

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
TO THE PETITION FOR REHEARING**

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This Court should deny petitioner’s request that the Court reconsider its order denying review of the Fifth Circuit’s decision in *Belle Co. v. United States Army Corps of Engineers*, 761 F.3d 383 (2014), cert. denied, 135 S. Ct. 1548 (2015). Petitioner seeks rehearing on the ground that, after this Court denied certiorari, the Eighth Circuit issued a decision that conflicts with the decision below. See *Hawkes Co. v. United States Army Corps of Eng’rs*, 782 F.3d 994 (2015); see also Pet. for Reh’g 2-7. Although petitioner is correct that the Eighth Circuit’s decision creates a circuit conflict, the government has filed a petition for panel rehearing and rehearing en banc in *Hawkes*. See 13-3067 Docket entry (June 9, 2015) (Gov’t Pet. for Panel Reh’g and Reh’g En Banc). If the Eighth Circuit grants rehearing in *Hawkes*, it may eliminate

the circuit conflict on the first question presented in the petition for a writ of certiorari in this case.

Although petitioner does not expressly limit its rehearing request to the first question presented in the certiorari petition, neither the Eighth Circuit's decision in *Hawkes* nor any other intervening event casts doubt on the Court's prior decision to deny review on the second question presented. In addition, this case is a poor vehicle to consider the questions presented, since it is unclear whether petitioner has standing to challenge the Fifth Circuit's decision and whether the case remains live. Rehearing is not warranted.

1. Petitioner seeks to challenge a jurisdictional determination by the United States Army Corps of Engineers (Corps) that particular property contains "waters of the United States" and is therefore subject to the Clean Water Act (CWA), 33 U.S.C. 1362(7). The Fifth Circuit held that a jurisdictional determination is not "final agency action" subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 704. Pet. App. A6-A25. Petitioner filed a petition for a writ of certiorari, contending (at 12-13) that a jurisdictional determination is final agency action, and that the Corps had violated petitioner's due process rights in the course of formulating the jurisdictional determination. On March 23, 2015, this Court denied certiorari. 135 S. Ct. 1548. Petitioner seeks reconsideration of that order on the ground that, after this Court denied review, the Eighth Circuit held that a jurisdictional determination does constitute final agency action reviewable under the APA. See Pet. for Reh'g 2-3 (citing *Hawkes, supra*).

Petitioner is correct that *Hawkes* conflicts with the decision below. In this case, the Fifth Circuit held that a jurisdictional determination does not satisfy the test for final agency action set forth in *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997), because it does not impose legal obligations or consequences beyond those already imposed by the CWA itself. Pet. App. A11-A19; see *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586 (9th Cir. 2008) (reaching same conclusion), cert. denied, 557 U.S. 919 (2009). The Fifth Circuit also concluded that this Court's decision in *Sackett v. EPA*, 132 S. Ct. 1367 (2012), which held that an EPA compliance order is reviewable final agency action, did not require a different result. Pet. App. A12-A19 & n.4. The Fifth Circuit explained that, unlike the jurisdictional determination that petitioner seeks to challenge, the compliance order at issue in *Sackett* imposed coercive legal consequences going beyond those imposed by the CWA. *Id.* at A15-A16.

On April 10, 2015, a panel of the Eighth Circuit held in *Hawkes, supra*, that a jurisdictional determination constitutes final agency action under *Bennett*. Pet. for Reh'g App. A14-A15. In the Eighth Circuit's view, a jurisdictional determination imposes legal obligations beyond those imposed by the CWA because it "requires" a property owner either to seek a permit or risk enforcement penalties, *id.* at A10, thereby "alter[ing] and adversely affect[ing]" the property owner's "right to use [its] property," *id.* at A11. The court of appeals also stated that "*Sackett* reflected concern that failing to permit immediate judicial review of assertions of CWA jurisdiction would leave regulated parties" unable to seek review.

Id. at A13-A14. The court therefore held that a “properly pragmatic analysis of * * * final agency action principles compels the conclusion that an [a]pproved [jurisdictional determination] is subject to immediate judicial review.” *Id.* at A14.

Although the panel decision in *Hawkes* created a circuit conflict on the question whether a jurisdictional determination is final agency action, that panel decision may not be the Eighth Circuit’s last word on the subject. The mandate in *Hawkes* has not yet issued, and the government has filed a petition for panel rehearing and rehearing en banc. See 13-3067 Gov’t Pet. for Panel Reh’g and Reh’g En Banc. If the Eighth Circuit grants rehearing and aligns itself with the Fifth and Ninth Circuits, its decision will eliminate the current conflict on the first question presented in this case. The panel decision in *Hawkes* therefore is an insufficient basis for reconsidering this Court’s denial of certiorari.

2. In addition to the “final agency action” issue, the certiorari petition presents the question whether the Corps violated petitioner’s due process rights. See Pet. i. As the government explained in its brief in opposition (at 25-27), the court of appeals’ rejection of petitioner’s due process claim is correct and does not squarely conflict with any decision of another court of appeals. This Court’s denial of certiorari reflects the Court’s evident determination that the second question presented did not warrant further review.

Although the rehearing petition is not explicitly limited to the first question presented in the petition for certiorari, petitioner does not contend that the Eighth Circuit’s decision in *Hawkes* sheds light on the proper resolution of the due process issue. Nor does

petitioner contend that any other “intervening circumstances of a substantial or controlling effect” have arisen, or that any “other substantial grounds not previously presented” warrant rehearing on that question. Sup. Ct. R. 44.2. Rehearing on the second question presented in the petition for a writ of certiorari therefore should be denied.

