

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 RESPONDENT'S OPPOSITION
TO PETITION FOR REHEARING**

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**REPLY TO RESPONDENT'S
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Respondent, Army Corps of Engineers, acknowledges, as it must, that there is a square intervening circuit conflict between the Eighth Circuit in *Hawkes v. United States Army Corps of Engineers*, 782 F.3d 994 (8th Cir. 2015), and the Fifth Circuit in this case on the vital question of whether a Jurisdictional Determination (i.e., a Corps wetlands delineation) is subject to immediate judicial review under the Administrative Procedure Act (APA) as interpreted by this Court's unanimous decision in *Sackett v. EPA*, 132 S. Ct. 1367 (2012). So, the only objection the Corps raises in opposition to Kent Recycling's Petition for Rehearing is conjecture and surmise.

1. First, the Corps argues this Court should not grant the petition for certiorari because the Corps has moved for a rehearing en banc in the Eighth Circuit and the current decision favoring *Hawkes* "may not be" the court's last word on the subject. This may be true, but it is largely irrelevant. If the Eighth Circuit reverses the panel decision, then the undersigned counsel, who happen to represent both *Kent Recycling* and *Hawkes*, would petition for a writ of certiorari of that case. But, the *Hawkes* case is almost identical to *Kent Recycling* on its facts and would raise the identical question presented in this case about the reviewability of Jurisdictional Determinations. That case would add nothing by way of facts or law to the *Kent Recycling* case, now pending in this Court, that would aid this Court in resolving the question presented. More importantly, if the en banc court

denies the Corps' request for rehearing, which is likely, or affirms the panel decision in favor of Hawkes, the Corps has *not* stated in its opposition that it would seek review in this Court to resolve the conflict with the Fifth Circuit. And, of course, the Corps has no incentive to seek review of an adverse decision by the Eighth Circuit when it can limit the damage to that circuit by doing nothing. Therefore, this case presents the best opportunity for timely resolution of the circuit split.

2. Second, the Corps argues this case is a poor vehicle for addressing the intervening conflict because *Hawkes* only addressed the first of two questions raised in *Kent Recycling*. In this case, we asked this Court to address: (1) whether Jurisdictional Determinations are immediately reviewable under the APA; and (2) whether a due process claim is subject to the same finality requirements of the APA as a Jurisdictional Determination. But that creates no problem for this Court as it may choose to address either one, or both, of these questions, or an entirely different question, at its discretion. Moreover, as we demonstrated in our opening and reply briefs in support of the petition for writ of certiorari, there is both an inter-circuit and intra-circuit conflict on the second question. *See Kent Reply* at 10. Resolving such conflicts is this Court's primary function. Therefore, *Kent Recycling* presents an even more compelling reason for review than *Hawkes*. If this Court were to deny review in this case, and the Corps were to fail to seek review of *Hawkes* (the most likely outcome), it would do a great disservice not only to petitioners in both cases, but to the entire regulated public.

3. Third, the Corps argues Kent Recycling has standing problems because the record does not reveal sufficient facts to establish standing, even on a motion to dismiss. But this is disingenuous. The record shows that Kent Recycling holds an option to purchase the subject property, Appendix at D-4, and that Kent Recycling was a party to the administrative appeal of the Jurisdictional Determination, Appendix E-1. These facts establish a cognizable property interest and substantial reliance on that property interest, as well as a procedural due process claim for the erroneous issuance of the Jurisdictional Determination. Moreover, as noted in our initial reply brief, *see* Kent Reply at n.1, Kent Recycling has expended more than a half million dollars in pursuit of this project. Under the authority cited by the Corps, these facts are sufficient to satisfy a facial challenge to Petitioner's standing. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 262 (1977) (finding that potential property owner with option to buy property at issue has standing to pursue claim related to property because option holder had expended thousands of dollars on plans for property).

4. Finally, the Corps argues the challenged Jurisdictional Determination has expired and because the Corps would apply its new jurisdictional rule redefining "waters of the United States" on remand, the Corps "might not issue the same Jurisdictional Determination. *See* Opposition to Petition for Rehearing at 8. This may well be now that the new rule covers most waters, like those in this case, by categorical rule rather than by case-by-case determination. But that is irrelevant to the issue in this case which goes to whether a Jurisdictional

Determination is immediately reviewable in court under the APA, no matter what the basis for the determination, rather than to the merits of whether the particular wetlands in the case are jurisdictional. The issue presented in this case is purely legal and imminently suitable for resolution by this Court.

Therefore, the petition for writ of certiorari should be granted.

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Respectfully submitted,

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