No. _____

In the

Supreme Court of the United States

KENT RECYCLING SERVICES, LLC,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Clean Water Act, the Army Corps of Engineers may issue a site-specific Jurisdictional Determination delineating "waters of the United States" on private land subject to federal regulation. The Ninth and Fifth Circuits hold that a Determination is conclusive as to federal jurisdiction. A Determination effectively prohibits the land owner from using the regulated portion of his land without a federal permit. But, in conflict with this Court's unanimous decision in *Sackett v. EPA*, these courts refuse to review such Determinations under the Administrative Procedure Act, holding they create no legal consequences and are not "final agency action." According to these Circuits, a landowner may bring a challenge to such a Determination in court only *after* making a prohibitively costly and time-consuming application for a permit, which the Corps has issued or denied. This application would be unnecessary, and outside the agency's power to decide, if the Determination is wrong, as Petitioner contends in this case. Moreover, in conflict with other Circuits, the Fifth Circuit held below that a due process challenge to a Jurisdictional Determination is also subject to this onerous permit requirement to establish "final agency action"under the APA.

1. Is a Jurisdictional Determination, that is conclusive as to federal jurisdiction under the Clean Water Act, and binding on all parties, subject to judicial review under the Administrative Procedure Act?

2. Is a due process claim against an agency action subject to the finality requirement of the Administrative Procedure Act?

LIST OF ALL PARTIES

Petitioner: Kent Recycling Services, LLC. Belle Company, LLC was a party below but does not join this Petition.

Respondent: United States Army Corps of Engineers.

CORPORATE DISCLOSURE STATEMENT

Kent Recycling Service has no parent corporation and no publicly held company owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Kent Recycling Services, LLC, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 761 F.3d. 383 (5th Cir. 2014), Appendix (App.) A. The opinion of the district court, filed on February 28, 2013, was not reported but is included as App. C.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 30, 2014, and is included as App. B. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See* Sup. Ct. Rule 13.3.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. V.

The Clean Water Act (CWA) provides in pertinent part:

> Except as in compliance with this section and section[] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a) (CWA § 301(a)).

> The Secretary may issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill materials into the navigable waters at specified disposal sites.

33 U.S.C. § 1344(a) (CWA § 404(a)).

> (5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.
>
> (6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . . .
>
> (7) The term "navigable waters" means the waters of the United States, including the territorial seas.

33 U.S.C. § 1362(5)-(7) (CWA § 502(5)-(7)).

Federal regulations define "waters of the United States" to mean:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (I) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or . . .
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
>
> (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
>
> (5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

> (6) The territorial seas;
>
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

33 C.F.R. § 328.3(a) (2005).

Federal regulations define "adjacent" as "bordering, contiguous, or neighboring." 33 C.F.R. § 328.3(c).

Federal regulations also authorize the Corps of Engineers "to issue formal determinations concerning the applicability of the Clean Water Act . . . to activities or tracts of land and the applicability of general permits or statutory exemptions to proposed activities." 33 C.F.R. § 320.1(a)(6); 325.9. The Corps has an administrative appeal process through which it reviews initial Jurisdictional Determinations. 33 C.F.R. § 331.

Finally, federal regulations state:

> A determination pursuant to this authorization shall constitute a Corps final agency action.

33 C.F.R. § 320.1(a)(6).

INTRODUCTION

This case raises questions of statutory and constitutional law of importance to tens of thousands, if not all, landowners in the Country. Under the Clean Water Act, the Army Corps of Engineers asserts regulatory authority over almost all waters (and much land) in the United States, including tributaries, ditches, ponds, ephemeral streams, drains, wetlands,

riparian areas and "other waters." *See "Definition of 'Waters of the United States' Under the Clean Water Act"* Proposed Rule - 79 Fed. Reg. 22188 (Apr. 21, 2014). On more than one occasion, this Court has chastised the federal government for overreaching and abusing its power under the Act. *See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (holding that regulation of remote ponds exceeds statutory authority and raises constitutional questions.); *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality holding that the agency's expansive interpretation of the Clean Water Act is over broad and creates federalism problems.); and *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367, 1375 (2012) (J. Alito concurrence opining that the "reach of the Clean Water Act is notoriously unclear" and that "any piece of land that is wet at least part of the year" may be covered by the Act, "putting property owners at the agency's mercy.").

