

No. 15-290

In the Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,
PETITIONER

v.

HAWKES CO., INC., ET AL.

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

REPLY BRIEF FOR THE PETITIONER

DONALD B. VERRILLI, JR.
*Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

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The court of appeals held in this case that a jurisdictional determination stating that particular property contains waters of the United States covered by the Clean Water Act, 33 U.S.C. 1251 *et seq.*, is reviewable “final agency action” under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* 5 U.S.C. 704. As the government explained in its petition for a writ of certiorari, that decision warrants review because it raises important questions about the proper timing of judicial review of the thousands of jurisdictional determinations that the United States Army Corps of Engineers (Corps) issues each year.

1. Respondents in this case agree (Br. 2) that certiorari should be granted. In particular, they agree (Br. 2-5) that the decision below conflicts with decisions of the Fifth and Ninth Circuits. See *Belle Co. v. United States Army Corps of Eng’rs*, 761 F.3d 383 (5th Cir. 2014), cert. denied *sub nom. Kent Recycling*

Servs., LLC v. United States Army Corps of Eng'rs, 135 S. Ct. 1548 (2015), petition for reh'g pending, No. 14-493 (filed Apr. 16, 2015); *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586 (9th Cir. 2008), cert. denied, 557 U.S. 919 (2009). Respondents also agree that the issue is important (Br. 11) and “likely to recur” (Br. 12).

2. Respondents defend (Br. 1-9) the court of appeals’ decision on the merits, arguing that a jurisdictional determination is subject to immediate judicial review because it forces a landowner to choose among incurring compliance costs, “abandon[ing] the proposed project,” or “risking immense fines.” Br. 2. The government disagrees for the reasons stated in its petition for a writ of certiorari, see Pet. 13-21, but will reserve further discussion for its briefs on the merits, should this Court grant plenary review.

3. Respondents further contend (Br. 9-12) that the Court should also grant the petition for rehearing in *Kent Recycling Services, LLC v. United States Army Corps of Engineers* (No. 14-493), and consolidate the two cases. That course of action is unwarranted. Like this case, *Kent Recycling* presents the question whether a jurisdictional determination is final agency action. But granting review and consolidating the cases would complicate, rather than facilitate, the Court’s consideration of that question.

Respondents do not contend that granting review in *Kent Recycling* would materially aid the Court in resolving the “final agency action” question that is common to both cases. That question is a purely legal one that does not turn on the circumstances of any particular case. While respondents emphasize (Br. 11) that *Kent Recycling* and this case “constitute both

sides of a primary circuit split,” this Court can take into account the Fifth Circuit’s reasoning in *Belle* without granting certiorari in that case. Respondents do not dispute, moreover, that this case provides a fully adequate vehicle to consider the “final agency action” question.

Respondents contend (Br. 11) that the Court should grant review in *Kent Recycling* to consider the additional question whether Kent Recycling’s claim that the Corps violated its due-process rights is subject to the APA’s “final agency action” requirement. See 14-493 Pet. i. As the government explained in its *Kent Recycling* brief in opposition (14-493 Br. in Opp. 25-27), the Fifth Circuit’s rejection of petitioner’s due-process claim is correct and does not squarely conflict with any decision of another court of appeals. The denial of certiorari in *Kent Recycling* reflects the Court’s evident determination that the second question presented did not warrant further review. With respect to that question, Kent Recycling has not established that any “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.

* In an October 16, 2015 letter to the Court, Kent Recycling argued that a recent Ninth Circuit decision conflicts with the Fifth Circuit’s holding that Kent Recycling’s due-process claim was properly dismissed because it did not challenge final agency action. That contention lacks merit. In *ASSE International, Inc. v. Kerry*, No. 14-56402, 2015 WL 5904715, at *1, *7-*9 (Oct. 9, 2015), the Ninth Circuit held that the State Department’s decision to impose certain sanctions against a program participant did not fall within the APA’s exception to judicial review for decisions “committed to agency discretion by law.” 5 U.S.C. 701(a)(2). The court stated in dicta that, even if the agency action in question had fallen

R. 44.2; see 14-493 Br. in Opp. to Pet. for Reh'g 4-5. Respondents likewise have provided (Br. 11) no justification for reconsidering the Court's denial of certiorari on the due-process issue.

The primary consequence of granting rehearing in *Kent Recycling* therefore would be to complicate the Court's consideration of the "final agency action" question by bringing before the Court the threshold justiciability issues present in *Kent Recycling*. As the government explained in its brief in opposition to the certiorari petition in *Kent Recycling*, the allegations in Kent Recycling's complaint do not establish that the terms of its alleged option to purchase the property at issue creates a concrete interest sufficient to support standing. 14-493 Br. in Opp. 8-12; see 14-493 Br. in Opp. to Pet. for Reh'g 5-8. It is also unclear whether the case continues to present a live controversy. 14-493 Br. in Opp. 11-12.

If this Court were to grant rehearing in *Kent Recycling* and consolidate the cases, the parties would brief and argue those justiciability issues, in addition to the "final agency action" question that is common to both cases, and the Court might ultimately conclude that *Kent Recycling* does not present a justiciable controversy. That conclusion would not prevent the Court from resolving the "final agency action" question in the context of *this* case. But because granting

within Section 701(a)(2), "we would still be able to review [it] insofar as ASSE had raised colorable constitutional claims, unless Congress precluded such review." *ASSE Int'l*, 2015 WL 5904715, at *9 n.12. That statement does not address whether and how the APA's "final agency action" requirement applies to constitutional claims. The court had no occasion to consider that question, as it was undisputed that the State Department's decision constituted final agency action for APA purposes. *Id.* at *9.

the petition in *Kent Recycling* would not aid the Court in resolving that issue, considerations of judicial economy support granting review in this case alone.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the Court should grant review in this case. The petition for rehearing in *Kent Recycling* (No. 14-493) should be held pending the resolution of this case, and then disposed of as appropriate in light of the Court's decision.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

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