fifth Circuit's precedent and the other decisions on which petitioner relies, and any intra-circuit disagreement within the Fifth Circuit does not warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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