It is imperative, therefore, that the courts safeguard a landowner's right to challenge the government's erroneous application of the law to his property. But that safeguard failed in this case, establishing a dangerous precedent. The Fifth Circuit held that a landowner is not entitled to immediate judicial review of a Clean Water Act Jurisdictional Determination, even though the determination is the Agency's "last word" on federal jurisdiction. Instead, the landowner has three options: (1) abandon his use of the land; (2) go through the pointless and costly permit process (averaging more than $270,000 and over 2 years); or (3), proceed without a permit, risking immense fines of $37,500 a day and imprisonment. These are not legitimate options. They are punitive sanctions imposed on landowners who dare to

challenge federal jurisdiction under the Clean Water Act.

Moreover, the Fifth Circuit decision conflicts with Supreme Court case law, including this Court's recent landmark decision in *Sackett v. EPA* wherein this Court overturned decades of uniform case law prohibiting judicial review of compliance orders issued pursuant to the Clean Water Act. This Court held unanimously that a determination of federal jurisdiction, issued through a compliance order, is "final" and subject to judicial review under the Administrative Procedure Act (APA). Like the determination in *Sackett*, the Jurisdictional Determination in this case has immediate and direct legal consequences. It is, in fact, an adjudicative decision that applies the law to the specific facts of this case and is legally binding on the agency and the landowner, thereby fixing a legal relationship, the sine qua non of "final agency action."

Additionally, the Corps' issuance of a Jurisdictional Determination, that was held inadequate on administrative appeal, is a clear due process violation that should be heard. For these reasons, more fully explained below, this Court should grant the writ of certiorari.

STATEMENT OF THE CASE

The Clean Water Act authorizes the Corps of Engineers to regulate certain discharges to "navigable waters" or "waters of the United States." 33 U.S.C. §§ 1311(a) and 1362(7). The term "navigable waters" has been variously defined by the Corps over the years, but this Court rejected those definitions and refined the term most recently in *Rapanos v. United States*, 547 U.S. 715. In *Rapanos*, the plurality defined "navigable waters" as traditional navigable waters (capable of use in interstate commerce) and nonnavigable but relatively permanent rivers, lakes, and streams, as well as abutting wetlands, with a continuous surface water connection to traditional navigable waters. *Id*. at 739-42. In a solo concurrence, Justice Kennedy opined that the Clean Water Act covered wetlands with a significant physical, biological, and chemical connection to a traditional navigable water. *Id*. at 779. As a matter of practice, the Corps seeks to establish federal jurisdiction over wetlands under either the plurality's "continuous surface water" test or Justice Kennedy's "significant nexus" test. *See United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009). Which waters are subject to federal regulation under the Clean Water Act is still a subject of national debate. *See* Pub. Nat. Resources L. Â § 19:21 (2nd ed.) 2 Pub. Nat. Resources L. Â § 19:21 (2nd ed.) (2014)

Federal regulations authorize the Army Corps of Engineers to issue landowners with a wetland delineation called a Jurisdictional Determination (or JD). *See* 33 C.F.R. § 320.1(a)(6). A Jurisdictional Determination applies statutory, regulatory, and judicial standards to determine federal jurisdiction on a particular parcel and involves a detailed site-specific

analysis that identifies the nature and extent of covered waters. A Jurisdictional Determination is subject to administrative appeal but, when finalized, it is conclusive of federal jurisdiction. *See* 33 C.F.R. §§ 331.2, 331.3. Federal regulations state that "a determination pursuant to this authorization shall constitute a Corps final agency action." 33 C.F.R. § 320.1(a)(6). Unless exempt, a discharge of a pollutant into jurisdictional waters is prohibited without a federal permit. *See* 33 U.S.C. §§ 1251(a), 1311(a), 1362(6). Failure to obtain a permit for such a discharge exposes the actor to severe liability. A party who discharges dredged or fill material into "navigable waters" without first obtaining a permit is subject to civil and/or criminal penalties of up to $37,500 per day (adjusted for inflation) for negligent violations and more for knowing violations, and imprisonment for up to three years. *See* 33 U.S.C. § 1319(b) and (c). Criminal liability for violation by a corporate entity extends to responsible corporate officers. *See* 33 U.S.C. § 1319(c)(6).

Obtaining a permit is onerous. According to this Court, the "average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide [more general] permit spends 313 days and $28,915–not counting costs of mitigation or design changes." *Rapanos*, 547 U.S. at 521.

