

No. 14-493

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**

—◆—
**REPLY TO OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

—◆—
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QUESTIONS PRESENTED

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?

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ARGUMENT**I****THIS CASE IS FIT
FOR REVIEW IN THIS COURT**

The Army Corps of Engineers raises two arguments suggesting this Court should not review this case. Both are red herrings.

First, with respect to standing, the Corps suggests Kent may no longer hold a valid option to purchase the project site because Belle has applied for a permit to use the site as a wetlands bank. However, the option remains in place.¹ Moreover, the district court dismissed this case on a motion to dismiss. The Corps did not challenge Kent's standing, so the parties did not litigate that issue. However the complaint recites that Kent has a valid option to purchase the project site and that Kent itself challenged the Jurisdictional Determination on administrative appeal, along with Belle. *See* Appendix, E-1 ("By letter dated July 26, 2011, you were notified by Major General Michael Walsh that your request, submitted on behalf of Belle Company and Kent Recycling Services, L.L.C., for appeal of a jurisdictional determination was found to have merit."). Kent's standing was therefore established. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 589 (2007) ("And as the Court recognizes, at the motion to dismiss stage, a judge assumes 'that all the allegations in the complaint are true.'" Given the

¹ In as much as the Corps referenced extra-record information regarding Belle's current permitting efforts (as a prudent back up plan) it should be brought to the Court's attention that Kent reports it has spent more than half a million dollars in pursuit of the project and continues to expend resources on the project.

posture of this case as a motion to dismiss, and the current state of the record, the proper venue to question Kent's current standing, if at all, would be on remand, in the district court, after a decision on the motion.

Second, the Corps notes the challenged Jurisdictional Determination has expired and implies the case may be moot. *See* Opposition at fn 3. The Jurisdictional Determination expired by its terms on May 15, 2014, prior to the Fifth Circuit decision in this case. But significantly, the Corps did not argue mootness below and does not expressly do so here. This is no doubt due to the fact that the Jurisdictional Determination is capable of repetition and therefore justiciable under this Court's precedent. *See Weinstein v. Bradford*, 423 U.S. 147 (1975) (holding that mootness exception applies when the issue is capable of repetition, yet evades review). In *Weinstein*, this Court traced the history of this doctrine to *Southern Pacific Terminal, Co. v. ICC*, 219 U.S. 498 (1911). In that case, an Interstate Commerce Commission order was of such short duration that it was nearly impossible to litigate the validity of the order prior to its expiration. Because of that and the fact that the same party would in "all probability" be subject to the same kind of order in the future, "review was allowed even though the order in question had expired by its own terms." *Id.* at 149. So it is in this case.

By regulation, Jurisdictional Determinations usually expire after five years. For reasons not revealed in the record, the Corps issued a Jurisdictional Determination in this case that expired in less than half that time. This made it virtually impossible to litigate the validity of the Jurisdictional

Determination prior to its expiration. Moreover, the Corps frankly concedes as “a practical matter,” the Jurisdictional Determination continues to reflect the Corps’ current position on CWA coverage and that if the Jurisdictional Determination were reissued, in the absence of changed conditions, “the Corps would likely issue substantially the same jurisdictional determination.” Opposition at fn 3. Thus, this case falls neatly into this Court’s “capable of repetition, yet evading review” doctrine.²

Finally, as identified in the second question presented, Kent brought a facial and as-applied challenge to the validity of the administrative appeals process under the Due Process Clause. App. D-19-D-20. The due process violation occurred at the time the Corps issued the Jurisdictional Determination and there has been no change in the appeals process. The due process claim is, therefore, not contingent on the duration of the Jurisdictional Determination.

This case is fit for review by this Court.

² In a footnote, fn 6, the Corps argues for the first time that the case is not ripe because Kent has not applied for a discharge permit for the proposed project. But this is essentially a restatement of the first question presented. In effect, that question asks whether a discharge permit is required to ripen or finalize the Jurisdictional Determination for review under the APA.

II**THE DECISION BELOW CONFLICTS
WITH THIS COURT'S PRECEDENTS**

The test for determining final agency action is a two-pronged 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 (1997). The Corps argued below that the Jurisdictional Determination met neither prong of the *Bennett* test. However, both the district and appellate courts held the Corps had “asserted its final position” on jurisdiction and the Corps’s argument conflicted with *Sackett v. EPA*, 132 S. Ct. 1367 (2012). The Corps now concedes the issue and focuses entirely on the second *Bennett* prong. See Opposition at 13.