3. Rehearing is unwarranted for the additional reason that this case would be a poor vehicle to consider the questions presented. As the government explained in its brief in opposition (at 8-12), there are substantial questions concerning whether petitioner has standing to challenge the Fifth Circuit’s decision and whether the case remains live.

a. Belle Company, L.L.C. (Belle), the owner of the property at issue in this case, did not file its own certiorari petition challenging the judgment below. This Court therefore could not address the questions presented without first determining whether petitioner has standing to invoke the Court’s jurisdiction. See Br. in Opp. 9-10. Petitioner’s assertion of standing is based on its allegation that it holds an option to purchase the property in question. Pet. App. A2; see *id.* at D4 (Compl. ¶ 14).

An option-holder’s standing to challenge restrictions on the use of particular property depends on whether the terms of the option give rise to a concrete interest in the property and on whether the option-holder has acted in reliance on the option. See Br. in Opp. 10 (citing *Warth v. Seldin*, 422 U.S. 490, 514-516 (1975), and *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 256-262 (1977)). The complaint and the record in this case, however, contain no information about the nature or terms of

petitioner's option. See Pet. App. D4 (Compl. ¶ 14) (alleging only that petitioner "has an option to purchase the Property if it can be used * * * as a solid waste landfill"); *id.* at D12-D14 (Compl. ¶¶ 60-69) (discussing Belle's interest in the property without mentioning petitioner). Instead, the complaint contains only the conclusory assertion that petitioner is "adversely affected and aggrieved" by the jurisdictional determination. *Id.* at D5 (Compl. ¶ 21). That bare assertion is insufficient to allege standing. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In its reply brief in support of certiorari, petitioner did not dispute that its assertion of standing is based solely on its alleged option to purchase the property at issue. Reply Br. 1-2. Nor did petitioner dispute that the option may confer standing only if it creates a concrete interest on which petitioner has relied. *Ibid.* Although petitioner represented at that time that "the option remains in place," *id.* at 1, and asserted without elaboration that it has expended resources "on the project," *id.* at 1 n.1, petitioner did not explain the terms of the option or assert that those terms create a concrete interest. Rather, petitioner argued only that its "standing was * * * established" because, at the motion-to-dismiss stage, the allegations in the complaint must be taken as true. *Id.* at 1. But the complaint contains no allegations pertaining to the terms of the option or petitioner's reliance thereon. Petitioner's standing therefore remains unclear.

b. This case may not present a continuing controversy. Belle, the owner of the property at issue, has applied for a permit to use the property as part of a mitigation bank (*i.e.*, as wetlands that will be protected in order to offset authorized impacts to other wa-

ters protected by the CWA). Br. in Opp. 11-12. Because that use of the property appears to be incompatible with petitioner's asserted plan to use the property as a "solid waste landfill," Pet. App. D4 (Compl. ¶ 14), the extent of petitioner's continuing interest in the property, and its practical ability to use the property for petitioner's desired purpose, are unclear.

Petitioner has asserted (Reply Br. 1 n.1) that Belle's "current permitting efforts" are "a prudent back up plan." Petitioner may be suggesting that Belle's pursuit of an approved mitigation bank and associated permit application should not affect the existence of a live controversy because Belle will pursue the mitigation-bank plan only if this Court does not grant review of the Fifth Circuit's decision. But Belle itself has neither filed its own petition for a writ of certiorari nor joined in (or supported as *amicus curiae*) petitioner's request for review.

Instead, Belle is actively pursuing a mitigation-bank instrument and permit. The Corps informs this Office that Belle has submitted an initial mitigation-banking prospectus, had the prospectus advertised by public notice, undergone a site visit, and submitted a revised prospectus in response to comments from resource agencies. The revised prospectus has been forwarded to resource agencies for coordination prior to preparation of the draft mitigation-banking instrument. Those actions cast doubt on petitioner's contention that Belle intends to pursue the mitigation-bank plan only if the Fifth Circuit's decision stands. As a result, even if petitioner were to obtain the relief it seeks here—judicial review of the jurisdictional determination—it is unclear whether petitioner would be

able to exercise its option on the property and utilize it as a solid waste landfill.

c. Finally, the jurisdictional determination at issue in this case expired on May 15, 2014. See Pet. App. E2. As the government stated in its brief in opposition (at 12 n.3), if petitioner or Belle were to seek a new jurisdictional determination, the Corps would assess the CWA's coverage based on current conditions.

After the Court denied review in this case, the Corps and EPA issued a new rule clarifying the agencies' interpretation of the scope of their jurisdiction under the CWA. See *Prepublication Version of the Final Clean Water Rule: Definition of "Waters of the United States"* 7 (June 2, 2015), <http://www2.epa.gov/cleanwaterrule/prepublication-version-final-clean-water-rule> (signed May 27, 2015, forthcoming in Federal Register) ("In this final rule, the agencies clarify the scope of 'waters of the United States' that are protected under the [CWA], based upon the text of the statute, Supreme Court decisions, the best available peer-reviewed science, public input, and the agencies' technical expertise and experience in implementing the statute."). If petitioner or Belle were to request a new approved jurisdictional determination after the rule's effective date, the Corps would evaluate that request under the new rule, and the agency might not issue the same jurisdictional determination.

* * * * *

The petition for rehearing should be denied.
Respectfully submitted.

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