The Belle Company owns agricultural property in Louisiana that Belle has contracted to sell to Petitioner, Kent Recycling Services, for conversion to a solid waste disposal site. App. D-4. This property has been subject to an agricultural exemption under the Clean Water Act for decades. App. D-12-13.

However, due to broad application of established wetland criteria, and an internal change in policy, the Corps of Engineers now claims that the Belle property is not exempt but includes jurisdictional wetlands that require a Clean Water Act (Section 404) "dredge and fill" permit. App. D-13-14. The Corps district engineer memorialized these claims in an initial Jurisdictional Determination. *Id.* Belle and Kent both appealed the determination to the division engineer (App. E-1) arguing the policy change was invalid and the determination did not establish the actual presence of jurisdictional wetlands on the property as required by agency regulations and practice as well as Supreme Court precedent. App. D-14-15. The division engineer agreed that certain changes in policy were inapposite and that the Jurisdictional Determination was inadequate to establish jurisdictional wetlands without further on-site analysis as to location, flow, and hydrology. *Id.* But on remand, the district engineer reissued the determination as a final Jurisdictional Determination without addressing the deficiencies noted on appeal. App. D-15-16.

Belle and Kent (Kent) challenged the validity of the Jurisdictional Determination in the district court on constitutional and statutory grounds. They argued the determination was wrong as to the presence of regulated wetlands, that the Corps' reliance on its change of policy was invalid because the policy change did not go through the rulemaking process, and that the issuance of the final Jurisdictional Determination—in essentially the same form as the erroneous initial determination—violated their due process rights.

Under the Administrative Procedure Act, "final agency action" is subject to judicial review and may be set aside if it is contrary to law or reason. Agency action is final if it (1) represents the consummation of agency decision-making on the matter and (2) the action fixes legal rights or obligations. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Below, the Corps argued the Jurisdictional Determination met neither prong of the APA standard because the determination could be revisited, it was advisory only, and it did not change Petitioner's legal rights or obligations. Relying on this Court's recent *Sackett* decision, that held a compliance order was final agency action subject to APA review, Kent argued the Jurisdictional Determination is final by its own terms and that it changed Petitioner's legal rights or obligations because Kent must now obtain an individual federal permit, at great cost, or subject itself to an enforcement action if Kent proceeds with its waste disposal project without a federal permit.

However, the trial court dismissed the case under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction with reliance on the pre-*Sackett* decision in *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586 (2008), and held that while the Jurisdictional Determination represented the consummation of the Corps' decision on jurisdiction, the Jurisdictional Determination did not alter Kent's legal rights or obligations under the Clean Water Act. The trial court did not address the due process or policy change claims.

On appeal, the Fifth Circuit held the Jurisdictional Determination clearly marked "the consummation of the Corps's decisionmaking process

as to the question of jurisdiction." App. A-10. According to the court, the Jurisdictional Determination was not subject to further agency review (even during the permit process) and was, therefore, binding as to jurisdiction on all parties. App. A-10. But, the court distinguished this Court's unanimous decision in *Sackett* and held the Jurisdictional Determination, unlike a compliance order, did not impose any burden on Kent and is not "final agency action" under the APA. Although Kent cannot now proceed with the waste disposal project without a federal permit, the court held the Jurisdictional Determination "is a notification of the property's classification as wetlands but does not oblige [Kent] to do or refrain from doing anything to [the] property." App. A-13. And although the permit process "can be costly for regulated parties" and does not subject the Jurisdictional Determination to further review or explication, the court also held that Kent must go though the permit process before Kent can challenge the Jurisdictional Determination in court:

> To be final, an agency action also must be one for which there is no adequate remedy in a court . . . . [Kent] may have an adequate judicial remedy because it could apply for a Corps permit and, if the Corps denies the permit, challenge the denial and the underlying jurisdiction in court.