**A. The Jurisdictional Determination
Has Legal Consequences**

The Corps argues the Fifth Circuit was correct to hold a Jurisdictional Determination does not determine rights or obligations, or impose legal consequences. Opposition at 13. But, in the very next sentence, the Corps admits “[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.” *Id.* In other words, a Jurisdictional Determination is a site-specific, adjudicative decision that establishes

the landowner's rights and obligations under the Act. Kent need go no further to prove its case. This is the very definition of final agency action.

Nevertheless, the Corps maintains the Jurisdictional Determination "does not impose any obligations not already imposed by the CWA." *Id.* This claim is disingenuous for two reasons: (1) the Act does not speak to a particular parcel of land like the Jurisdictional Determination; and (2), Kent alleges the designation of the land at issue here as "waters of the United States" is ultra vires. The complaint sets forth specific facts demonstrating the Jurisdictional Determination is inadequate to establish jurisdictional wetlands at the project site. *See* App. D-14-15. This is a motion-to-dismiss case where the facts alleged are generally taken as true at this stage of the proceedings. *See Bell Atl. Corp. v. Twombly*, 550 U.S. at 589. Therefore, the Jurisdictional Determination imposes a permit obligation on Kent the Act does not, satisfying the finality requirement for APA review. *See Sackett*, 132 S. Ct. at 1371 (recognizing the imposition of a legal obligation satisfies the second *Bennett* prong for final agency action).

The Corps goes to great lengths to distinguish *Sackett*. For example, the Corps argues the compliance order in that case imposed different obligations on the Sacketts than the Jurisdictional Determination imposes on Kent. But this argument misses the point. Under *Bennett*, the Jurisdictional Determination need not be identical to the compliance order in *Sackett*, so long as the determination fixes a right or obligation or has other legal consequences. *See Bennett*, 520 U.S. at 177-78.

The Corps further argues the Jurisdictional Determination “does not alter the manner in which the Corps may enforce the CWA, or the penalties to which a violator is potentially subject.” Opposition at 13. However, this claim is belied by the Corps’ admission that the Jurisdictional Determination “might be offered as evidence of the owner’s knowledge of its obligations under the CWA,” in an enforcement action, thereby converting a negligent violation into a knowing violation. Opposition at 19-20. The Clean Water Act imposes severe civil and criminal penalties for any violation of the Act, but knowing violations are subject to greater potential penalties. 33 U.S.C. § 1319(c)(1)-(2). The Corps acknowledges this potential for increased liability from the Jurisdictional Determination but argues “the same could be said for any number of non-final agency warnings or opinion letters,” or even a private consultant’s report. Opposition at 20. But the Jurisdictional Determination differs from these other “warnings” in one crucial respect—with regard to jurisdiction, the Jurisdictional Determination is legally binding. Providing a legally binding statement of jurisdiction is the very purpose of the Jurisdictional Determination. According to the Corps, a Jurisdictional Determination is issued to clarify that “the public can rely on that determination as a Corps final agency action.” 51 Fed. Reg. 41206, 41207 (Nov. 13, 1986).

Additionally, the Corps claims the Jurisdictional Determination does not affect the value of the underlying property. Opposition at 21. But this argument defies logic. Property designated as jurisdictional, and subject to individual permitting, as in this case, is devalued at the cost of the permit which may run on average more than \$270,000. *See*

Rapanos, 547 U.S. 715, 721 (2006). Add to that the cost of mitigation, project redesign, and added carrying costs and the loss of property value becomes prohibitive. Amici American Farm Bureau Federation, *et al.*, cite a case in Virginia where the appraised value of property was reduced by millions of dollars due to its designation as jurisdictional waters. *See* Amici Brief at 19 (citing *Bergen Cnty. Assocs. v. Borough of E. Rutherford*, 12 N.J. Tax 399, 403, 411, 418 (N.J. Tax Ct. 1992) (land severely reduced in value based on “waters of the United States” determination)).

B. This Case Conflicts with This Court’s Decisions That Demand a Practical Approach to Judicial Review

In *Frozen Foods Express v. United States*, 351 U.S. 40 (1956), this Court held a commodities order issued by the Interstate Commerce Commission was reviewable because it had “immediate and practical” effects on the regulated parties. The Jurisdictional Determination in this case is indistinguishable. *See* Petition at 20-21.

Significantly, the Corps does not dispute that the Jurisdictional Determination has the same effects on Kent. Instead, the Corps asserts *Frozen Foods* authorized judicial review of the commodities order in that case because it “established a rule of general applicability.” Opposition at 22. However, that is not what this Court held. This Court took a more pragmatic approach and determined the order was reviewable because of its practical impact. *See Frozen Foods*, 351 U.S. at 43-44.