App. A-19 n.4. As for Kent's due process claim, the Fifth Circuit held (in conflict with other Circuits) that the waiver of sovereign immunity under § 702 of the APA applies only to actions arising under the APA and that § 704 of the APA requires Kent to satisfy the "final agency action" requirement, even for

constitutional claims. App. A-20-23. Finally, the Fifth Circuit held that Kent could not challenge the policy change with respect to exempt agricultural lands because Kent either lacked standing or the policy challenged was protected by the statute of limitations. App. A-23-24.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT BETWEEN THIS COURT AND THE CIRCUIT COURTS AS TO WHETHER A FINAL JURISDICTIONAL DETERMINATION IS SUBJECT TO IMMEDIATE JUDICIAL REVIEW

The Fifth Circuit in this case followed the lead of the Ninth Circuit in *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586, in holding that a Jurisdictional Determination is not "final agency action" under the APA because the determination does not fix a legal right or obligation. But this is inconsistent with this Court's recent decision in *Sackett v. EPA*, 132 S. Ct. 1367, wherein this Court held a determination on jurisdiction issued through a compliance order *is* subject to judicial review under the APA.

The test for determining final agency action is generally described as a two-prong analysis: "First, the action must mark the 'consummation' of the agency's decisionmaking process." And second, "the action must be one by which 'rights or obligations have

been determined,'" *or* from which "legal consequences will flow." *Bennett v Spear*, 520 U.S. 154, 177-78. What is often overlooked is that the second prong of the *Bennett* test is written in the disjunctive. Even if new "legal consequences"do not flow, the agency action may still be final if it determines "rights or obligations." Likewise, the action may be final if it fixes a "right" but not an "obligation." *See Sackett*, 132 S. Ct. at 1371. The *Bennett* test provides multiple bases for finding agency action is final.

Sackett is a watershed case that reversed 40 years of lower court case law relating to the reviewability of agency actions under the Clean Water Act. In *Sackett*, the Environmental Protection Agency issued a compliance order asserting the Sacketts had filled wetlands to build a home on their half acre lot near Priest Lake, Idaho, without a federal permit in violation of the Clean Water Act. The compliance order was based on two definitive "Findings and Conclusions:" (1) that the subject lot contained jurisdictional wetlands; and (2) that the placement of gravel on the site was an unlawful discharge. Among other things, the compliance order directed the Sacketts to remove the fill and restore the site. Like Kent in this case, the Sacketts contested the jurisdictional determination and sought review of that finding in court. The government filed a motion to dismiss for lack of subject matter jurisdiction, which was granted. The Ninth Circuit affirmed. At the time this Court heard the case, five Circuit Courts and at least ten district courts had held that compliance orders were not reviewable under the APA, even to challenge agency jurisdiction. But this Court reversed.

Relying on *Bennett*, this Court held the compliance order "marks the 'consummation' of the agency's decisionmaking process" because "the 'Findings and Conclusions' that the compliance order contained were not subject to further agency review." *Sackett*, 132 S. Ct. at 1372. Just like the Jurisdictional Determination in this case.

The "Findings and Conclusions" in *Sackett* included a determination of federal jurisdiction. In fact, that determination was the predicate finding of a violation. This is significant because it was the consummation of the agency's decisionmaking process relative to jurisdiction that informed this Court's conclusion that the compliance order was justiciable. This is made clear by Justice Ginsburg's concurring opinion:

> Faced with an EPA administrative compliance order threatening tens of thousands of dollars in civil penalties per day, the Sacketts sued "to contest the jurisdictional bases for the order." Brief for Petitioners 9. "As a logical prerequisite to the issuance of the challenged compliance order," the Sacketts contend, "EPA had to determine that it has regulatory authority over [our] property." *Id.*, at 54-55. The Court holds that the Sacketts may immediately litigate their jurisdictional challenge in federal court. **I agree, for the Agency has ruled definitively on that question.**

Sackett, 132 S. Ct. at 1374 (emphasis added).

So it is in this case; "the Agency has ruled definitively on that question." The Jurisdictional

Determination in this case is every bit as conclusive as in the *Sackett* case. In fact, more so.

Unlike the Jurisdictional Determination in this case, the compliance order issued in *Sackett* was statutorily authorized based on "any information available." "Like the [Clean Air Act], the [Clean Water Act] permits the EPA to issue compliance orders 'on the basis of any information available,' 33 U.S.C. § 1319(a)(3), which presumably includes 'a staff report, newspaper clipping, anonymous phone tip, or anything else that would constitute 'any information.'" *Sackett v. EPA*, 622 F.3d. 1139, 1145 (9th Cir. 2010). That is far less than what is required for the formal, onsite Jurisdictional Determination at issue here. A Jurisdictional Determination is based on an extensive review of the soils, hydrology, and vegetation, including an assessment of the number, location, and seasonality of related waters; the physical, biological and chemical nature of such waters; the nexus among these waters, and much more. *See* App. E.

Moreover, unlike a compliance order, a formal Jurisdictional Determination is subject to administrative appeal, as occurred in this case. It would be anomalous, therefore, for a court to find that a determination as to jurisdiction based on "any information," and no administrative appeal, is the consummation of the agency's decisionmaking process, as this Court did in *Sackett*, but to hold that a formal Jurisdictional Determination based on an extensive onsite investigation, and a possible administrative appeal, is not.

This Court rejected the claim raised by the government in *Sackett* that the agency action was merely tentative and subject to change:

> As the Sacketts learned when they unsuccessfully sought a hearing, the "Findings and Conclusions" that the compliance order contained were not subject to further agency review. The Government resists this conclusion, pointing to a portion of the order that invited the Sacketts to "engage in informal discussion of the terms and requirements" of the order with the EPA and to inform the agency of "any allegations [t]herein which [they] believe[d] to be inaccurate." [ ]. But that confers no entitlement to further agency review. The mere possibility that an agency might reconsider in light of "informal discussion" and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal.

Sackett, 132 S. Ct. at 1372.

Nevertheless, the government argued below in this case that Jurisdictional Determinations that go through all available administrative appeals, do not mark the "consummation of the agency's decisionmaking process." The Fifth Circuit rejected this argument, as *Sackett* requires. So did the Ninth Circuit in *Fairbanks*. But that is the end of these Circuits' agreement with *Sackett*. These Circuits part ways with *Sackett* under the second prong of *Bennett*–whether the agency action determines a legal right or obligation.

In *Sackett*, this Court determined legal consequences flowed from the compliance order because: (1) it increased the petitioners' liability "in a future enforcement proceeding;" and (2), it also

severely limited "the Sackett's ability to obtain a permit for their fill." *Sackett*, 132 S. Ct. at 1371-72. Similar legal consequences flow from the Jurisdictional Determination in this case. To wit, the Jurisdictional Determination, and not the Act, establishes a prima facie violation for discharging fill on the property without a permit, potentially subjecting Kent to severe civil and criminal liability in a future enforcement proceeding. Moreover, the existence of the Jurisdictional Determination converts an unauthorized discharge from an unknowing or negligent act into a knowing violation. This change in scienter created by the Jurisdictional Determination could increase civil and criminal penalties. *See* 33 U.S.C. § 1319(c)(2) (increased penalties for knowing violations).

The Jurisdictional Determination also severely limits Kent's ability to use the property for a waste disposal site because Kent must now obtain a federal Clean Water Act (section 404) permit before the project can proceed. This is no small matter:

> The burden of federal regulation on those who would deposit fill material in locations denominated "waters of the United States" is not trivial. In deciding whether to grant or deny a permit, the U.S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot, relying on such factors as "economics," "aesthetics," "recreation," and "in general, the needs and welfare of the people," 33 C.F.R. § 320.4(a) (2004).

Rapanos v. United States, 547 U.S. 715, 721 (2006) (footnote omitted).

The result of this broad, almost unfettered, discretion is that such permits costs hundreds of thousands of dollars and may take years to complete. *See id.*

The Jurisdictional Determination has other, equally severe, consequences for Kent. The Jurisdictional Determination independently changes the legal milieu reducing the value of the property, undermining the proposed project, constraining the property's uses, and increasing costs. These effects are real and can effectively rob the landowner of all viable economic use. Simply depositing a bucket of soil in the wetland areas is a technical violation of the law. In effect, Petitioners are excluded from the regulated areas. To say that the Jurisdictional Determination has no legal consequences is to deny the obvious. Under *Sackett*, it is a fiction.

Before *Sackett*, the courts focused on the independent legal consequences flowing from the agency action while ignoring the alternative basis for determining finality—whether the agency action fixes "rights or obligations." In *Sackett*, this Court took pains to illustrate that the compliance order not only created independent legal consequences but it also determined a legal obligation:

> Through the order, the EPA "'determined'" "'rights or obligations.'" *Bennett v. Spear*, 520 U. S. 154, 178, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71, 91 S. Ct. 203, 27 L. Ed. 2d 203 (1970)). By reason of the order, the Sacketts have the legal obligation to "restore" their property according to an

> agency-approved Restoration Work Plan, and must give the EPA access to their property and to "records and documentation related to the conditions at the Site." App. 22, ¶ 2.7. Also, " 'legal consequences . . . flow' " from issuance of the order.