Moreover, in *Frozen Foods*, Justice Harlan issued a sole dissent objecting to review of the commodities

order precisely because it was a rule of general applicability. According to Justice Harlan, the case would have been stronger if it had been applied to a specific carrier. *See id.* at 45-48. Therefore, this case is even more compelling than *Frozen Foods* because it does not involve a rule of general applicability, but a site-specific, adjudicative decision with real world impacts. This interpretation is supported by the APA itself. *See* 5 U.S.C. § 551(4) (defining “agency rule” to include “an agency statement of general *or particular applicability* and future effect designed to implement, interpret, or prescribe law or policy”(emphasis added)).

This Court relied on *Frozen Foods* in the seminal case of *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967). In *Abbott Labs*, this Court explained that courts should apply the finality element of the APA in a “pragmatic way.” *Id.* at 149. In support of that proposition, this Court cited three cases that had taken a “flexible view of finality,” including *Frozen Foods*. But here the Corps urges this Court to apply the APA in a mechanical, one-size-fits-all manner that categorically excludes Jurisdictional Determinations from review under the APA. This is inconsistent with this Court’s decisions in *Sackett*, *Frozen Foods*, and *Abbott Labs*. This Court should therefore grant review in this case.

III

**THE PERMIT
REQUIREMENT IS
NOT AN ADEQUATE
ALTERNATIVE TO
IMMEDIATE JUDICIAL
REVIEW AND CONFLICTS
WITH THIS COURT'S PRECEDENTS**

The court held below the Jurisdictional Determination was not subject to APA review because Kent could go through the permit process and then challenge the Corps' jurisdiction. However, there is no provision in the Clean Water Act that requires a landowner to seek a permit before challenging agency jurisdiction. And for good reason. The regulations establishing Jurisdictional Determinations provide a separate administrative appeals process and expressly state "[a] determination pursuant to this authorization shall constitute a Corps final agency action." 33 C.F.R. § 320.1(a)(6). Although the Corps claims the permit process provides for further administrative review of the jurisdictional question, Opposition at fn 8, the Fifth Circuit rejected that argument as inconsistent with this Court's decision in *Sackett*. App. A-10.

By the Fifth Circuit's own admission, under *Sackett* the permit process adds nothing to the jurisdictional question. Therefore, the permit process serves no purpose in making the challenge to a Jurisdictional Determination more fit for judicial review. It adds nothing to the facts nor clarifies the law. It is simply an artificial barrier to APA review that subjects the landowner to unnecessary and

extraordinary costs. Accordingly, the permit requirement is irrational and conflicts with *Sackett* and the APA. It also conflicts with this Court's long line of cases that establish the law does not require the performance of a useless act. *See* Petition at 24. An unnecessary and prohibitively expensive administrative review process can never provide an adequate remedy in court as the APA requires. 5 U.S.C. § 704.

IV

**THE FIFTH CIRCUIT
DECISION CREATED A
MULTI-CIRCUIT SPLIT AND A
CONFLICT WITHIN ITS OWN COURT**

In response to Kent's argument that this Court should grant review to resolve a conflict among the circuits as to whether a due process claim is subject to the finality requirement of the APA, the Corps argues this Court should not do so because the Fifth Circuit decision in this case also conflicts with a prior decision in the same Circuit. But that fact provides an even greater impetus for granting the petition, not less.

The Corps acknowledges, as it must, that the Fifth Circuit decision in this case conflicts with the D.C. Circuit decision in *Trudeau v. Federal Trade Commission*, 456 F.3d 178 (DC Cir. 2006), and by extension with the Ninth and Eighth Circuits. Opposition at 25-27. But the Corps argues there is no "square" conflict for this Court to settle because the decision in this case conflicts with the Fifth Circuit decision in *Alabama-Coushatta Tribe v. United States*,

757 F.3d 484 (5th Cir. 2014), and therefore the issue of finality is unsettled in that circuit. Rather than resolve these conflicts, the Corps urges this Court to sit on the sidelines until the intra-circuit split is someday resolved through an en banc proceeding. Opposition at 27.

This approach does not address the conflict before this Court now. And it reduces a case that affects the livelihood of real people throughout the Nation to an academic exercise. The owners of Kent Recycling Services were denied their constitutional right to a fair process and outcome in the issuance of a Jurisdictional Determination. They, and those like them, should not be denied this right because the Fifth Circuit is conflicted over the finality requirement of the APA.

Rather than undermine the petition for review, the existence of an intra-circuit conflict, as well as a broad inter-circuit conflict, supports the petition for review. These conflicts warrant resolution by this Court.

CONCLUSION

In every relevant sense, the Jurisdictional Determination in this case is “final agency action” under the APA. And, the due process claim is fit for review.

The petition should be granted.

DATED: February, 2015.

Respectfully submitted,

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