Sackett, 132 S. Ct. at 1371.

In *Port of Boston*, cited in *Sackett* above, this Court had to decide who had primary jurisdiction to review an order by the Maritime Commission and, in the process, this Court addressed the standard for determining final agency action. Relevant here is this Court's holding that agency orders need not create a new, independent legal consequence to be final.

According to this Court, the argument that the Commission's order lacked finality "because it had no independent effect on anyone" had the "hollow ring of another era." *Port of Boston*, 400 U.S. at 70-71. Citing *Frozen Food Express v. United States*, 351 U.S. 40, 44 (1956), this Court concluded that "Agency orders that have no independent coercive effect are common" but that was not the "relevant consideration[] in determining finality." *Port of Boston*, 400 U.S. at 70-71. The relevant consideration, this Court stated, was "whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined." *Id.* at 71. In that case, there was "no possible disruption of the administrative process" because there was "nothing else for the Commission to do." *Id.* So it is in this case. No further administrative review of the Jurisdictional Determination is required or allowed.

In point of fact, now that the Corps has issued the Jurisdictional Determination, it will not revisit that determination even during the permit process. *See* App. A-10. *See also Fairbanks*, 543 F.3d at 593. In other words, the Jurisdictional Determination is legally binding on the Corps and Kent.

As for agency action that has "no independent coercive effect," an examination of *Frozen Food*, 351 U.S. 40, is helpful because it is analogous to the present case. Frozen Food Express was a motor carrier that transported certain "agricultural commodities" that were exempt from regulation by the Interstate Commerce Commission. When the Commission issued a determination that certain commodities were no longer subject to the agricultural exemption, Frozen Food Express sought to challenge the order in court. In determining the order was final and subject to judicial review, this Court recited the following facts: (1) "the determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact on carriers who are transporting the commodities;" (2) the "order" serves as a warning that transporting these commodities without authorization will subject the carrier to "civil and criminal risks;" (3) when unauthorized transportation occurs, the Commission can issue a cease and desist order enforceable in court; (4) "the 'order' of the Commission which classifies commodities as exempt or nonexempt is, indeed, the basis for carriers in ordering and arranging their affairs;" and (5), the "determination made by the Commission is not therefore abstract, theoretical, or academic." *Id*. at 43-44.

This Court could have been talking about this case, because the same facts obtain: (1) the binding determination that the property here is not subject to the agricultural exemption has an immediate and practical effect on Kent who is seeking to use the property; (2) the Jurisdictional Determination serves as a warning that anyone filling the wetlands at this site without authorization will be subject to civil and criminal liability; (3) when unauthorized filling occurs, the Corps can issue a cease and desist order enforceable in court; (4) a Jurisdictional Determination which classifies specific wetlands as subject to federal control is, indeed, the basis for landowners ordering and arranging their affairs; and (5), the Jurisdictional Determination is "not therefore abstract, theoretical, or academic."

In its effect, the Jurisdictional Determination in this case is indistinguishable from the Commission's determination in *Frozen Food* and the compliance order in *Sackett* that this Court found final and reviewable. The Fifth and Ninth Circuit decisions therefore conflict with both *Sackett* and *Frozen Foods*.

If that were not enough, consider *Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948), on which *Bennett* relied. *Chicago* held that administrative determinations are reviewable if they "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Id*. at 113. This formulation is helpful in analyzing this case.

By reason of the Jurisdictional Determination, Kent has the obligation to obtain a section 404 permit from the Corps if Kent wishes to proceed with the proposed waste disposal project. This obligation was

only inchoate before the Jurisdictional Determination was issued. The Clean Water Act only requires a permit for discharges to "waters of the United States" generally, which Kent can show do not exist on the property. In contrast, this Jurisdictional Determination is an actual adjudicative decision requiring a federal permit for discharges on this specific property. It is a quintessential application of the law to the facts of the case. For the first time, this obligation is now final and conclusive.

The Corps claims the wetlands on Kent's property are subject to federal jurisdiction under the Clean Water Act because the wetlands have a "significant nexus" or are "adjacent"to traditional navigable waters. However, Kent contends the Jurisdictional Determination is faulty because it does not establish the requisite elements for determining covered waters. App. D-14-16. The division engineer agreed with this contention on appeal. *Id.* Therefore, the Jurisdictional Determination violates the Clean Water Act itself, the government's own implementing regulations, and this Court's interpretation of Clean Water Act jurisdiction in *Rapanos* and other cases. If Kent is correct, Kent has a legal right to proceed with the waste disposal project without a federal permit. But because the Jurisdictional Determination is binding on the issue of federal jurisdiction, Kent has been denied this right.

But perhaps the most telling aspect of the finality analysis under this Court's decisions in *Chicago*, *Frozen Food*, and *Sackett*, is whether the agency action fixes a legal relationship. Although the Fifth and Ninth Circuits have held that a Jurisdictional Determination is merely advisory and a restatement of statutory law, nothing could be further from the truth.

The Jurisdictional Determination is controlling in the field. Any permit decision by the Corps must comport with the Agency's determination that the property contains jurisdictional wetlands. The Corps and EPA can and will base an enforcement action on the Jurisdictional Determination if Kent seeks to use the property without a federal permit. And, because the Jurisdictional Determination itself purports to be final agency action, it leads private parties and others to believe they must accede to the Corps' position. It is hard to conceive of a more compelling case of final agency action or of a clearer conflict with Supreme Court precedent.

II

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO DETERMINE WHETHER A USELESS PROCEDURE CAN DEFEAT THE FINALITY STANDARD UNDER THE APA

Under the APA, a decision is final (and subject to judicial review) if it is an agency action for which there is "no other adequate remedy in a court." 5 U.S.C. § 704. The Fifth and Ninth Circuits have held that Petitioners, like Kent, do have an adequate remedy in court; they can challenge the Jurisdictional Determination in court after obtaining a permit or a permit denial. But this is a useless act because these same courts have held that Jurisdictional Determinations are the agency's "last word" on federal jurisdiction and not subject to additional review, even in the permit process. Therefore, sending Kent through the permit process serves no administrative or judicial purpose. It does not clarify the law nor add to the facts in any way helpful to a reviewing court. It is

axiomatic that the law does not require a useless and futile act.

Stated in various ways, the ancient maxim "lex non cogit ad inutilia," or "the law does not know useless acts," has been a fundamental tenet in Anglo-American jurisprudence for centuries. *See Seaconsar Far East, Ltd. v. Bank Markazi Jomhouri Islami Iran*, [1999] 1 Lloyd's Rep. 36, 39 (English Court of Appeal 1998); *People v. Greene Co. Supervisors*, 12 Barb. 217, 1851 WL 5372, at 3 (N.Y. Sup. Ct. 1851); *see also Ohio v. Roberts*, 448 U.S. 56, 74 (1980) ("The law does not require the doing of a futile act."); *Cary v. Curtis*, 44 U.S. 236, 246 (1845) ("The law never requires . . . a vain act."); and *Stevens v. United States*, 2 Ct. Cl. 95 (1866) ("The law does not require the performance of a useless act.").

At its best, the permit requirement is a delaying tactic imposed by the courts. There is no regulatory or statutory provision that requires Kent to seek a permit that has nothing to do with the underlying jurisdictional challenge. A permit is irrelevant to the question of whether the federal government has jurisdiction over private wetlands and other waters. In fact, to seek a permit is to concede the very issue in question.

At its worst, the permit requirement is punitive and even discriminatory. As previously noted, the cost of obtaining an individual permit, like that required in this case, is prohibitively costly, running into the hundreds of thousands of dollars and years in the making. *See Rapanos v. United States*, 547 U.S. 715, 721. And should Kent ultimately win the case, after obtaining a permit or permit denial, Kent can never recover the costs expended in the permit process. Only

those who can afford to seek a permit and the subsequent cost of litigation, which can also run into hundreds of thousands of dollars, can ever be vindicated in court. This favors the rich and discriminates against the poor, or even the average citizen who may be subject to the Clean Water Act because of the putative presence of jurisdictional waters.

The permit requirement is reminiscent of the poll tax which prohibited the poor from exercising their right to vote and which this Court rejected as unconstitutional. In like manner, the permit requirement imposes an excessive burden on ordinary Americans who are denied their right to seek redress in the courts against an overreaching federal agency. Both are invidious because they discriminate on the basis of one's ability to pay. *See Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966)("We have long been mindful that where fundamental rights and liberties are asserted . . . classifications which might invade or restrain them must be closely scrutinized and carefully confined. . . . Those principles apply here. For to repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned."). The right to redress in the courts is no less a precious, fundamental right. But it is severely burdened by this nefarious permit requirement.

Moreover, the permit requirement is the paradigmatic example of "justice delayed is justice denied." The court's dismissal of Kent's case for lack of subject matter jurisdiction is, in effect, a judicial decision on the merits. The ultimate question in

Kent's case is whether Kent can use the property without a permit. But the Fifth and Ninth Circuits have perversely concluded that landowners like Kent must seek a permit to determine if a permit is required.

This Court should grant the writ to determine whether such a useless act can defeat the finality standard under the APA.

III

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS ON WHETHER A DUE PROCESS CLAIM IS SUBJECT TO THE FINALITY REQUIREMENT UNDER THE APA

On Kent's due process claim, the Fifth Circuit held Kent failed to demonstrate the government's waiver of immunity and, under the APA, Kent must satisfy the "final agency action requirement." App. A-22 n.5. This decision directly conflicts with the D.C. Circuit decision in *Trudeau v. Federal Trade Commission*, 456 F.3d 178 (D.C. Cir. 2006), and other Circuits.

In *Trudeau*, the Appellant raised a constitutional claim against the FTC arguing the Commission violated his First Amendment rights when it issued a "false and misleading" press release implying wrong doing on the part of Trudeau who was engaged in protected activity. To determine whether this constitutional claim could survive a 12(b)(1) motion to dismiss, for lack of subject matter jurisdiction, the court first addressed the scope of § 702 of the APA.

According to the D.C. Circuit, § 702 "waives the Government's immunity from actions seeking relief 'other than money damages.'" *Id.* at 186. However, the FTC argued (1) that waiver applies only to actions brought under the APA and (2) that § 704 limits all APA cases to "final agency actions." *Id.* The court disagreed.

The court responded that it had repeatedly rejected the FTC's first argument, expressly holding that the "APA's waiver of sovereign immunity applies to any suit whether under the APA or not." *Id.* The court observed that nothing in the language of § 702 restricts its waiver to suits brought under the APA. To the contrary, the D.C. Circuit held § 702 "waives sovereign immunity for '[a]n action in a court of the United States seeking relief other than money damages,' not for an action brought under the APA." *Id.* The court supported this conclusion with citations to the APA's legislative history. *See id.*

With respect to the FTC's second argument, the D.C. Circuit explained that although it had never directly considered the contention that the "final agency action" requirement of § 704 restricts § 702's waiver of sovereign immunity, the court's holding "that the waiver is not limited to APA cases—and hence that it applies regardless of whether the elements of an APA cause of action are satisfied—removes the linchpin of the FTC's argument." *Id.* at 187. Moreover, the court explained, the waiver language of § 702 "provides no support for the FTC's contention." *Id.* "While [§ 702] does refer to a claim against an 'agency' and hence waives immunity only when the defendant falls within that category, it does not use

either the term 'final agency action' or the term 'agency action.'" *Id.*

In sum, the court held "that APA § 702's waiver of sovereign immunity permits not only Trudeau's APA cause of action, but his nonstatutory and First Amendment actions as well." *Id.* To bolster this holding the D.C. Circuit observed that other Circuits were in accord with its interpretation of the APA, including *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989) (holding that the government's "attempt to restrict the waiver of sovereign immunity to actions challenging 'agency action' as technically defined in § 551(13) offends the plain meaning of the amendment"); and, *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988) (rejecting the contention that the waiver in § 702 "exists only to allow review of a final agency decision," and holding that "[t]he waiver of sovereign immunity contained in section 702 is not dependent on application of the . . . review standards of the APA").

The Fifth Circuit's contrary holding in this case, that "final agency action" is a 12(b)(1) deficiency, is thus in conflict with at least three other Circuits. Therefore, this Court should grant the writ to resolve this conflict.

CONCLUSION

The Jurisdictional Determination is an adjudicative determination that requires Kent to obtain a federal permit if the proposed project is to proceed. It is unthinkable that the government would

create such elaborate procedures and expend such extensive resources on a Jurisdictional Determination that has no legal effect and was not intended to determine a legal "right or obligation." Moreover, Kent has an independent due process claim that should be subject to immediate judicial review.

DATED: October, 2014.

Respectfully submitted,

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